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

CRIMINAL APPEAL NO. AAU 101 OF 2013
(High Court No. HAC 259 of 2013)

BETWEEN	:	**LEONE K. VERESA**	***Appellant***
AND	:	**THE STATE**	***Respondent***
Coram	:	**Gamalath, JA** **Goundar, JA** **Perera, JA**	
Counsel	:	**Mr. T. Lee for the Appellant** **Ms. P. Madanavosa for the Respondent**	
Date of Hearing	:	**24 August 2017**	
Date of Judgment	:	**14 September 2017**	

JUDGMENT

Gamalath JA

The background

[1] This appeal is against the sentence of imprisonment of 17 years imposed on the appellant on a charge of Rape, by the learned High Court Judge at Suva. As it transpired through the proceedings relating to this appeal, the learned High Court Judge imposed the impugned sentence of imprisonment by invoking the powers vested in him under section 190 of the Criminal Procedure Act 2009, (CPA 021A)

(CPA from now onwards for convenience). What has now become arguable about the decision of the learned High Court Judge is, whether it is permissible in law for the learned High Court Judge to assume powers *ex mere motu* and to follow the procedure that was invented in imposing the impugned sentence of imprisonment. As a prelude to understanding the arguable nature of the matter, one needs to examine as to how the proceedings had surfaced in the High Court in the first place.

[2] As the proceedings in the appeal brief would reveal, it was the Director of Public Prosecutions who initiated proceedings in the High Court by appealing against the sentence of imprisonment of 8 years, on a count of Rape, pronounced after trial before the Magistrate's Court of Nasinu. In the said trial before him, the learned trial Magistrate having convicted the appellant on the charge of Rape, imposed the 8 years sentence of imprisonment and suspended it partially. It was challenging the said sentence, the Director of Public Prosecutions launched the appeal to the High Court, Suva.

[3] Having regard to the learned Magistrate's sentencing decision, it is quite clear that the learned High Court Judge at Suva entertained serious reservations, not only about the fact that it was partially suspended but also he opined that the total sentence was clearly not commensurate with the gravity of the offence. Therefore, the learned High Court Judge decided that the sentence should be revised by enhancing the quantum and the suspension should stand rescinded.

[4] Now, there is a jurisdictional problem standing in the way of the learned High Court Judge, circumscribing his scope of powers to achieve this goal, for as already stated, the Director of Public Prosecutions had initiated the proceedings by invoking the jurisdiction as laid down in section 256 of the CPA .Under the said provisions, the High Courts are empowered only to exercise limited appellate powers over decisions coming from magistracy. Disregarding the statutory limitations that operate to fetter his powers through the provisions of section 256 (3) of the CPA, the learned High Court Judge seemed to have resorted to a course of "judicial activism", when he invented a novel device to enhance the sentence passed against the appellant. The learned High Court Judge by reading section 256 (2) (e) in conjunction with section 190 of the Criminal Procedure Act and assuming purported statutory power upon him

to impose a severe sentence had handed down the impugned sentence under review in the present appeal.

[5] In the circumstances this appeal deals not only on the legality of the impugned sentence of 17 years imprisonment but also the procedure adopted by the learned High Court Judge in arriving at that sentence.

A discussion on the relevant sections of the Law

[6] Section 256(3) of the CPA states as follows:

> *"Powers of High Court:*
>
> *At the hearing of an appeal whether against a 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 Magistrate's Court and pass such other sentence as it thinks ought to have been passed."* (emphasis added).

[7] On the other hand Section 190 of CPA, dealing with "Transfer to High Court for Sentence" states as follows:

> *"190(1) where -*
>
> *(a) A person over the age of 18 years is convicted ... and*
> *(b) The Magistrate is of the opinion (whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has power to impose –*
>
> *The magistrate may, by order transfer the person to the High Court for sentencing.*
>
> *(2)_*
>
> *(3) The High Court shall inquire, into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted and sentenced by the High Court.*
>
> (emphasis added).

[8] Since the language of the two sections is devoid of any ambiguity, there is no difficulty to understand the conceptual notions contained in them. (see, *Albert Fellows Stephen Arnold* in (1997)1 Cr. App. R. 244,on "contemporary interpretation theory "These are issues of interpretation . The Court's primary task is to ascertain the meaning of the words of the statute itself, and it is only in this sense that what was or may be inferred to have been the intention of Parliament.

Whilst the Court's decision in a particular case may indicate and be described as a purposive as distinct from a literal approach it would be wrong in our view to say that one or other of these two methods should be predetermined as correct.

That may become relevant if some ambiguity is found to exist, but the first inquiries should be what the words themselves mean." (emphasis added). In another word the efficacy of the legal provisions should be understood with having reference to their respective tone and texture.

[10] In that context in order to understand the issues involved in the instant appeal it is necessary to have an accurate grasp of the language of the relevant sections. In my understanding of their language, they do not contain powers which are to be construed as having any competing powers with each other or even powers complimentary to each other. Simply, they are to be understood as having been evolved as "stand-alone" , "self – containing" provisions of law, dealing with two different situations, in the sense whilst the section 256 of CPA is vested with "appellate jurisdictions over decisions of the Magistrate", section 190 of CPA deals with the powers to impose enhanced or different sentences on matters arising out of the proceedings of a Magistrate's Court. In the second instance what precedes the assumption of jurisdiction is the initial reference of the matter by a magistrate who wishes to invoke the High Court's powers as stipulate in the section.

