IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 78 of 2010
(High Court HAC 26 of 2010)

BETWEEN	**:**	**TOMASI TIKO BULIVOU**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Chandra RJA**
Counsel	**:**	**Appellant in person** **Mr M. Korovou for the Respondent**
Date of Hearing	**:**	**5 August 2013**
Date of Ruling	**:**	**9 August 2013**

RULING

1. The Appellant was charged before the High Court at Lautoka on two counts of attempted rape contrary to section 151 of the Penal Code (Cap.17), five counts of rape contrary to sections 149 and 150 of the Penal Code (Cap.17), one count of defilement of a girl under 13 years of age contrary to section 155(1) of the Penal Code (Caop.17) and one count of indecent assault contrary to section 154(1) of the Penal Code (Cap.17). Of these nine counts, the first six counts were in respect of one victim and counts 7 to 9 were in respect of another victim. The incidents on which the Appellant had been charged had occurred over a period of four years and the first victim was the Appellant's sister's daughter who had been 5 years old when the first attempted rape had taken place, and the second victim had been 8 years old when the Appellant had attempted to rape her.

2. When the matter was taken up for trial before Assessors on 30th August 2010, the Appellant pleaded guilty to two counts of rape and pleaded not guilty to the other counts.

3. The trial had commenced and continued till 1st September 2010 and both victims, the mother of the first victim, the grandmother of the second victim and a Doctor had given evidence.

4. When the case was taken up for further trial on 1st September 2010, it is recorded that the Appellant had moved for a short adjournment to reconsider his plea and after the adjournment the Appellant had informed Court that he wanted to plead guilty to the remaining charges also.

5. Thereafter the Appellant had admitted the evidence given by the witnesses up to that stage of the trial, pleaded guilty to all nine counts and consequently the learned trial judge had sentenced him on 3rd September 2010 to a total of 16 years of imprisonment in respect of the offences committed in respect of each victim and ordered the sentences to run partly concurrently and partly consecutively and thereby the Appellant was to serve a term of 20 years imprisonment with a non parole period of 16 years.

6. The Appellant filed a leave to appeal application on 13th October 2010 and has urged the following grounds:

   a. That the trial Judge had acted unlawfully and may have perverted justice when he was advised after a short adjournment that he could help him out by reducing the sentence from 3 years to 2 years the plea was changed and pleaded guilty to all the offences charged.

b. That his guilty plea to the 7 other charges was unequivocal because of the judge's advice to him which the Judge did not note down in his judgment.

c. That the trial judge had erred in law when he failed to direct himself properly on the issues of lies especially where the victim had recalled assumed sexual activities from young an age as 5 years old and where the victim's allegation no longer needs corroborative evidence.

d. That there had been a great miscarriage of justice that had occurred in his case.

e. That on the 7 counts on victim L.C. he was coerced to plead guilty by the trial Judge, the Judge was wrong in law when he accepted the guilty plea since the summary of facts did not contain evidence of the offence charged and where the facts were insufficient, assumed and circumstantial.

f. That the investigation by police was flawed and prejudiced and where a supposed victim, L.C. may have been coerced to give a false statement to police which the trial judge judiciously failed to investigate, thereby erring in law.

g. That the sentence ordered by the court is too harsh and excessive.

7. When this matter had come up for hearing on the application for leave on 15th April 2011, the presiding Judge had wanted evidence from the prosecution in the form of affidavit from Ms. Bull who had conducted the prosecution and consequently Ms. Bull had filed an affidavit in Court on 26th April 2011 and the matter came up for re-hearing on 3rd April 2013 as no ruling had been given by the previous Judge.

8. At the re-hearing of the application on 3rd April 2013 Mr.Savou appearing on behalf of the Appellant from the Legal Aid Commission stated that the Appellant wished to represent himself and moved to withdraw which was allowed. The Appellant sought further time to file written submissions. On 9th May 2013 the Appellant sought leave to file additional grounds of appeal and set out the following additional grounds of appeal:

1. That the trial was prejudiced through lack of legal representation.
2. That the summary of facts failed to disclose each element of the offence the appellant is convicted for.
3. That the conduct of the learned trial judge in advising the appellant to reconsider the plea prior to the calling of the last witness is a substantial miscarriage of justice.
4. That the learned trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and not taking into account relevant considerations.

