**IN THE COURT OF APPEAL, FIJI ISLANDS**
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL NO. AAU0066 OF 2005**
(High Court Criminal Case No. HAA 51 of 2005)

| | | |
|---|---|---|
| **BETWEEN:** | **HEM DUTT** | ***Appellant*** |
| **A N D :** | **THE STATE** | ***Respondent*** |

**Coram:** **Ward, President**
**Penlington, JA**
**Scott, JA**

**Hearing:** **Monday 6 November 2006**

**Counsel:** **J Nair for appellant**
**D Goundar for respondent**

**Date of Judgment:** **Friday 10 November 2006**

---

**JUDGMENT OF THE COURT**

---

[1] The appellant appeared in the Nadi Magistrates' Court charged with abduction, wrongful confinement and rape. All the charges arose from the same overall chain of events. The complainant was his wife from whom he had been

separated, according to the prosecution statement of facts, "for a long time". Exactly what that amounted to was never explained. He pleaded guilty and was sentenced to two years, two years and six years respectively but all the sentences were ordered to be served consecutively giving a total of ten years imprisonment.

[2] He appealed to the High Court in Lautoka against the sentence. On 8 April 2005, the learned judge delivered a short judgment which can be set out in full:

> "The appellant was convicted of the abduction, unlawful confinement and rape of his wife who had been separated from him. He pleaded guilty. He was sentenced to a total of 10 years made up of 2 years for abduction, 2 years for wrongful confinement and 6 years for rape all being consecutive. The three offences being part of the same transactions ought to have been made concurrent. To reflect the gravity of his criminality the learned trial magistrate ought to have punished more severely for rape. I therefore set aside the learned trial magistrate's sentences and in lieu order as follows:
>
> On count 1 – a term of imprisonment for 2 years
>
> On count 2 – a term of imprisonment for 2 years
>
> On count 3 – a term of imprisonment for 9 years
>
> I order that the sentences be served concurrently."

Thus the overall effect of the appeal was a reduction in the total sentence by one year.

[3] The facts can be summarised from the statement of facts given to the magistrate. The appellant, who was living in Nadi, hired a van and went to a house in Lautoka where his wife was living with her relatives. She was alone and he entered the house, grabbed her and dragged her to the van. She was screaming and crying and refusing to go. He held her on the floor of the van and ordered the driver to go to a point near Nadi where he forced her to a pine plantation and there tore her clothes and raped her.

[4] At the outset of the trial, the appellant was carefully and thoroughly questioned by the learned magistrate to ensure he understood the nature of the offences with which he was charged and that he had known she did not consent.

[5] Before mitigating, the appellant told the court that he wanted to tell his wife he was sorry and should not have done it to her. In mitigation, he more than once admitted the complainant had not consented:

> "I am sorry what I did to her. I got her by force as she did not want to come with me. She left me as she said I ill-treated her. I always wanted her back. She did not want to return to me. So I got her like this. I am sorry. ... I married her so I have all right to do all these to her as she is my legally married wife though separated. ... She did not want to do sex with me. I wanted it. I am sorry. Made a mistake."

[6] Despite the reference to the claim of right because of their marriage, the magistrate clearly did not consider this was an equivocal plea and commenced his detailed sentencing remarks by saying:

> "It is high time that men should realise that there is no longer a rule of law (or any other form of rule) that a wife was deemed to have consented irrevocably to sexual intercourse with the husband and that therefore a husband could not be convicted of rape or attempted rape of his wife ..."

[7] Later, when passing sentence, he stated:

> "The accused should realise that the maximum sentence for each of the three counts is very high. However, in the light of his mitigation and given that he has pleaded guilty, I have reduced the sentence quite a lot."

[8] Unfortunately he clearly erred in passing a sentence of two years on the second count of wrongful confinement which carries a maximum sentence of one year imprisonment or $400.00 fine. The mistake in the sentence for wrongful confinement was repeated by the High Court judge.

[9] The appeal to this Court was under Section 22 of the Court of Appeal Act and, as had been the case in the High Court, was against sentence only. That section allows appeal against sentence on the ground, inter alia, that the sentence was an unlawful one. That is clearly the case in respect of the wrongful confinement as counsel for the State has properly conceded from the outset.

[10] However, when the case came before a single judge of this Court, leave was also given to appeal against conviction on the basis of his claim in the Magistrates' Court that he had a right to have sexual intercourse with the complainant because they were married.

[11] Following the grant of leave, the appellant was represented by counsel under legal aid. Detailed and extensively researched submissions on the question of marital rape were filed by both parties. We are grateful to counsel for their industry and regret this case does not, in the event, allow long needed clarification of this aspect of the law.

[12] The reason is that the appellant also filed written submissions himself in which he sought to appeal against conviction on the ground that his wife had consented to the sexual intercourse and that it was not rape for that reason. At the hearing, he was asked to clarify his case and he confirmed that his appeal was on the ground of his wife's actual consent.

