

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0012 OF 1996S

(High Court Criminal Appeal No. HAC0005 of 1995)

BETWEEN:

WAISAKE NAVUNIGASAU

APPELLANT

-and-

THE STATE

RESPONDENT

Mr. S. D. Sahu Khan, Mr. M. N. Sahu Khan and Mr. M. Raza for the Appellant
Mrs N. Shameem (Director of Public Prosecutions) for the Respondent

Date and Place of Hearing : 4 November 1997, Suva
Date of Delivery of Judgment : 14 November 1997

JUDGMENT OF THE COURT

The appellant was charged in the High Court in Suva with seven counts of Rape, contrary to sections 149 and 150 of the Penal Code (Cap.17). He was convicted on five of the counts and sentenced to serve nine years' imprisonment on each count, the sentences to be served concurrently. He has appealed against the convictions and the sentences.

The trial in the High Court began on 3 June 1996 before Scott J. and three assessors. The appellant pleaded 'not guilty' to all seven counts. He informed the judge that he could not afford legal representation and applied for the trial to be adjourned so that he could apply for legal aid; he said that he had received the depositions only on 28 May. Scott J. recorded

at length his response to that application. He noted first that the depositions were not lengthy, only 15 pages. He observed that legal aid was usually granted only in murder cases and that it was unlikely, therefore, that an application by the appellant for it would succeed. He pointed out that the appellant had been charged in January 1995 and could have sought legal aid earlier. He had already noted that the appellant had been on bail until May 1996, i.e. the month before the trial. He said that he was satisfied that, as the depositions amounted to only 15 pages, the appellant had had sufficient time to study them. Accordingly he refused the application for the trial to be adjourned.

The person alleged to have been raped, whom we shall refer to as the complainant, gave evidence. She is the daughter of the appellant and was a schoolgirl aged seventeen when the offences were allegedly committed over a period of about six months in 1994. She said that from the age of seven until the age of seventeen her grandmother had looked after her in a village. By 1994 the appellant was residing in a three-storey house at Nakasi and was married to a woman who was not the complainant's mother. The complainant said that she went to stay with him; she wanted to do so. However, on the first night when she came home from school he insisted on bathing her and shortly afterwards called her into his room, where he told her to remove her clothes and to lie down. She said that she refused to do so but the appellant forced her; he then opened her legs and pushed his penis into her vagina by force. She said that she was frightened and began to bleed. When those events were occurring, her stepmother was away from the house.

The complainant gave evidence of six other occasions on which, she said, the appellant had sexual intercourse with her against her will. She said that eventually she told

her stepmother but that for some time she had not done so because the appellant had threatened to kill her if she told anyone. She said that, after she had told her stepmother, she left the appellant's house and went to stay at Raiwaqa with the appellant's younger brother and his wife. However, on the second day that she was there the appellant came, broke open the back door of the house, came inside, pulled her out, forced her into a taxi and took her away with him. She said that, when he went into a shop, she escaped and went to the Central Police Station where she reported the offences.

The complainant gave evidence that on two of the occasions on which the appellant had sexual intercourse with her that occurred elsewhere than at Nakasi. In the Information presented to the Court all seven offences were alleged to have been committed at Nakasi. Scott J., therefore, held that the prosecution had not established its case in respect of two of the counts and acquitted the appellant of the offences charged in them.

A niece of the appellant gave evidence that one night, when she was staying in the appellant's house, she and the complainant were sleeping in the same bedroom; at about midnight the appellant came and knocked on the door of the room and told the complainant to go and sleep in his room. She said that the complainant did not want to go and was crying but the appellant made her go with him. That evidence was consistent with evidence given by the complainant of events immediately preceding one of the occasions on which the appellant had sexual intercourse with her against her will.

The wife of the appellant's younger brother to whose home the complainant went when she left the appellant's house gave evidence that, when the complainant arrived there,

she was pale and frightened. Another of the appellant's brothers gave evidence that he was present on 14 October 1994 when the appellant came to the younger brother's house and took the complainant away with him. He said that she did not want to go and that the appellant pulled her and made her go with him.