9. Considering the entirety of the grounds of appeal urged by the Appellant, it would be seen that the main grounds of appeal are:

a. Whether there was a miscarriage of justice as the learned trial Judge had advised the appellant to reconsider the plea prior to the calling of the last witness and whether his changed plea of guilt could be considered as unequivocal.

b. Whether the sentence of 20 years imprisonment was harsh and excessive.

10. When the application for leave to appeal had been taken up for hearing before Justice Marshall on 15th April 2011, Justice Marshall had indicated that it would be necessary to

obtain affidavits from Ms. Bull who had been the prosecuting Counsel and the Court Clerk if possible.

11. Consequently, Ms.Bull who had been the prosecuting counsel , had filed an affidavit on 26th April 2011 setting out the manner in which the trial had proceeded in the High Court. She has stated therein that prior to the calling of the State's last witness, the learned trial Judge had inquired from the Appellant as to whether after hearing the prosecution witnesses, he wished to maintain his plea or to take time out to consider. That the learned trial Judge had made it very clear to the Appellant that no one was forcing him, and that whatever decision he made, he must reach it voluntarily and without fear. Further that since the Appellant was unrepresented that it was the duty of the Court to assist him. Thereupon, the Appellant had asked time to reconsider and the Court had adjourned for that purpose. When the Court had reconvened, the Appellant had informed the Court that having heard the evidence of the children complainants, and also to save the Court's time, he wanted to plead guilty to all counts on the information. The learned trial Judge had again asked him whether anyone had forced him or induced him to take that decision to which the Appellant had replied in the negative. The Assessors had then been called in and informed of the Appellant's decision to change his plea. Before the Assessors also the learned trial Judge had asked whether anyone had forced him to change the plea to which too he had replied in the negative. Thereafter a guilty plea had been recorded for each count.

12. The complaint of the Appellant is that the learned trial judge had induced him to reconsider the plea to get a lesser sentence. Although the affidavit filed by Ms.Bull does not suggest such a situation, where the prosecution case had almost been concluded, when the trial Judge wanted the Appellant who was unrepresented to re-consider his plea on the basis of what the prosecution witnesses had upto that time stated in their evidence, it is possible that the Appellant may have considered to change his plea rather than go

through the trial as the trial Judge had already made up his mind. If that could be a possibility then the changed plea becomes questionable as to whether he was induced by what the learned trial Judge had told him.

13. In **R v Barnes** 55 Cr. App. R 100, where in a case when an accused was represented by Counsel, the trial Judge had in the absence of the jury commented adversely on the time wasted on hopeless defences and invited the defending counsel to reconsider the position. Counsel had then offered to withdraw from the case as he had twice advised the accused regarding same. Thereupon the trial judge had expressed the view that any other counsel would be bound to tender the same advice to the accused and had asked the accused whether he preferred to have his present counsel or wished to represent himself. The accused had asked for an adjournment till the next day which had been refused. He continued with the same counsel and maintained his plea of not guilty. The trial judge proceeded to convict the accused. On appeal it was a case of putting extreme pressure on the accused to plead guilty, and that it was bound to make the accused think that the judge had taken so adverse a view of his case that he was unlikely to obtain a fair trial.

14. Although the facts in Barnes's case are different from the present case, it would be arguable as to whether the Appellant would have thought when asked to reconsider his plea, that the judge had taken an adverse view of his case and that it was better for him to plead guilty which brings about the question as to whether he had a fair trial and whether his plea was unequivocal. In view of this position leave is granted to the Appellant.

15. The ground of appeal regarding sentence is on the basis that it is harsh and excessive. He had been sentenced to 20 years imprisonment which had been arrived at by the learned trial Judge by combining the sentences for the offences committed against the two victims. The sentences pronounced in respect of the offences on each victim was 16 years

and they were to take effect concurrently and partly consecutively. The second 16 year sentence was to operate from the 4th year of the 1st sentence.

16. The question arises as to whether the sentence imposed on the Appellant offends the totality principle. The totality principle requires the sentencing judge to look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences when cases of multiplicity of offences come before the court. **Mill v The Queen** [1988] HCA 70; **Tuibua v The State** [2008] FJCA 77.

17. In the present case, as to whether the ordering of the sentences to run partly concurrently and partly consecutively offends the totality principle is a matter that is arguable and leave is granted.

Order of Court:

Leave to appeal against conviction and sentence allowed.

Suresh Chandra
Resident Justice of Appeal