ALFRED JOHN H v STATE (AAU0019 of 2005)

COURT OF APPEAL — CRIMINAL JURISDICTION

TOMPKINS, SCOTT and WOOD JJA

3, 10 March 2006

Criminal law — appeals — Appellant unrepresented — equivocal plea of guilty — right to fair trial — fairness of sentencing process — sentence imposed manifestly excessive — Prisons Act (Cap 86) s 6(1)(b).

The Appellant had regularly raped with force one of his daughters. He also indecently assaulted and attempted to rape another daughter. In 2002 the Appellant was charged with 10 offences of rape, attempted rape and indecent assault in the Magistrates Court. He pleaded guilty to one charge of rape and two offences of indecent assault. He pleaded not guilty to the other charges. The guilty plea was accepted and the charge sheet was severed. The file dealing with the three uncontested offences remained as numbered but a new file containing the seven outstanding charges was created and given another number. The Magistrates Court sentenced the Appellant to a total of 3 years' imprisonment.

The Appellant was committed for trial on the remaining seven charges in the High Court. The information was filed on 6 December 2004 or over 2 years after the disposal of the three earlier charges. Thus, when the Appellant came before the High Court to be re-arraigned he had already been released from prison to serve the balance of his 3-year term extramurally. The High Court granted him bail. The Appellant appeared in High Court unrepresented. On 4 February 2005 the Appellant was convicted on his own plea by the High Court on six counts of rape and one count of attempted rape. He was sentenced to a total of 10 years' imprisonment. The Appellant appealed against both conviction and sentence on the following grounds: (1) the guilty plea was equivocal; (2) the Appellant's right to fair trial was breached by the High Court's refusal to afford him sufficient time to get legal representation; (3) insufficient consideration was given to the fact that he had already served a period of imprisonment for the same series of offences; and (4) the sentence was manifestly excessive.

Held — (1) The evidence established that the Appellant had not only decided to proceed unrepresented on his own but he also specifically stated that no pressure had been put on him to change his plea. Moreover, the allegation that the court refused to allow the Appellant sufficient time to engage counsel was also contradicted by the record showing he was granted several adjournments for this purpose. Subsequent to this no further adjournment was requested nor indeed was needed, because the Appellant changed his plea and decided to represent himself.

(2) The sentence imposed was entirely appropriate given the unsatisfactory way in which the two sets of sentences were imposed. Given the 7 years starting point laid down in *Mohammed Kasim v State* the court was satisfied that the sentence imposed for the offences was appropriate were it not for the erroneous way in which the series of offences were dealt with by two different courts on two different occasions.

Appeal against conviction dismissed. Appeal against sentence allowed.

Cases referred to

Mohammed Kasim v State [1994] FJCA 25; *Waisake Navunigasau v State* (unreported, AAU0019/1996), cited.

Bennett (1980) 2 Cr App Rep (S) 96, considered.

Appellant in person

A. Driu and *S. Puamau* for the Respondent

Tompkins, Scott and Wood JJA.

Introduction

[1] On 4 February 2005 the Appellant was convicted on his own plea by the High Court at Lautoka on six counts of rape and one count of attempted rape. He was sentenced to a total of 10 years' imprisonment.

[2] Numerous grounds of appeal were filed by the Appellant who represented himself. On 28 June 2005 the president gave leave to the Appellant to appeal against both the conviction and the sentence. The grounds of appeal may be summarised as follows:

(i) the guilty plea was equivocal;

(ii) the Appellant's right to a fair trial was breached by the High Court's refusal to afford him sufficient time to arrange legal representation;

(iii) insufficient consideration was given to the fact that he had already served a period of imprisonment for the same series of offences; and

(iv) the sentence was manifestly excessive.

Background

[3] The circumstances leading up to the proceedings in the High Court were both unpleasant and unusual. Owing to the misplacement of a case file and other documents, the precise sequence of events, which in this case are particularly important, cannot definitely be stated.

[4] The Appellant is a married man with four children, two boys and two girls. The elder daughter E was born on 25 October 1983. The younger daughter L was born on 20 August 1987. In October 2002 it was reported to the police that between 1997 when she was aged 14 and 2002 when she was aged 19, the Appellant had regularly and frequently and with force raped his daughter E. It was also alleged that between January 2001, when she was 14, and October 2002 the Appellant had twice indecently assaulted his daughter L and on one occasion attempted to rape her.

Proceedings in the Lautoka Magistrates Court

[5] On 18 November 2002 the Appellant was charged with ten offences of rape, attempted rape and indecent assault. On 19 November 2002 he pleaded guilty to one charge of rape against E in November 2002 and two offences of indecent assault against L between January 2001 and October 2002. He pleaded not guilty to the other charges. The guilty plea was accepted and the charge sheet was severed. The file dealing with the three uncontested offences remained numbered 861/02 but a new file containing the seven outstanding charges was then created and numbered 866/02. This was an entirely wrong procedure.

[6] In *Bennett* (1980) 2 Cr App Rep (S) 96 the following was stated:

> It needs to be said, as firmly and strongly as possible that there is an obligation on solicitors, counsel and judges alike to do all within their power to ensure that so far as possible all outstanding charges against a defendant are dealt with in the same court, by the same judge upon a single occasion …
>
> We wish to make it plain that when a solicitor and a member of the Bar knows that there are other charges against [the Accused] to be dealt with other than those before the Court they should ensure that an application is made … to have the [Accused] … put back to be dealt with … where the other outstanding charges lie.

