

IN THE COURT OF APPEAL, FIJI ISLANDS  
APPELLATE JURISDICTION

Criminal Appeal No: AAU0099/08

BETWEEN:

PHILIP FONG TOY

Appellant

AND:

THE STATE

Respondent

**Coram:** Goundar JA  
Temo JA

**Hearing:** 24<sup>th</sup> May 2010

**Counsel:** Appellant in person  
Ms S. Bull for State

**Date of Judgment:** 11<sup>th</sup> June 2010

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**JUDGMENT OF THE COURT**

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- [1] The appellant pleaded guilty in the Magistrates' Court to four counts of rape. He was sentenced to six years imprisonment on each count, to be served concurrently.

### Facts

- [2] The victim was the appellant's stepdaughter. The incidents of rape occurred when she came to live with her mother and the appellant after the death of her biological father. In 2004, she was fourteen years old when the first incident of rape occurred. The appellant was fifty-four years old. The other three incidents of rape occurred in 2005. On each occasion the appellant threatened to kill the victim and her family if she complained to anyone. Towards the end of 2005, the victim complained to her aunty about headache and backache. Upon medical examination, it was revealed that the victim was six months pregnant. She relayed to her aunty about the incidents of rape by the appellant. Under caution, the appellant admitted the offences.

### The Magistrates' Court Proceedings

- [3] The appellant appeared in the Magistrates' Court on 3 January 2006. He elected Magistrates' Court trial and pleaded not guilty. He was remanded in custody and was advised to seek legal representation. On 26 January 2006, he changed his pleas to guilty after being represented by counsel from the Legal Aid Commission.
- [4] Despite the presence of some disturbing aggravating factors, the State did not apply for the case to be transferred to the High Court for sentence. By allowing the case to proceed in the Magistrates' Court the State accepted the sentencing jurisdiction of that court.
- [5] For each count, the learned magistrate picked six years as his starting point, added 3 years for the aggravating factors and reduced 4 years for the guilty pleas and mitigating factors. The final terms of 6 years imprisonment on each count were

ordered to be served concurrently after the learned magistrate considered the totality principle.

### **The High Court Proceedings**

[6] The State appealed against the sentence to the High Court whilst the appellant cross-appealed. On 15 September 2008, the State's appeal was allowed and the appellant's sentence was enhanced to 14 years on each count of rape. Since the State's appeal was allowed, it was not necessary to deal with the cross-appeal of the appellant.

### **Appeal to this Court**

[7] The appellant filed an appeal against the High Court judgment to this Court and on 20 February 2009, he was granted leave to appeal by a single judge.

[8] This being an appeal against a judgment of the High Court in its appellate jurisdiction, the right of appeal is subject to the provisions of section 22(1) of the Court of Appeal Act.

[9] The main contention of the appellant is that the High Court exceeded its jurisdiction in imposing a sentence of 14 years imprisonment on appeal against the sentence imposed in the Magistrates' Court.

[10] It is a settled principle that the right of appeal is conferred by statute. There is no right of appeal in common law. The powers of the High Court on appeal are not unfettered. The powers of the High Court on appeal are confined to section 319 of the Criminal Procedure Code:

- (1) At the hearing of an appeal the High Court .... may thereupon confirm, reverse or vary the decision of the magistrates court .... and may by such order exercise any power which the magistrates court might have exercised:

Provided that:

- (a) .....  
 (b) .....

- (2) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law, whether more or less severe, in substitution therefor as it thinks ought to have been passed."

- [11] In *Tevita Poese v. State Criminal Appeal No: AAU0010.2005S*, this Court considered the powers of the High Court on an appeal against sentence from the Magistrates' Court and said:

"It can be seen therefore that, on appeal from the Magistrate's Court, the High Court's jurisdiction is limited to making orders, (in this case variations of sentences), which do not go beyond exercising **"any power which the magistrates court might have exercised"**."