The remaining prosecution witnesses were police officers who gave evidence of arresting the appellant near his house on 14 October 1994, of interviewing him at Nausori police station, of answers he gave after caution to questions asked and of formally charging him on 17 January 1995 with one offence of rape and one offence of incest. The statement made after charge was a denial of using force. The appellant told the judge that he had given the answers at the interview because he was beaten by the police officers. A trial within a trial was held to determine whether they were given voluntarily.

P.C. Aniti gave evidence that, having taken the complainant's statement of complaint at 7.10 p.m., he went with two other police officers, found the appellant and at about 11.00 p.m. brought him to Nausori police station for questioning; the appellant's wife came with him. The interview commenced at about 11.40 p.m. and was completed at 1.30 a.m. At the start of the interview, he said, he cautioned the appellant and had him sign the written record of the caution. He denied that the appellant was hit or threatened and said that he took part in the interview voluntarily. He said that, when the interview was completed, the appellant was allowed to leave and did so. P.C. Naisaboca gave evidence that he was present at the interview; he said that the appellant was not assaulted or threatened. This witness was not cross-examined to suggest that he had hit the appellant or that any threats had been made. D.C. Caquasa gave evidence of going with P.C. Aniti to find the appellant but was not

present at the interview. He was not cross-examined to suggest that the appellant was hit or threatened while he was present.

The appellant gave evidence that he was taken to Nausori police station in custody; however, his wife was allowed to accompany him. On arrival at the police station, he said, there was an altercation between him and several police officers in the course of which P.C. Naisaboca slapped his cheek. He said that they told him that, if he did not "obey what they said", they would punch him; when they told him what was alleged he replied, he said, that the allegations were false but he was "forced to admit" them. He said that they threatened to beat him to death if he did not admit the allegation and told him that he must reply "Yes" to all the questions he was asked. He said that all the questions had been prepared before the interview and he "could not do anything about it". Cross-examined, he said that the only physical violence used against him was the slap by P.C. Naisaboca but that three police officers had made threats. He admitted that very few of the questions were answered simply "Yes" but said that the answers recorded were what he was told he had to say. He agreed that he was released ten minutes after the interview was completed and that he made no complaint to anyone then. He said that he subsequently complained to "the Inspector" and to a legal practitioner but did not complain to the magistrate when he appeared in the Magistrates' Court in January 1995; he said that he was not allowed time to do so.

The appellant told the judge that he wished to call a person named Wati as a witness at the trial within a trial and it was adjourned to enable him to do so. However, after the adjournment he said that he did not wish to call any witness.

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Scott J. recorded in writing his ruling on the admissibility of the record of the interview. He said that he had no doubt that, because the complainant had run away from the appellant and gone to the police, the initial meeting with the police was fraught with emotion. He thought it possible that P.C. Naisaboca had given the appellant a backhand cuff as described to him by the appellant but was "quite satisfied" that, if that did happen, it was "not part of any concerted course of oppression brought to bear upon him in order to induce him to confess". He pointed out that some of the answers recorded amounted to partial denial and that very few were simply "Yes". Some, to which he referred specifically, were "far from commonplace" and he did not find it credible that they had been prepared by the police as alleged by the appellant. He noted also that the appellant's wife had been present at the police station during the whole episode and that no complaint had been made to the persons to whom it might have been expected that complaint would have been made, namely the charging officer and the examining magistrate. He, therefore, rejected the appellant's evidence, accepted that of the police officers and found that the questions were answered voluntarily and that the record of the interview was admissible. Evidence in respect of it was then given in the presence of the assessors and it was received as evidence.

