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IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 64 of 1986

Between:

(1) JONE CIVATABUA — Appellants

(2) SAIMONI KACILALA

- and -

R E G I N A M — Respondent

Mr. S. Matawalu for the first Appellant
Mr. K. Bulewa for the second Appellant
Mr. M. Raza, Director of Public Prosecutions
and Mr. S. Singh for the Respondent.

Date of Hearing: 14th September, 1987

Delivery of Judgment: 25th September, 1987

JUDGMENT OF THE COURT

O'Regan, J.A.

The charges preferred against both appellants all involved allegations of offences against the person of a young woman named Lite Tadulala which were said to have occurred on the 25th October, 1985.

On that morning, Miss Tadulala was walking along McGregor Road in the city of Suva on her way to work when she came upon a group of

eight or so young men and two girls. One of the young men, whom she later identified as the second appellant, took her by the hand against her will, pulled her across McGregor Road into and along Mitchell Street to Gorrie Street and thence to the Lau Rehabilitation Centre. During these events she went to the ground and thereafter was dragged along the roadway and sustained multiple abrasions to her right leg anu a small head wound. The latter, however was caused by a stone thrown by one of the girls and thus not referable to the second appellant.

At the Rehabilitation Centre she was shown some consideration by one of the inmates who sponged her head and other wounds and had one of the girls present provide her with a shirt to replace her own which had become bloodstained. Subsequently an attempt was made by an unidentified man to molest her but she managed to avoid him, but shortly afterwards the first appellant came upon the scene and in short order had intercourse with her, intercourse which he said was consensual and she said was rape.

Arising out of these incidents the first appellant was charged with rape contrary to section 149 of the Penal Code - a charge upon which he was ultimately convicted and sentenced to imprisonment for 8 years. He originally appealed against both conviction and sentence but at the hearing before us abandoned the former.

On his behalf, Mr. Matawalu stressed that the first appellant was not present during the events preceding the arrival of the complainant at the Rehabilitation Centre and that there was no evidence that he was aware of them. He also brought to our notice that the learned Judge had made no reference in his observations in passing sentence to the appellant's reference in his plea in mitigation to his reformation since the incident and his prayer for

leniency in the interest of his rehabilitation. And, in all those circumstances, he submitted that the sentence was manifestly excessive and should, as he put it, be drastically reduced.

It seems clear that the first appellant was not privy to or even present at the events preceding the complainant's entry into the centre. But whether he subsequently became aware of them or not, the fact is that when he first saw her she was bearing signs of her injuries and in a very distressed state. But notwithstanding that he subjected her to the further ordeal and indignity of rape.

The Judge did not refer to the appellant's profession of reformation but it is clear from the record that it did not escape him that it was at a centre for rehabilitation at which endeavours by his own people to rehabilitate him were being made, that he chose to embark upon such gross misconduct and it may well have struck him, as it strikes us, that his assertion of present and future rehabilitation may well have a hollow ring about it.

The appellant has a long list of convictions which are in the main for a variety of minor offences but they are punctuated with three instances of serious assaults and all in all his history indicates proclivity to contempt for others and general lawlessness.

The crime of rape is all too prevalent in Fiji and that, of course, is a relevant feature to which regard must be paid on sentencing offenders.

In cases of rape the sentence must be such as:

> "first of all mark the gravity of the offence; second to emphasise public disapproval, third, to serve as a warning to others. Fourth, to punish the offender, and last but by no means least, to protect women."

See R. v. Roberts 1 All E.R. 609 per Lord Lane C.J.

Having taken account of those considerations and of the prevalence of the offence in this country we are of the opinion that the sentence of imprisonment for 8 years is not excessive; to the contrary, we think it entirely appropriate.

Accordingly the first appellant's appeal against sentence is dismissed.

The second appellant was charged first with abduction contrary to section 252 of the Penal Code and with assault occasioning actual bodily harm, and convicted on both counts. He appealed both against conviction and sentence but at the hearing all the grounds of appeal against conviction except one were abandoned and that one related solely to the charge of abduction under section 252.

Section 252 provides:

> "Any person who kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person or knowing it to be likely that such person will be so subjected; or so disposed of, is guilty of a felony....."

We have set out the body of section in full to show the context in which the offence actually charged finds itself.

The appellant was in fact, charged that he:-

> "did abduct Lice Tadulala, knowing it to be likely that she would be subjected to the unnatural lust of any person."