[13] Where the plea entered at the trial was one of guilty, an appeal against conviction will only be allowed on the basis that the plea was equivocal. That is not a question of law and so, where the appeal is under Section 22, it does not give a right of appeal to this Court.

[14] Once it was ascertained at court that the appellant's appeal against conviction was solely on the ground of his wife's actual consent, he no longer had a right to appeal against conviction unless the plea was shown to be equivocal on the face

of the record. As has been stated, the record shows the magistrate took care to ascertain that the appellant understood exactly what he was pleading to. There is no evidence of equivocation and the appeal against conviction is dismissed.

[15] Passing to the appeal against sentence, the sentence on the charge of wrongful confinement must be corrected. Like the abduction charge where a sentence of two years was imposed against a maximum of seven years, it was clearly not in the most serious category and so we quash the sentence of two years and substitute one of four months imprisonment.

[16] We have a more serious concern about the manner in which the learned judge dealt with the sentence for rape and the totality of the sentences. He was undoubtedly correct to take the view that the offences were all part of the same transaction and the sentences should therefore have been concurrent. Once that was decided, it was necessary for the court to stand back, as it were, consider the overall criminality of the events and pass a sentence which appropriately reflects it. That is clearly what the judge did in the present case but we are concerned at the manner in which he reached the sentence of nine years imprisonment.

[17] Having made the sentences concurrent, he was left with a total sentence of six years imprisonment. The judgment shows he considered that inadequately reflected the overall criminality and corrected it by increasing the sentence for rape.

[18] In such a case, the appellate court must reassess the appropriate sentence by a clear evaluation of the matters, both of aggravation and mitigation, which are relevant to the case before it. It is important that, having done so, the court should state its reasons and, where the sentence is increased, it is essential. If there should be an appeal and the court below has not given reasons, this Court has no way of evaluating the decision.

[19] In *Lasarusa Rakula v The State*, Cr App AAU 18/04, 26 November 2004, the Lautoka High Court increased the sentences for offences of robbery passed in the Magistrate's Court but gave no reasons. On appeal, this Court pointed out:

> "[The trial judge] gave no reasons for the decision. There should always be clear reasons given for allowing any appeal either against conviction or sentence. In the present case, although the total sentence the appellant will serve is reduced by 2 years the learned judge increased the sentence on both robbery charges. Clear reasons are especially important when sentences are increased."

Unfortunately the same situation has again arisen in this case. Despite increasing the sentence for the rape by half as much again, the judge has given no indication of how he reached that conclusion.

[20] The appellant was unrepresented in the appeal before the High Court. The judge prefaced his note of the proceedings in the High Court with the warning, "Possible that sentence may be enhanced." We accept that the notes kept by a judge cannot be a full record of all that is said and, as the appellant was unrepresented, we must assume that an experienced judge, as in the present case, would have explained the meaning of that possibility in clear terms.

[21] Unfortunately we cannot make the same assumption in respect of the matters which the judge may or may not have considered in assessing sentence and must decide the appeal on the limited information available from the record.

[22] Taking a starting point of seven years, we would increase it for the manner in which the appellant entered the house, dragged his wife to the van, held her down on the floor of the van and then forced her into the pine plantation. Those are further aggravated by the breach of the trust a wife is entitled to have that her husband will treat her with respect. All those events must have been made worse because they were done in the sight of the driver of the van. We would increase the sentence for those to ten years.

[23] The principal matter of mitigation reducing the sentence is the fact that the appellant admitted the offence early and pleaded guilty at the first opportunity. In cases of rape that will result in a substantial reduction. The judge does not mention whether he allowed for the plea of guilty. He undoubtedly should have done. In this case, the early plea could reasonably have reduced the sentence by anything between a quarter and third. Even if the judge had only allowed for the smaller of those reductions, it would mean that he must have been considering a sentence of twelve years before he made the reduction. A sentence of that length would be appropriate for a case near the upper end of the scale of seriousness. We cannot accept it is appropriate in this case. We would reduce the sentence for the plea of guilty together with the fact that the appellant had no previous convictions to one of seven years imprisonment.

[24] **Result:**

The appeal against conviction is dismissed.

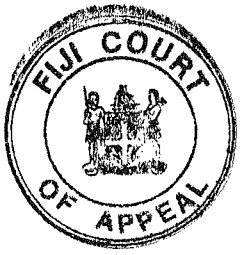
The appeal against sentence is allowed. The sentences are quashed and the following sentences substituted:

**Count 1 Abduction – 2 years imprisonment**
**Count 2 Wrongful confinement – 4 months imprisonment**
**Count 3 Rape - 7 years imprisonment.**

All sentences to be served concurrently giving a total sentence of seven years imprisonment.

**Ward, President**

**Penlington, JA**




**Scott, JA**

**Solicitors:**

**Office of the Director of Legal Aid for appellant**
**Office of the Director of the Public Prosecutions, Suva for the respondent**