In the statement the appellant was recorded as admitting having had sexual intercourse with the complainant four times at his home and as stating that he did so on the first occasion because he had heard rumours that she had had sexual intercourse with a boy in the village and he wanted to find out whether she was still a virgin. He was recorded as admitting that she told him not to have sexual intercourse with her but that he did not listen because he was very angry, and as admitting also that she was crying. He was not asked whether she consented to having sexual intercourse with him on the other occasions and he

did not listen because he was very angry, and as admitting also that she was crying. He was not asked whether she consented to having sexual intercourse with him on the other occasions and he did not volunteer information on that question. When he was charged with rape and incest, he was recorded as having replied after caution that he "did not force her".

The appellant gave evidence on oath at the trial. He said that he did not have sexual intercourse with the complainant and that the police had "framed up" the charge in order to ruin his career. He said that in November 1995 the complainant wrote a statement saying that the case against him should be discontinued and subsequently made a statutory declaration that "at no time was there any sexual encounter". The appellant had not cross-examined the complainant about the statement or the statutory declaration; nor had he brought their existence to the attention of the Court before he gave his evidence. However, because he was unrepresented, Scott J. decided to admit the documents into evidence but recalled the complainant so that she could be cross-examined about them.

The complainant gave evidence that she wrote the statement after discussing with her uncle and aunt the effect which conviction of the appellant would have on the family. She said that she agreed to forgive him and wrote the statement voluntarily. However, she gave evidence that she did not make the statutory declaration voluntarily. She said that the appellant came to her home and told her what she had to write; he spoke to her harshly and she was scared of him. She said that she was forced by him and a bailiff he

had brought with him to go with them to Government Buildings to sign the declaration but that she did not sign it that day. She did so on the following day in front of a lawyer. She said that she told the lawyer that she could not write what the appellant wanted because she had made a statement to the police; but he spoke to her "in a harsh way" and told her not to waste their time. She said that she reported next day to the police what had occurred.

The appellant gave evidence that he took the complainant's written statement to the Solicitor-General's office to obtain advice and was told that it was not in the proper form. He said that his wife told him to go with the bailiff and see the complainant and that he asked the Solicitor-General's office to assist him; as a result a Legal Officer from that office went with him. He said that, because the Court had forbidden him to contact the complainant, he waited outside her house while the Legal Officer went in. He denied telling the complainant what to write and said that she made the statutory declaration voluntarily.

The Legal Officer gave evidence that he went with the appellant to the complainant's house because he was told that she was not feeling well. He said that he waited outside the house while the appellant went in and that the appellant came out and took him in. The complainant was there and made the statutory declaration before him. He said that he asked her about it and she agreed that she had written it and understood it; he "could see from her feeling that she was a bit confused". He asked her to sign the declaration and she did so; he witnessed it. He said that no force was used to make her

sign it and he heard no harsh words being spoken to her. He said that he then left and went back to his office.

The bailiff also gave evidence. He said that he went with the appellant to the complainant's house, where the appellant showed her a form and asked her to sign it. The complainant wrote what the appellant told her to write; he used no physical force but his "tone was quite harsh or heavy on the girl". The witness said that he told the appellant that the document had to be signed before a lawyer and also told the complainant not to sign it. They went with her then to Government Buildings; the complainant was reluctant to leave the house because she had been told to look after it but she went with them. The witness said that he left the appellant and the complainant at the lawyer's office.

The final defence witness, the appellant's sister, gave evidence that the appellant came to their brother's house and asked for reconciliation in the traditional Fijian way for "tearing down" the door of the house and "for things he had done [to the complainant]". After the reconciliation ceremony the complainant told her uncle "Whatever you think is right I will follow".

The trial lasted from 3 June to 11 June. On 4 June a report of the trial was published in the Fiji Times. Part of the report read:

"The victim was yesterday giving evidence in the High Court in Suva in which her father, who is an

ex-convict, is charged with seven counts of raping his daughter....."