The appeal alleged non-direction by the learned trial Judge as to the meaning of the phrase "unnatural lust".

In opening the case in the court below the learned prosecutor told the assessors that unnatural lust meant "sexual intercourse outside the bounds of marriage". That proposition was not challenged by counsel for the accused and, as well might be expected, this appellant, who by that stage of the trial, had taken over the conduct of his own defence, did not refer to it in his final address. And neither did the learned Judge in his summing up.

Before us, Mr. Raza allowed that the prosecution has stated the meaning of the phrase too narrowly but he himself did not attempt to submit as to its meaning.

Mr. Bulewa submitted that in its widest connotation the phrase referred to the offences of sodomy and bestiality but in the context othe charge preferred, because of the dual reference to "any person" in the section, it related solely to sodomy. We uphold Mr. Bulewa's submission.

Construing the phrase in its ordinary meaning - as we first do before resorting to authority and texts - we find the Shorter Oxford dictionary 3rd edition defining "lust" as "libidinous desire" and "unnatural" as "not in accordance with the usual order of nature".

The words "the order of nature" have been incorporated into the law of Queensland relating to both sodomy and bestiality. Section 208 of the Criminal Code of that state provides:

Unnatural offences:

Any person who -

(1) has carnal knowledge of any person against the order of nature; or

(2) has carnal knowledge of an animal;

(3) permits a male person to have carnal knowledge of him or her against the order of nature;

is guilty of a crime.

On a literal construction of subsections (1) and (3) it is clear that they relate to sodomy. The dual use of the phrase "any person" in subsection (1) and the words "him and he" in subsection (3) preclude any other construction.

Section 367 of the Indian Penal Code 1860 has like provisions. It reads:

> "Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment....."

In his commentary on that section Sir Hari Singh Gour referring to this section had this to say -

> "Kidnapping or abduction of a woman for gratification <u>of natural lust</u> is punishable under the last section. Kidnapping or abduction for the gratification <u>of unnatural lust</u> is punishable under this section."
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> - 4th edition p.1817.

(The underlinings are ours.)

There are similar contrasting provisions in the Criminal Code of this country.

Section 153, so far as it is relevant, provides:-

> "Any person, with intent to .....
> carnally known any woman of any age
> or to cause her to be .....
> carnally known by any other person,
> takes her away, or detains her,
> against her will is guilty of a
> felony ....."

"Carnal knowledge", generally speaking, encompasses both vaginal and anal intercourse but in this section we think it refers only to the former. If the phrase "unnatural lust" in section 252 encompassed vaginal intercourse as the assessors in this case were led to believe and the reference to carnal knowledge in section 153 was intended to encompass sodomy, those two sections would be providing for two identical offences, a result which we cannot accept to have been the intention of the legislature. We conclude therefore that section 153 proscribes as a felony, inter alia, abduction of a woman for the purpose of her being subjected to vaginal intercouse and section 252 proscribes abduction inter alia, of man or woman for the purpose of being subjected to sodomy. And the references we have made to the Penal Codes of Queensland and India lend confirmation to those conclusions.

In the present case there was no evidence of any intention on the part of the appellant to have the complainant subjected to sodomy and none from which such an intention could be inferred. It follows, therefore, that the conviction cannot stand.

Mr. Raza invited us in that event, to exercise the powers conferred upon us by subsection (2) of section 22 of the Court of Appeal Act (Cap. 12) which provides:-

> "Where a party to an appeal brought under the provisions of this section has been convicted of an offence and .....the Supreme Court could have found him guilty of some other offence, and on the finding of .....the Supreme Court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered .....by the Supreme Court a conviction of guilty of that offence and pass such sentence (whether more or less severe) in substitution for the sentence passed .....by the Supreme Court for that other offence."

Mr. Raza invited us to substitute a conviction under either section 152 to which we have earlier referred or section 249 which renders abduction simpliciter a felony. Having regard to the requirements of section 22(5) of the Court of Appeal Act we think the appropriate course is to substitute a conviction for abduction contrary to section 249. We so order. And we pass a sentence of imprisonment for five years in substitution for the sentence passed by the Supreme Court.

The appellant has appealed also against the concurrent sentence of imprisonment for two years on the charge of assault occassioning actual bodily harm.

Whilst the complainant's injuries were not of a serious nature the circumstances in which she sustained them were and, all in all, we think the

sentence was entirely appropriate. The appeal against sentence on that charge is dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal