

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIM. MISC. CASE NO: HAM009 OF 2009

BETWEEN:

KAMAL PRATAP

Applicant

AND:

THE STATE

Respondent

Counsel: Mr. H.A. Shah for Applicant
Mr. W. Kuruisaqila for State

Date of Hearing: 30th March 2009

Date of Ruling: 2nd July 2009

RULING

[1] This is an application for appeal out of time.

- [2] The applicant was convicted of indecent assault on his plea of guilty. On 20 August 2002, he was sentenced to twelve months imprisonment suspended for two years.
- [3] On 12 February 2009, this application was filed to seek an extension of time to appeal against conviction and sentence. The application is supported by an affidavit from the applicant.
- [4] The principles to be applied to this type of application were considered in **R v. Knight** [1995] 15 CRNZ 332 and adopted by the Court of Appeal in **State v. Patel** Criminal Appeal No. AAU0002 of 2002S (15 November 2002).
- [5] The relevant criteria set out in the case of **R v. Knight** (supra) are:
- “... The strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for the delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.”
- [6] The main contention of the applicant is that his plea of guilty is equivocal because he was assaulted and threatened by police officers to plead guilty. He further adds that he was promised a lenient sentence.
- [7] It is trite law that an appeal against conviction arising from a guilty plea will only be entertained if there is **some evidence of equivocation on the record** (**R v. Vent** (1935) 25 Cr. App. R. 55). (Emphasis added)

[8] A plea of guilty that is made freely and voluntarily without any pressure, threat, promise or inducement will not be interfered with by an appellate court (*Maxwell v. Queen* (1996) 184 CLR).

[9] The record of the Magistrates' Court reveals the following:

"20/8/2002

Prosecution : Inspector Michael

Accused : Present

Accused : I wish to plead guilty.
Charge Read, Explained and Understood

Plea: Guilty. I plead guilty on own free will.
Nobody forced me to plead guilty including
the Police.

Facts

As per summary read and tendered and also
tender record of interview.

Facts admitted.

Court : Convicted as Charged

Prosecution : First Offender

Mitigation

23 years, Married, 2 children – wife is a teacher
in ... High School. I am a student at U.S.P.
doing Bachelor of Engineering Course – I will

not re-offend. I complete my course in June 2003. I am on a scholarship.

Sentence

The Accused has pleaded guilty. He is first offender by pleading he has spared complainant the ordeal of giving evidence. The Accused is a married man with 2 children and his wife is a school teacher. He is now doing a Bachelor of Engineering course at USP and will complete the same in June 2003.

This was a case where the element of indecency was found trivial. I refer Sitiveni vs State Criminal ... HAA0098 of 1994 page 2 of ... Judgment.

I don't think this is a case that calls for an immediate Custodial Sentence as the element of indecency was found trivial and the Accused will stand to lose a lot if an immediate Custodial Sentence is imposed as it will deprive him to complete his course at U.S.P.

Accused is sentenced to 12 months imprisonment and suspended for a period of 2 years.

Right to appeal – 28 days."

[10] The grounds of appeal are:

- (a) The Appellant was denied a fair hearing.
- (b) The Appellant's plea of guilty was not freely given as the same was obtained by assaults and threats of assault by police officers.

(c) The Appellant was not advised of his rights to appeal.

(d) The sentence is harsh and excessive in all the circumstances of the case.

[11] As can be seen from the court record, the applicant himself informed the court that he wanted to plead guilty. The charge was read and explained to him. The applicant informed the court that he was pleading guilty of his own free will and without any force from anyone including the police.

[12] The facts were read out and accepted by the applicant. The facts stated that the applicant and his girlfriend picked up the complainant from her school. The complainant and the applicant's girlfriend were sisters. They took the complainant to a place beside the Ba river. The girlfriend got off and went to a shop while the complainant remained in the vehicle with the applicant. While the girlfriend was away, the applicant touched the complainant's breast and thighs and also tried to unbutton her uniform. The complainant was offended by the applicant's conduct. She pushed him away and warned him that she would complain to her father. A school teacher from the complainant's school came down to where the complainant and the applicant were, and took her back to the school. The matter was reported to the police by the applicant's father. At the time of the assault the complainant was fourteen years old and the applicant was twenty four years old. In his caution interview, the applicant denied indecently assaulting the complainant but admitted taking the complainant from her school to the riverside in his vehicle.

- [13] The applicant argues that he was denied a fair hearing because the learned Magistrate failed to inform him of an available statutory defence under s.154(3) of the Penal Code and to follow the procedure prescribed by s.10 of the Juvenile Act to determine the competency of the complainant who was of a tender age.
- [14] At no point in the hearing or in his caution interview the applicant suggested that the complainant had consented to the act of indecency or that he had reasonable cause to believe and did in fact believe the complainant was of or above the age of sixteen years. Thus, the applicant was not prejudiced by the fact that the learned Magistrate did not advise the applicant of the defence set out in s.154(3) of the Penal Code. Nor was the applicant prejudiced by the fact that the learned Magistrate failed to comply with s.10 of the Juveniles Act. Section 10 of the Juveniles Act is only applicable when a child witness gives evidence in a contested hearing. In a case where the accused pleads guilty, there is no requirement for the complainant to be called to determine his or her competency or to look for corroboration for the child witness's testimony. In any event, s. 10 of the Juveniles Act has been held to be unconstitutional by this Court in ***State v A.V. Criminal Case No.HAC192 of 2008 (2 February 2009)***.
- [15] Albeit the applicant was a first time offender, he was not an illiterate person. Earlier in the proceedings, he was represented by counsel. His counsel never appeared in court but instructed other lawyers. A previous hearing was adjourned because his counsel was ill. On 20 August 2002, counsel failed to appear and did not instruct any lawyer. The applicant was on bail at all times. He did nothing to assert his right to counsel or immediately complain about alleged assault or threats made to him by the police officers.

- [16] The record shows the applicant informed the court that he wanted to plead guilty. He did not seek any further adjournment. The learned Magistrate ensured the applicant was freely and voluntarily pleading guilty. The applicant was afforded an opportunity to mitigate before the sentence was passed. In suspending the sentence the learned Magistrate noted that the applicant was studying at the University of the South Pacific.
- [17] There can not be any legitimate complaint that the suspended sentence was manifestly excessive or wrong in principle for an act of indecent assault on a fourteen year old school girl by a man who was ten years older than her. I can find no merit in any of the grounds of appeal.
- [18] The appeal is out of time by more than six years. The length of delay is substantial. The reason advanced by the applicant for the delay is that he was not advised of his right to appeal and that he only came to learn about the conviction when he tried to migrate.
- [19] The applicant's reasons are unsatisfactory. First of all, according to the record, he was advised of his right to appeal, and secondly, being an educated person, he must have known about his conviction because he was present in court when he pleaded guilty and was sentenced in 2002. I am not satisfied that good cause exists for not filing the appeal within the twenty eight days prescribed by s.310 of the Criminal Procedure Code.

[20] I bear in mind that granting leave to appeal after a substantial delay of more than six years is likely to have some impact on others. The likely remedy granted in this type of cases is a re-trial. The State may not have the witnesses available for the re- trial and the complainant's personal circumstances may have been changed. Also, there is a public interest in preserving finality of verdict entered after a fair hearing; otherwise, the criminal courts will be burdened with late appeals which ultimately will affect the general administration of justice.

[21] For all these reasons, the application to appeal out of time is refused.

Daniel Goundar
JUDGE

At Lautoka
2nd July 2009

Solicitors:

Mr. H.A. Shah for Applicant
Office of the Director of Public Prosecutions for State