Before the trial resumed on 4 June the prosecuting counsel drew the report to Scott J.'s attention in the absence of the assessors. He directed that the article be shown to the appellant, who said "I am not happy to what has been printed. I am unrepresented. I am at a disadvantage anyhow." His Lordship then considered whether or not he should discontinue the trial. He recorded his decision in the following terms:

"In all the circumstances and taking into account the nature of the charges and the evidence in support I am of the view that I can deal with the matter by way of a strong warning to the assessors in due course. The trial will continue....."

He warned the press against repetition of such conduct. The assessors then returned and he "warned them about the article" and "told them to put it out of their minds".

On 5 June the Fiji Times published a report that Scott J. had "barred the media from reporting" the proceedings of the trial within a trial. The report went on to refer to his warning to the press about the previous day's report and in doing so stated that that report had said that the appellant was an ex-convict. Before the trial resumed on 5 June Scott J. referred to the report in the absence of the assessors. He said that he did not think that it affected the continuation of the trial as it was a mere repetition of what had been disclosed by the previous report but that he would "rewarn" the assessors. When

they returned, he "warned [them] not to take note of anything published in the newspaper about the trial". He did not refer to the matter in his summing-up to the assessors.

The grounds of appeal are as follows:

1. That the Learned Trial Judge erred in law in not aborting the trial and discharging the assessors on the publication of the Appellant's prior criminal history in the Fiji Times whilst the trial was in progress.
2. The Learned Trial Judge erred in admitting the Record of Interview dated the 14th day of October, 1994.
3. That the Learned Trial Judge misdirected himself and/or the assessors when he in his summing up repeatedly said that the primary function of the assessors was "to determine where the truth lies".
4. That the Learned Trial Judge erred in relying upon the alleged admissions in the Record of Interview as corroboration.
5. That the verdict is unsafe, dangerous and unsatisfactory and cannot be supported having regard to the evidence as a whole.

- 6. The Learned Trial Judge erred in not allowing the Appellant's application for an adjournment to enable him to be legally represented and/or enable him to prepare his defence.

- 7. The Learned Trial Judge did not properly and or adequately consider and/or evaluate and/or direct the assessors on the defence case.

- 8. That the sentence is harsh and excessive having regards to all the circumstances of the case.

We have come to the conclusion that the appeal must be allowed in part on grounds nos. 4 and 5. In our view it cannot succeed on any of grounds nos. 1, 2, 3, 6 and 7. We shall explain why first and then deal with grounds nos. 4 and 5.

It was most unfortunate that during the course of the trial the newspaper twice published reports in which it referred to the appellant as an ex-convict. However, in larger jurisdictions than Fiji disclosure, usually inadvertent, that a defendant has a criminal record, while happily infrequent, has occurred sufficiently often that the duty resting on the trial judge in such circumstances is well established. If the defendant is unrepresented, the judge should ascertain from him whether he wishes the trial to be aborted or to continue. (R v Fripp (1942) 29 Cr. App. R.6). If the defendant wishes it to

be aborted, the judge has a discretion whether or not to accede or to direct that the trial is to continue. His exercise of that discretion must depend on his assessment whether, if he gives the jurors or assessors an appropriate warning, the trial will be fair (R v Wright (1934) 25 Cr. App. R.35). An appellate court will not lightly interfere with the trial judge's exercise of that discretion (R v Weaver [1968] 1 QB 353); however, if it perceives any danger that the trial was not fair, it will set aside the conviction (R v Malik (1967) 52 Cr. App. R.140).

In the present case Scott J. did not ask the appellant expressly whether he wished the trial to be aborted; but the appellant's response when the first newspaper report was read to him was essentially an expression of dissatisfaction with the trial continuing. Scott J. proceeded as though the appellant had applied for the trial to be aborted; the appellant was, therefore, not prejudiced by the fact that he was not expressly told that he might make such an application. In our view the manner in which His Lordship exercised his discretion cannot be faulted. Nothing that occurred in the trial causes us to perceive any danger that the trial was not fair because it was continued after the disclosure that the appellant had a criminal record.