[7] *Blackstone's Criminal Practice* 1993 at para D9.20 states:

> If an accused enters mixed pleas on a multi — count indictment and the prosecution are not prepared to accept those pleas, sentencing for the counts to which he has pleaded guilty should be postponed until after he has been tried on his not guilty counts.

[8] The fact that, as in this case, the accused elected to plead guilty in the Magistrates Court but elected to be tried in the High Court does not affect the operation of the principle above set out.

[9] After agreeing the facts (the statement of which has been lost) and after presenting his mitigation (the record of which has also been lost) the Appellant was sentenced concurrently to 2 years' imprisonment on each of the indecent assaults and 3 years' imprisonment for the rape: a total of 3 years' imprisonment. Given that the victims of these assaults were the Appellant's own daughters we are surprised, to say the least, that the Director of Public Prosecutions decided not to appeal against the plainly lenient sentence imposed by the Magistrates Court.

The proceedings in the High Court

[10] In April 2003 the Appellant was committed for trial on the remaining seven counts in the High Court. For reasons which we were told are now unknown, the matter did not reach the High Court until 2 November 2004. The information was not filed until 6 December 2004, that is over 2 years after the disposal of the three earlier charges.

[11] The disgracefully long delay in filing the information combined with the operation of s 6(1)(b) of the Prisons Act (Cap 86) meant that by the time the Appellant came before the High Court to be re-arraigned he had already been released from prison to serve the balance of his 3-year term extramurally. The High Court granted him bail.

[12] On 1 February 2005 the Appellant appeared again in the High Court. He was unrepresented. He told the court that his lawyer, Mr Iqbal Khan, had suddenly gone away. Although the eight prosecution witnesses were present, together with the assessors, the matter was adjourned to the following day. The next day there was some mention of another lawyer appearing in the place of Mr Iqbal Khan and the matter was stood down for half an hour. The record states that at 10 am the following occurred:

> 10 am — Accused wish to proceed on my own. Wish to change my plea. Do this of my own free will. No pressure.
> In presence of assessors.
> Accused — wish to change plea
> Information put
> [7 counts — understand — plead guilty]
> Accused: I have pleaded guilty knowing the seriousness of charges to what I have pleaded guilty.

[13] After the pleas had been recorded a summary of facts was read out. This summary, a copy of which we have been provided with, makes no mention at all of the fact that the Appellant had previously been dealt with for three offences which were part of the same series of offences to which he had just pleaded. Although the fact of the three previous convictions was placed before the court these previous convictions appear to have been treated as disassociated from and indeed even aggravative of the seven charges now falling to be dealt with. Thus, in his sentencing remarks the judge said:

> The victims were not only your daughters but these acts were not the only ones you committed. You were convicted of similar offences in 2002. The counts to which you

have pleaded guilty took place together with numerous other abuses of a similar nature thereby establishing a pattern of behaviour whereby you persistently abuse your daughters especially your elder one over a long period of time.

[14] The judge took as his starting point 7 years' imprisonment: see *Mohammed Kasim v State* [1994] FJCA 25 (*Mohammed Kasim*). After making an allowance of 1 year for the guilty pleas and taking into account the circumstances and the manner in which the offences were committed, concurrent sentences of 10, 9 and 3 years' imprisonment were imposed.

Appeal against conviction

[15] The Appellant's suggestion that his plea was equivocal by reason of pressure from the court is inconsistent with the record of what actually occurred. From the extracts of the record set out above it can clearly be seen that the Appellant not only decided to proceed on his own but that he specifically stated that no pressure had been put upon him to change his plea. This ground of appeal fails.

[16] The suggestion that the court refused to allow the Appellant sufficient time to engage fresh counsel is also contradicted by the record. After Mr Iqbal Khan withdrew the Appellant was granted an adjournment until the following day. When he again appeared and the possibility of being represented by Mr Shah was under consideration he was again granted an adjournment. Had Mr Shah accepted the brief it is highly unlikely that the judge would have refused a further application to enable Mr Shah to take instructions. As is clear from the record, no further adjournment was requested nor indeed was needed, for the reason that the Appellant changed his plea and decided to represent himself. The second ground of appeal also fails.

Appeal against sentence

[17] The final matter is the fairness of the sentencing process and the length of the sentence arrived at. In *Waisake Navunigasau v State* (unreported, AAU0019/1996) this court upheld a sentence of 9 years' imprisonment imposed in respect of a course of offending very similar to the present case except that only one daughter was involved. The 9 years' imprisonment was described as entirely appropriate. Given the 7 years starting point laid down by this court in 1994 in *Mohammed Kasim* we are satisfied that the sentence imposed in this case for these offences would have been similarly appropriate were it not for the erroneous way in which the series of offences were dealt with by two different courts on two different occasions.

[18] As we have explained, the right procedure would have led to one sentence of 10 years' imprisonment being imposed on one occasion for the whole series of offences committed by the Appellant. Had that occurred then the Appellant would have been entitled to serve the last 12 months of the sentence (after one-third remission) extramurally. As it is, the failure to follow the correct procedure will benefit the Appellant by entitling him to two such 12 months periods after deduction of two periods of one third remission.

[19] Although the sentence imposed by the High Court was entirely appropriate, given the unsatisfactory way in which two sets of sentences were imposed, we are satisfied that the appeal against sentence must be allowed to take into account the 3-year period already served by the Appellant when he appeared in the High Court.

Result

(1) Appeal against conviction dismissed.
(2) Appeal against sentence allowed: sentence of 10 years' imprisonment set aside. Sentence of 7 years' imprisonment with effect from 4 February 2005 substituted.
(3) Suppression of names order extended indefinitely.

Appeal against conviction dismissed. Appeal against sentence allowed.