[12] If one may take a holistic view of the provisions of the CPA, it should become clear from the law, that the procedural law has not envisaged a situation by which means an overarching mechanism could be devised for the exercise of powers in an interchangeable manner between sections 190 and 256.

The Instant Appeal

[13] In the backdrop of the discussion on law relating to this appeal, now I wish to turn to the facts of this appeal.

[14] The appellant in this appeal stood trial in the Magistrate's Court at Nasinu, on one count of Rape, contrary to Section 149 and 150 of the Penal Code – (Cap 17).

[15] According to the particulars of the charge, on 8th December, 2007, at Nasinu he had unlawful carnal knowledge of Kelera Veresa, without her consent.

[16] Kelera Veresa, is the biological sister of the appellant. Since the conviction and the facts are not in dispute, the facts of the case shall be set out briefly as follows:-

[17] On the day of the incident, the appellant had sent for the victim to his house to question her about the gossip that was rife in the village, that she is a lesbian. According to the evidence at the trial in the magistrate's court, her alleged sexuality had brought in severe disrepute and embarrassment to the family. At his house, whilst questioning her over the matter, the appellant repeatedly slapped her across the face, until she bled from the mouth. In fear she became incontinent. He got her to clean herself up and ordered her into his bedroom, where he had sexual intercourse with her. Besides, she was forced to perform fellatio on him, another form of rape under the contemporary criminal law. The appellant seemed to have resorted to this violence with the fervent hope that the victim would turn a heterosexual and give up her homosexual life pattern.

[18] Based on these facts the Appellant was charged in the Magistrate's Court, Nasinu.

[19] After trial in the Magistrate's Court, the learned trial Magistrate convicted the appellant as charged. Adopting a rather lax attitude towards the appellant the magistrate imposed a sentence of 8 years imprisonment and suspended it partially.

This in effect means that the appellant should be at community work during the weekdays, and on each Friday of the entire 8 years period, he should submit himself to the prison authority to be incarcerated during the weekends.

[20] Considering the gravity of the offence and the attendant abominable circumstances of the case it is obvious that the sentence was totally disproportionate and not commensurate with the criminality involved.

[21] Being aggrieved by the sentence, on 19 February, 2013, the Director of Public Prosecutions lodged an appeal to the High Court, Suva, to canvass the learned Magistrate's sentence of imprisonment. According to the appeal by DPP, all what was sought to be achieved was annulment of the suspension of the sentence, so that the appellant will be left just with the 8 years imprisonment. The fact that no parole period was prescribed by the Magistrate was also raised as a ground.

[22] This exercise was done by invoking the jurisdiction vested in the High Court to act in appeal and the plain reading of the prayer at the end of the appeal that would become quite clear;

> *"Wherefore the Appellant prays that this Honourable Court be pleased to set aside the said sentence given by the learned Magistrate and impose an appropriate and lawful one."*

[23] Based on this in the High Court the appeal proceedings commenced. According to his reasons in the sentencing decision the learned High Court Judge has had no reservations in expressing his abhorrence towards the crime committed by the appellant. He was eager to replace the learned Magistrate's sentence and impose a severe sentence that in his opinion would help achieving ends of justice.

[24] As discussed in the beginning this is where the learned High Court Judge adopted a peculiar procedure of his own, that purportedly helped him in circumventing the operational sphere that is contained within the pale of section 256(3) of CPA.

[25] In adopting this peculiar approach the learned High Court Judge had stated thus;
See para 4 of the Sentencing Order;

"The appeal succeeded (See Cr. App. 014 of 2013) and in the process this Court, after setting aside the sentence passed below and in assuming the role of the Magistrate pursuant to section 256(2)(e) of the Criminal Procedure Decree (the Decree) ordered that the matter be sent up to the High Court for sentencing in accordance with Section 190 of the Decree."

[26] This is *ex facie*, a wrong decision. As already discussed in the beginning the law does not permit the High Court to adopt the kind of course of action that the learned High Court Judge had resorted to in this matter. The learned High Court Judge had been oblivious to the fact that after the pronouncement of the sentence of imprisonment in the Magistrate's Court, in so far as taking initiatives to institute proceedings by a magistrate under sec 190 of the CPA are concerned, the Magistrate is *functus officio* (**Re v. G. M. Holdings Ltd**. [1941] 3 All ER 417) and in the circumstances, the decision of the learned High Court Judge is clearly erroneous and unenforceable. Moreover, the maximum penalty that a magistrate can legally impose on a convict for Rape is 10 years and in that context as well, the learned High Court Judge's approach does not stand to reason.

The Present Appeal

[27] Against the sentence of imprisonment of 17 years imposed in the High Court, the Appellant is presently prosecuting this appeal.

[28] He does not pursue a ground of appeal against the conviction.