The record of interview was admitted into evidence by Scott J. after he had held a trial within a trial to determine whether it was admissible. The appellant was in custody at a police station when he was interviewed. His Lordship found that one of the police officers who brought him there had possibly given him a "back-hand cuff". However, he examined carefully the whole of the circumstances (see D.P.P v Ping Lin [1975] AC

574, 606; Daulat Khan v R (1976) 22 FLR 27), including the facts that the situation was fraught with emotion and the appellant's wife had been permitted to accompany him to the police station, and the content of some of the answers given by the appellant to questions asked at the interview, and came to the conclusion that there was no course of oppressive conduct and that the appellant answered the questions voluntarily. This Court should not disturb his findings of fact as to the voluntariness of the answers unless it is satisfied that he made a wrong assessment of the evidence or failed to apply the correct principles (D.P.P v Ping Lin (supra) at 188). We are not satisfied that he committed either of those errors.

Mr. Sahu Khan drew our attention to the fact that the interview had been continued after the appellant had admitted one act of sexual intercourse to which the complainant had not consented, an apparent breach of principle (d) referred to in the Home Office circular by which notice was given of the making of the Judges' Rules. Scott J. did not record that he had addressed his mind to that possible breach; consequently he did not exercise his discretion whether to exclude the record of the interview on the ground of such breach. However, the admissibility of the record of the interview up to the point where the admission was made was not affected by the breach, if there was one. As no further admissions of non-consensual intercourse were made during the remainder of the interview, the appellant was not prejudiced by its admissions. In view of our decision to convict him of three offences of incest instead of three of the five offences of rape of which he was convicted at the trial, we should mention that, although the appellant admitted those instances of incest during the latter part of the

interview, he had already done so unequivocally before he admitted the act of sexual intercourse which occurred without the complainant's consent. So the admission of the record of the whole interview instead of only the first part of it did not prejudice him in respect of his liability to be convicted of three offences of incest instead of three of the offences of rape charged.

In order to ascertain whether a trial has been vitiated by the manner in which the judge has summed up it is necessary to look at the summing-up in its entirety and not simply to individual portions of it. Mr. Sahu Khan correctly pointed out that a direction to the assessors – and to the trial judge himself as the eventual decision-maker – that they must “determine where the truth lies” carries with it the implication that they must come to a firm conclusion as to the existence or non-existence of the facts and cannot remain in a state of doubt about them. A direction in a summing-up having that effect could deprive a defendant of being given the benefit of a reasonable doubt.

If a summing-up contains such directions, their effect *may* be to vitiate it notwithstanding that the judge has included also proper directions in respect of the standard of proof. That was found by the Full Court of the Supreme Court of South Australia to be the situation in R v Calides (1983) 34 SASR 355. However, the inclusion of such a direction or directions in a summing-up will not necessarily have that effect. Whether it does so or not depends on the content of the summing-up as a whole. We have examined carefully Scott J's summing-up in the present case and, although he should have avoided giving any directions couched in terms of finding where the truth

lies – indeed references to where the truth lies are seldom helpful - we are satisfied that, taken as a whole, it did not misdirect the assessors and was not a misdirection to the judge himself. However, we think it worthwhile to draw the attention of judges of the High Court to the advice of Goddard L.C.J. in R v Lobell [1957] 2 WLR 524 at 527:-

“A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution.”

We have set out above the details of the appellant’s request for an adjournment and Scott J.’s response to it. The appellant told the judge that he had received the depositions only six days before the trial commenced. At the hearing of the appeal our attention was drawn to the fact that the committal proceedings in May 1995 consisted of what is commonly called a “paper preliminary inquiry” (i.e. a preliminary inquiry conducted in accordance with Part VIII of the Criminal Procedure Code (Cap.21)) and that before the preliminary inquiry the appellant was provided with copies of the documents which were to become the depositions. It is clear from the record that he had been on bail from the time when he was charged in January 1995 until May 1996, shortly before the trial. He had had ample opportunity to obtain the services of a barrister and solicitor if he could afford them and also to obtain a thorough grasp of the contents of the documents given to him in May 1995.