- [12] From the case of *Poese* it is clear that the High Court's jurisdiction on an appeal against sentence is restricted to the maximum jurisdiction of the Magistrates' Court.
- [13] The maximum jurisdiction of a Magistrates' Court is 10 years imprisonment (s.7 of the Criminal Procedure Code). However, when a person is convicted of more two offences on one trial, the Magistrates' Court may order the sentences to be served consecutively, provided that the total sentence does not exceed 14 years imprisonment (s.12 of the Criminal Procedure Code).

[14] In our judgment the learned judge quite correctly pointed out that a starting point of ten years imprisonment should have used instead of seven years which was used by the learned magistrate. The starting point of ten years for rape of a child was recommended by this Court in *Asesela Drotini v The State* AAU0001 of 2005S [HAC0016 of 2003]. In that case, a father had raped and indecently assaulted his step daughter aged nine or ten years and after trial was sentenced to eleven years imprisonment. The Court observed:

“Cases of rape by fathers or step fathers appear before the courts in Fiji far too frequently and, in such cases, the starting point should be increased to ten years. Where there are further aggravating circumstances beyond those basic circumstances, such as repeated sexual molestation of any nature, threats of violence or actual violence or evidence that the offender has attempted to persuade other family members to help cover up the offences or discourage complaint to the police, there should be substantial increases above that starting point.

In any such case, there are few possible mitigating circumstances beyond a plea of guilty and the sentencing court should be careful to evaluate any matters put forward as suggested mitigation against the family situation. Thus, for example, whilst subsequent concern for, or assistance of, the victim following rape on a stranger may be accepted as some mitigation of the offence, a similar situation in a family rape would do little to mitigate the initial breach of trust. In the present case, the appellant made no attempt to avoid his daughter becoming pregnant and we regard that as a substantial aggravation of the breach of trust.”

[15] In the present case, the learned judge after using 10 years as a starting point and adjusting for the aggravating and mitigating factors, considered a term of 9 years imprisonment was appropriate on each count. However, when applying the totality principle, the learned judge substituted a term of 14 years imprisonment on each count.

- [16] In our judgment the learned judge misconstrued the totality principle. The effect of the totality principle is to require a sentencer when ordering a series of sentences to run consecutively to consider whether the total sentence is too much and will have a crushing effect on the offender. If a sentencer concludes that making a series of sentences cumulative will have a crushing effect on the offender, then the sentences should be made concurrent. That is how the totality principle operates. The totality principle cannot be applied to enhance a sentence which otherwise is just and appropriate, as was done in this case. In our judgment the High Court passed the sentence in this case as a consequence of an error of law.
- [17] Furthermore, by increasing the sentence in excess of the maximum jurisdiction of the Magistrates' Court, the High Court made a jurisdictional error. The maximum sentence the High Court could have passed on each count was 10 years imprisonment.
- [18] In the present case, the appellant entered early guilty pleas and relieved the complainant from giving evidence in court. He showed remorse and had spent time in custody after he was charged. The aggravating factors were the threat to kill although no physical violence was inflicted, the breach of trust and the resulting pregnancy of the complainant depriving her education opportunities. Taking all these factors into account, we agree with the initial assessment of the learned High Court judge that a term of 9 years imprisonment was just and appropriate on each count of rape.

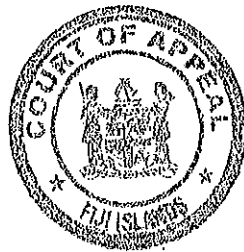
### **Result**

- [19] For the reasons we have given, the appeal is allowed.

[20] The sentence of 14 years imprisonment is quashed and a sentence of 9 years imprisonment is substituted on each count of rape, to be served concurrently.



Hon. Mr. Justice D. Goundar  
**Judge of Appeal**



Hon. Mr. Justice S. Temo  
**Judge of Appeal**

**Solicitors:**

Appellant in person  
Office of the Director of Public Prosecutions for State