JOSEVA VUDIABOLA NARABE v STATE (AAU0067 of 2005)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, SCOTT and MCPHERSON JJA

22, 24 November 2006

Criminal law — sentencing — aggravating circumstances — Constitution of the Republic of Fiji s 38(2)(a) — Court of Appeal Act (Cap 12) s 22(1)A(a).

The Appellant went to the complainant's residence, climbed the fence and entered the house. He quietly began to have sexual intercourse with the complainant as she was in her bed asleep. The Appellant threatened the complainant with a 4-inch nail to her neck as she shouted. He then raped and sodomised her. The complainant offered $100 but the Appellant took another $360 after he asked her for money for beer. She hesitantly accompanied the Appellant to a shop to buy beer. Upon arrival, the complainant raised the alarm in which the Appellant ran off but was later apprehended. The Appellant cooperated fully with the police following his arrest. He admitted the offence and said that he had been acquainted with the complainant. The Appellant was convicted and sentenced by the Magistrates Court of the following offences: (1) burglary — 12 months' imprisonment; (2) rape — 6 years' imprisonment; (3) unnatural offence — 3 years' imprisonment; (4) robbery with violence — 6 years' imprisonment; and (5) wrongful confinement — 12 months' imprisonment. Counts 2–4 were to be served consecutively and counts 1 and 5 concurrently. He was sentenced to a total term of 15 years' imprisonment. The Appellant pleaded guilty to the five charges. He had six previous convictions, four for larceny and one for robbery with violence for which he had been sentenced to a suspended term of imprisonment. The judge in the High Court reduced the term to 9 years. The Appellant filed a second appeal and raised the issue of whether the sentence of 9 years' imprisonment was lawful.

Held — The overall sentence was reduced from 9 years' to 7 years' imprisonment since the judge did not specify exactly what he took as aggravating circumstances. The judge did not mention and took into account the Appellant's mitigation which was an early guilty plea, which was a particularly significant mitigating factor. The resulting sentence of 7 years' imprisonment in light of the whole of the Appellant's conduct was lenient. It was not justified to interfere with the judge's estimation of the degree of aggravation which resulted in a head sentence of 9 years.

Appeal allowed.

Case referred to

Mohammed Kasim v State [1994] FJCA 25, cited.

Appellant in person

D. D. Gounder for the Respondent

[1] Ward P, Scott and McPherson JJA. On 23 March 2004, the Appellant was convicted and sentenced by the Nadi Magistrates Court as follows:

(1) Burglary — 12 months' imprisonment
(2) Rape — 6 years' imprisonment
(3) Unnatural offence — 3 years' imprisonment
(4) Robbery with violence — 6 years' imprisonment
(5) Wrongful confinement — 12 months' imprisonment

Counts 2, 3 and 4 were to be served consecutively, counts 1 and 5 concurrently. The Appellant was therefore sentenced to a total of 15 years' imprisonment.

[2] The brief facts were that at about 11 pm the Appellant went to the complainant's residence. He climbed a fence and entered the house. The complainant was in bed asleep. The Appellant, without saying anything, began to have sexual intercourse with her. When she realised what was happening she began to shout. The Appellant who had brought a 4-inch nail with him held it to her neck and told her to be quiet. He then raped and sodomised her. When he had finished, he asked her for money for beer. She offered him $100 however he took another $360 as well. He then forced the complainant to accompany him to a shop to buy beer. On arrival at the shop the complainant raised the alarm. The Appellant ran off but was later apprehended.

[3] Following his arrest the Appellant co-operated fully with the police. He admitted the offence and said that he had been acquainted with the complainant. He pleaded guilty to the five charges. He had six previous convictions, four for larceny and one for robbery with violence in 2001 for which he had been sentenced to a suspended term of imprisonment.

[4] The Appellant appealed against sentence to the High Court at Lautoka. On 29 October 2004 at a somewhat informal hearing the judge told the Appellant that the sentence of 15 years was wrong and would be reduced, probably to 9 years.

[5] Judgment was delivered later on the same day. The judge began with the offence of rape and took as his starting point the 7-year period established in *Mohammed Kasim v State* [1994] FJCA 25. In the judge's view the circumstances in which the rape was committed aggravated the offence and therefore 9 years' imprisonment was warranted.

[6] The judge then turned to the remaining offences. Given that they all arose from the same incident he took the view that the sentences imposed should have been concurrent. That was plainly correct. He also took the view that the terms imposed in respect of the other offences were not wrong in principle. We agree. The overall result was that the Appellant's 15-year sentence was reduced to 9.

[7] On 8 September 2005 the Appellant filed a second appeal against his sentence to this court. When granting him leave, the president pointed out to the Appellant that since this was a second appeal it was confined to points of law. Unless the sentence imposed by the High Court was unlawful or passed in consequence of an error of law, no appeal lay: s 22(1)A(a) of the Court of Appeal Act (Cap 12).

[8] The Appellant's submissions to us were largely repetitive of the grounds originally filed. He again pointed out that he had pleaded guilty at the first opportunity, thus sparing the complainant the ordeal of giving evidence. He suggested that the 9 years' imprisonment offended the totality principle, that the sentence passed was manifestly excessive, especially in comparison to sentences imposed on offenders who had committed more serious crimes. The Appellant also suggested that he was so intoxicated at the time as to be temporarily insane.

[9] So far as the sodomy was concerned the Appellant reminded us that the High Court at Lautoka had recently ruled that the criminalisation of sodomy was discriminatory and therefore contrary to s 38(2)(a) of the Constitution. This submission can be dealt with shortly. The Appellant sodomised the complainant against her will; that is not permitted by any clause in the Constitution.

[10] The remaining grounds of appeal and the arguments adduced in their support do not, with one exception, in our view give rise to any conclusion that the sentence passed was unlawful or passed in consequence of an error of law.

[11] The only matter which gives us concern is that, as explained by the judge, he arrived at the conclusion that the head sentence should be one of 9 years' imprisonment because of the aggravating circumstances. Unfortunately he did not specify exactly what he took those aggravating circumstances to be. Neither did he mention, nor apparently take into account, the Appellant's mitigation which was an early guilty plea which, in a case of this type, is a particularly significant mitigating factor. In our view it would have been proper to discount the sentence on that ground by 2 years.

[12] While we are aware that the resulting sentence of 7 years' imprisonment might, in the light of the whole of the Appellant's conduct, be regarded as somewhat lenient, we do not think that we would be justified in interfering with the judge's estimation of the degree of aggravation which resulted in a head sentence of 9 years.

Result

Appeal allowed: overall sentence reduced to 7 years' imprisonment.

Appeal allowed.