It is, we consider, most unsatisfactory that legal aid is not provided to persons charged with serious offences other than murder. As Mr. Sahu Khan has pointed out, in Australia the High Court has held that the trial of a person for a serious offence may be vitiated by unfairness if he is (otherwise than voluntarily) unrepresented by counsel (Dietrich v R (1992) 177 CLR 292). That is not a view which we can properly take in the circumstances of Fiji; the availability of legal aid to persons charged with criminal offences, while most desirable, must ultimately be dependent on the ability of the economy of the country to make adequate financial provision. Even in a comparatively wealthy country such as Australia, the decision of the High Court in Dietrich has put a severe strain on the States' legal aid systems. However, we do express without reservation the hope that, when the Legal Aid Act 1996 comes into operation, funds will be available to enable legal aid to be granted not only in murder cases but in other serious criminal cases. However, in the state of affairs that existed in June 1996, there was no realistic prospect that the appellant would obtain legal aid if an adjournment was granted. Scott J. was, therefore, quite correct to refuse an adjournment.

We do not accept that he failed to put the appellant's defence case to the assessors properly. It was essentially a total denial of having had sexual intercourse with the complainant. Scott J. made that clear. The appellant sought to impugn the complainant's evidence by producing the statement and the statutory declaration made by her. The judge read them both to the assessors during the course of his summing-up and then referred in considerable detail to the evidence given by the complainant, the appellant and

defence witnesses in respect of them. In our view he put the defence case to the assessors very fully and very fairly.

We turn now to grounds 4 and 5 which we shall consider together. We note that the learned judge directed the assessors that the admissions made by the appellant during the interview were capable of corroborating the complainant's evidence. Earlier in the summing-up he had told them that, when they retired, they would be able to examine the record of the interview at their leisure. But he did not refer them to any particular answers in that record. Later in the summing-up he told them *incorrectly* that the appellant had admitted having sexual intercourse with the complainant against her will four times. Because the appellant gave evidence denying having had sexual intercourse with the complainant at all, his admission that he had done so may have constituted corroboration of her evidence that he had raped her but, unlike his admission that on the first occasion he did so without her consent, it was not direct corroboration of her evidence that she did not consent. This was not brought to the assessors' attention; we think that as it would have been better had it been. The evidence of the appellant's niece, which might have been accepted by the assessors as corroboration of one of the later alleged offences, was not drawn to their attention.

The judge failed to direct the assessors:-

- (a) that it was him, the judge, to identify those matters capable of constituting corroboration but for them to say whether all or any of those matters did in fact constitute corroboration (R v McInnes (1989) 90 Cr. App. R.99); and

- (b) that, provided that they paid heed to the warning that it was dangerous to convict on the uncorroborated testimony of the complainant on any given count, it was nevertheless open for them to convict.

The appellant's admission at the interview that on the first occasion of sexual intercourse with the complainant she did not consent to it constituted strong corroboration of the complainant's evidence of the first offence charged. The mistake in relation to the other admissions, namely that the appellant had admitted having intercourse four times against her will, does not, in our view, render unsafe or dangerous the conviction of the appellant of the first offence. The learned judge in adopting the opinions of the assessors that the appellant was guilty on all five remaining counts, was clearly accepting that the appellant had given the answers recorded in the record of interview, as he was entitled to do.

We are satisfied that the conviction on the first count should stand. However, because the appellant did not admit having sexual intercourse with the complainant on more than four occasions, there was no corroboration at all of the complainant's evidence of the fifth occasion. Further, because he did not admit that the intercourse took place without her consent except on the first occasion and because of the judge's mistake in his direction that the appellant admitted that in respect of all four occasions, it would, we believe, be dangerous to allow the convictions of rape on the other three counts to stand.

