IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: 5 OF 2013

BETWEEN: **JONE TABAKA**

Appellant

AND: **STATE**

Respondent

Counsels : **Appellant in person**
Mr. Semi Babitu for the Respondent

Date of Hearing : **19 November 2013**
Date of Judgment : **3 December 2013**

JUDGMENT

1. The appellant was charged before the Rakiraki Magistrate under following count:

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE:- Contrary to Section 209 of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

JONE TABAKA, on the 21st day of May 2012 at Qelema settlement, Rakiraki in the Western Division, assaulted **SADHNA DEVI** with intent to commit rape.

2. The appellant pleaded not guilty and after trial he was convicted and sentenced for 2 years 11 months imprisonment with 2 years 5 months as the non-parole period on 18th October 2012.

3. The facts of the case are on 21st May 2012 at Qelema settlement Rakiraki between 7.00 p.m. and 8.00 p.m. appellant and another had gone to the house of the victim. There appellant and another had enquired about the husband of the victim. Victim had informed that husband is not at home. Then appellant and other had forcefully entered the house of the victim and kicked the kerosene lamp. Then appellant had grabbed her from behind and hold her neck and mouth. Victim was told to keep quiet or else she would be raped and killed. Then appellant had pulled

victim's clothes and tried to remove those. Victim had tried to free herself. Upon hearing the victim's husband coming appellant and other ran away.

4. This appeal was filed on 15th November 2012 within time.

5. The grounds of appeal are :

   (i) That the learned Magistrate erred in law and in fact when he failed to advice the accused of his right to legal counsel before and during the trial.
   (ii) That the learned Magistrate erred in law and in fact when he failed to advice the accused of the availability and his rights to be provided with Legal Aid assistance.
   (iii) That the learned Magistrate erred in law and in fact when he did not take into consideration the mitigating factors in sentencing.
   (iv) That the sentence is harsh and excessive.

Grounds (i) and (ii)

6. The appellant was first brought before the learned Magistrate on 1.6.2012. On that day he had requested for Legal Aid assistance. He was given time till 6.6.2012.

7. On 6.6.2012 he had moved further time to seek legal aid assistance. He was granted bail that day and time was given till 1.8.2012.

8. On that day appellant had waived his right for counsel and informed court that he will represent himself. Thus hearing was fixed for 6.9.2012 after appellant pleaded not guilty.

9. On 6.9.2012 after the trial was stood down for hearing, he had requested for a private counsel. The learned Magistrate had noted that right for counsel was given since 1.6.2012 and the appellant had not taken any steps. He had not applied for legal aid. As sufficient time was given, his application to apply for private counsel was refused. The learned Magistrate was of the view that the appellant was trying to play with the court system.

10. The right for representation is not an absolute right. In ***Shankar v The State*** [2006] FJHC 14; CAV 0008U.2005S (19 October 2006) it was held that "*the right of counsel under Section 28 (1) of the Constitution is subject to that criterion of reasonableness. To construe Section 28 (1) (d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. Such a construction would, practically, be unworkable. It is implicit in the section the right to counsel conferred thereby is qualified by considerations of reasonableness. The Constitutional right is one which must be exercised at the proper time. It cannot be exercised on the eve of the trial to force an adjournment."*

11. Further in ***Ramalasou v State*** [2010] FJHC 19;AAU 0085.2007 (28 May 2010) it was held by His Lordship Mr. John Byrne and His Lordship Mr. Daniel Goundar that:

    "*This court has on several occasions explained the practical limits on the right to counsel. The right to counsel is not absolute. Where an accused person is indigent, the right to be provided with representation under the Legal Aid Scheme must depend on the interests of justice."*

12. In ***Drotini v The State*** [2006] FJCA 26;AAU0001.2005S (24 March 2006) it was held that:

"*It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trail court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence."*

"The question for this Court is whether there was possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel, he was advised correctly of his rights by the trail judge and conducted his case competently."

13. The appellant was given time from 1.6.2012 to 1.8.2012 to seek Legal Aid assistance. Then he had waived his right of representation on 1.8.2012 and informed court that he is going to represent himself and ready for hearing. When the case was taken up for hearing 1 month and 6 days later appellant had requested for private counsel. The learned Magistrate had given more than adequate time to find counsel and there is no merit in these grounds of appeal.

Ground (iii)

14. The appellant had filed submissions in mitigation of the sentence. He had given his family back ground and sought forgiveness from court. Further he had promised that he will not come again to court. He was in remand for 31 days.

15. The learned Magistrate had considered this written submission in the sentence in paragraph 3.

"*You were given opportunity to mitigate and submitted written mitigations. I have considered your written mitigation and you have acknowledges wrong-doing and requested for forgiveness and leniency. Apart from these I don't see any other mitigating factors in your favor."* In paragraph 9 "For your mitigation I reduce your sentence by 1 year" Further in Paragraph 11 " *Taking into consideration that you've already spent 1 month in custody for this offence, I order that you serve an immediate imprisonment term of 2 years and 11 months."*

16. Therefore there is no merit in this ground that the learned Magistrate did not take into consideration the mitigating factors when sentencing. In fact the learned Magistrate had considered all the mitigating factors submitted and given the discount due for those.

Ground (iv)

17. Assault with intent to commit rape under Section 209 of the Crimes Decree, 2009 carries a maximum punishment of 10 years. There is no sentence tariff judgment for this offence. The learned Magistrate had chosen a tariff of 1-4 years. Considering the nature of the offence, I am of the view the tariff chosen by the learned Magistrate is just and appropriate.

18. The learned Magistrate had taken a starting point of 2 years and had added 2 years for the aggravating factors. Then he had reduced the sentence by 1 year for mitigating factors and deducted further 1 month for the time period in remand in arriving at the sentence of 2 years and 11 months. Therefore there is no merit in the ground that the sentence is harsh and excessive. That ground too fails.

19. For the reasons given above the appeal against conviction and sentence is dismissed.

Sudharshana De Silva
JUDGE

At Lautoka
03rd December 2013

Solicitors for the Appellant: In Person
Solicitors for the Respondent: Office of the Director of Public Prosecution