[29] On the other hand, having reference to the submissions made by the learned counsel for the State, it is my understanding what they wish to achieve through the hearing of this appeal is the restoration of the original sentence of imprisonment handed down by the learned magistrate, namely 8 years , sans its suspension.

How should the sentence be reviewed in appeal

[30] Answering this question prior to arriving at any conclusion with regard to the quantum of the sentence, it is incumbent upon this Court to determine the extent to which the learned High Court Judge's sentence should be subject to review under this appeal.

[31] This brings me back to the issue of correctly understanding the provisions contained in 256 (3) of the CPA. The provision of the law states as follows:

> *"At the hearing of an appeal ... quash the sentence passed by the Magistrate's Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*(emphasis added).

[32] On comparison and contrast, one may find an identical section in the Criminal Procedure Code (Cap. 21), in Section 319(2).

[33] What it means by "as it thinks ought to have been passed" has been interpreted in the decisions of **Eri Mateni v. State** [1999] AAU 21/98 HAC 18/98B) (MAC 21/98B) 14 May, 1999 and in **Paula Malo Radrodro v. State** (2000) 1 FLR 289 AAU 32/95 (apf HAA 98/98L) 17 November, 2000.

[34] Accordingly, it was decided that "ought to have passed" must mean ought to have passed by the Magistrate." It means clearly, nothing more-nothing less. (emphasis added).

[35] Reiterating this position in the single judge's ruling Goundar J had cited the judgment of **Livai Nawalu v. The State**, [unreported], Criminal Appeal No. CAV0012 of 2012, 28 August, 2013, where the Supreme Court had set out the parameters within which See 256(3) CPD should be activated;

> *"[24] The appeal court must, if it substitutes its own sentence on appeal or by way of revision of the Magistrates Court's sentence, keep within the powers of the Magistrates Court. The High Court cannot substitute a Magistrates Court sentence with one which only the High Court can impose. The Magistrate is limited to a maximum term of imprisonment on each offence of 5 years. [section 7 CPC] now 10 years [section 7(1)(a) CPD] and in total to 14 years where there are two or more distinct offences [section 12 CPC and section 7(2) power of the Magistrate to sentence beyond the usual limit."*

[36] In light of the discussion above based on different legal dicta, it is abundantly clear that the learned High Court Judge had exceeded his sentencing powers and therefore there is a clear error on judgement of the sentence of imprisonment.

The Suspended Sentence

[37] As discussed in the preceding paragraphs, the Director of Public Prosecutions initiates the appeal proceedings in the High Court, Suva against the partial suspension of the 8 years sentence of imprisonment imposed by the learned magistrate.

[38] It is trite law that Rape is one of the most heinous crimes and convicts for Rape should be punished severely so that its deterrent effect will have a strong and indelible impact on whole society.

[39] In this appeal the learned Magistrate's decision to partially suspend the sentence of 8 years is baffling and what is more baffling is that the learned Magistrate did not seem to have considered that following the conviction the matter should have been referred under sec 190 for punishment by High Court.

[40] Be that as it may, given the fact that the maximum prescribed sentence for rape in the Magistrate's Court is 10 years, the sentence of 8 years imprisonment in the Magistrate's Court is not objectionable. What is strongly objectionable is the suspension of the sentence partially. It indeed is an illegal sentence for law does not permit the suspension of a sentence of 8 years imprisonment.

[41] In the circumstances, I find merits in the submission of the Learned Counsel for the State and hence the Magistrate's decision to partially suspend the imprisonment should be rescinded.

[42] The appeal is only against the sentence imposed by the High Court and we have already dealt with its legality.

Conclusion

[43] As the learned High Court Judge's decision to enhance the sentence of imprisonment to 17 years cannot be supported in law, the appellant's appeal against the17 years sentence should be allowed.

[44] However, since there is no appeal against the conviction, the learned Magistrate's finding of guilty of the appellant of the charge of rape shall stand confirmed.

[45] In the circumstances, acceding to the request by the Learned Counsel for the State, the partial suspension of the sentence of 8 years imprisonment imposed by the learned Magistrate shall stand annulled.

[46] In place of that, the original sentence of 8 years imprisonment is confirmed. However, the learned counsel for the appellant informed this court that the appellant is presently serving the sentence imposed in the High Court and consequently he had already served 4 ½ years in prison.

[47] We find that there was an inadvertent omission on the part of the learned trial Magistrate's sentence for it does not prescribe a non-parole period. Further. according to the learned counsel, the appellant was in remand custody for a week prior to his trial commenced in the Magistrate's Court.

[48] In the circumstances, his period of one week in remand and the four years and six months period in prison will be deducted from the total sentence of 8 years imprisonment. He shall serve a non parole period of 7 years.

Goundar, JA

[49] I agree.

Perera, JA

[50] I agree with the decision of Gamalath, JA.

Orders

1. *Appeal allowed.*

2. *Sentence imposed in the High Court is set aside and substituted with a sentence of 8 years imprisonment with a non-parole period of 7 years, effective from 29 July, 2013.*

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice D. Goundar
JUSTICE OF APPEAL

Hon. Justice V. Perera
JUSTICE OF APPEAL