However, section 176 of the Criminal Procedure Code provides that a person charged with rape may be convicted of the offence of incest by a male person contrary to section 178 of the Penal Code (Cap.17) if the Court is of the opinion that he is not guilty of rape but is satisfied that an offence against that section was proved; he may be so convicted even though he is not charged with incest. In the High Court, therefore, if the Court had been of the opinion that the appellant was not guilty of any of the remaining four counts of rape, it could have convicted him instead of incest, if it was satisfied that it was established beyond reasonable doubt that he had committed that offence. By virtue of section 24(2) of the Court of Appeal Act (Cap.12), if it appears to this Court that Scott J. must have been satisfied of facts which proved the appellant guilty of the offence of incest in respect of any of the four counts where we have quashed the conviction, this Court may substitute for the verdict found by the judge a verdict of guilty of that offence and pass sentence in respect of it.

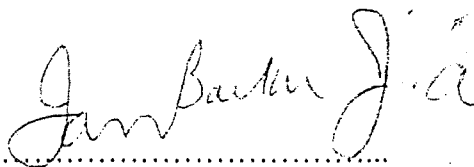
As we have observed above, it is apparent that Scott J. accepted the complainant's evidence and that he accepted also that the appellant gave the answers in the record of interview; it appears to us, therefore, that he must have been satisfied that the appellant had sexual intercourse with the complainant on four occasions, that the complainant was his daughter and that he knew that. We have come to the conclusion, therefore, that we should substitute for the verdict of guilty of rape returned in the High Court in respect of the second, third and fourth counts a verdict of guilty of incest by a male person contrary to section 178 of the Penal Code and we do so.

We alerted counsel to the possibility that we might substitute a verdict of guilty of incest in respect of three of the counts. However, we received no submissions from them regarding sentence for those offences. Nor did Mr. Sahu Khan address us on the sentence imposed by Scott J. in respect of the first count. We have come to the conclusion that we should not interfere with it. In Mohammed Kasim v The State (Criminal Appeal No. 21 of 1993: judgment delivered on 27 May 1994) this Court indicated that for an offence of rape committed by an adult seven years' imprisonment should be the starting point for fixing the sentence. If there are mitigating circumstances, the sentence may be for a shorter period; if there are aggravating circumstances, it should be longer. In this instance there are no mitigating circumstances but there are seriously aggravating circumstances, namely that the victim was the appellant's child residing in his home and that the offence was committed in the home during the absence of the appellant's wife. In our view, nine years' imprisonment is an entirely appropriate sentence. So far as the offences of incest are concerned, the maximum sentence that can be imposed for each of them is seven years' imprisonment. Although serious, they are not as serious as they would have been if the victim had been younger. (If she had been below thirteen years of age, the maximum sentence would have been imprisonment for life). In our view a sentence of five years' imprisonment should be imposed for each of the three counts in respect of which we have substituted a verdict of guilty of incest.

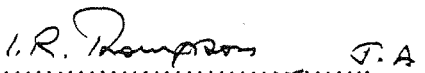
Accordingly the appeal is allowed in part. The conviction of rape and the sentence of nine years' imprisonment imposed on the first count are affirmed. For the verdict of guilty of rape on each of the second, third and fourth counts a verdict of guilty

of incest is substituted; the sentence of nine years' imprisonment in respect of each of those counts is set aside and a sentence of five years' imprisonment is imposed in respect of each of them. Those sentences are to be served concurrently with one another and with the sentence imposed in respect of the first count. The conviction on the fifth count is quashed and the sentence set aside.

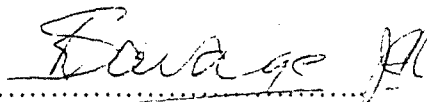
The name of the appellant is suppressed and any particulars relating to the complainant and her relationship to the appellant shall not be published.



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Sir Ian Barker
Judge of Appeal



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Mr. Justice I. R. Thompson
Judge of Appeal



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Mr. Justice Savage
Judge of Appeal