

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**REVISIONAL JURISDICTION**

**REVISIONAL CASE NO: HAR 002/2009**

**BETWEEN:**

**SAIMONI TOGA**

**Applicant**

**AND:**

**THE STATE**

**Respondent**

**Counsel:** Applicant in person  
Ms S. Puamau for State

**Date of Hearing:** 1<sup>st</sup> June 2009

**Date of Judgment:** 10<sup>th</sup> June 2009

## **JUDGMENT**

[1] The applicant was tried in the Magistrates' Court on two counts of rape and sentenced to a term of 15 years imprisonment on each count, to be served concurrently. He applied for leave of the court to appeal his conviction and sentence.

[2] On 24 February 2009, after hearing the application, Shameem J refused leave. Albeit leave was refused, Shameem J found the sentence passed on the applicant to be wrong. After citing sections 7 and 12 of the Criminal Procedure Code, the learned Judge said:

“The relationship between these two sections was explained by the Court of Appeal in ***Tevita Poese v. State (2005) AAU010/05S***. A Magistrates Court may pass a sentence of up to 10 years imprisonment on each count, but where there are several counts, may not pass a sentence which totals more than 14 years imprisonment.

The sentence passed on the Applicant was wrong for two reasons. Firstly, the sentence on each count exceeded 10 years. Secondly the total sentence exceeded the 14 years limit under section 12(2)(a) of the Criminal Procedure Code. Clearly there are merits in the appeal against sentence. Indeed it is regrettable that counsel for both the State and the defence did not realize this in 2005 and did not immediately refer the matter to the High Court to correct the situation.”

[3] Later in her ruling the learned Judge said:

“There are two possible ways of correcting this error at this stage. One is to grant leave to appeal, call for the record and hear the parties in relation to sentence alone. A second alternative is to exercise my revisionary jurisdiction to correct the sentence.

I decide on the second alternative because the Applicant’s reasons for his late appeal are most unsatisfactory and because there are no other merits in the appeal.”

[4] After perusing the court record, it became apparent that the error deducted by Shameem J is not the only error in the sentence. Another error is discernible.

- [5] The applicant committed the offences in 2000 but he was not charged until 2004. In 2000 the maximum sentence that a Magistrate could impose on each count was 5 years imprisonment and a total overall sentence of 10 years if there were multiple counts. In October 2003, the jurisdiction of the Magistrates' Court was increased from 5 years to 10 years imprisonment on each count, by way of an amendment to the Criminal Procedure Code.
- [6] The question is whether the amendment had a retrospective effect?
- [7] The English cases are settled on this point (see ***DPP v. Lamb*** [1941] 2 KB 89, ***Brickman v. Button*** [1943] KB 505 and ***R v. Oliver*** [1944] 29 Cr. App. 137). In ***Re Lord Athlumney*** [1898] 2 QB 547 Wright J at p.551 said:
- "No rule of construction is more firmly established than this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."
- [8] Similar approach has been adopted by the Australian courts (see ***Maxwell v. Murphy*** (1957) 96 CLR 261, ***Samuels v. Songaila*** (1977) 16 SASR 397) and by the Court of Appeal in ***Silatolu v. The State*** [2006] FJCA 13 AAU0024.2003(10 March 2006).
- [9] In a recent case of ***State v. Volivale*** Criminal Case No: HAC 030(A)/2005 (2 June 2009), this Court said:

"It has been a long standing principle in common law that statutes dealing with jurisdiction and procedure are, if they relate to the inflictions of penalties, strictly construed. Compliance with procedural provisions will be stringently exacted from those proceedings against the person liable to be sentenced. (***R v. Jones, exp. Daunton*** [1963] 1 WLR 270, ***R v. Clarkson*** [1961] 1 WLR 348).

If there is any ambiguity or doubt it will, as usual, be resolved in the favour of the accused (***R v. Bullock*** [1964] 1 QB 481)."

- [10] The fundamental principle is that an amendment to a criminal statute should not be given a retrospective operation, unless there is clear legislative intention to do so, and that the amendment is favourable to the accused.
- [11] In this regard, I cannot say that the 2003 amendment is favourable to the applicant. If he was convicted and sentenced before the amendment was made, the maximum sentence that the Magistrate could have imposed on each count was 5 years imprisonment.
- [12] The amendment has doubled up that term of imprisonment. A retrospective operation will prejudice the applicant because instead of being exposed to a maximum sentence of 5 years imprisonment, he will be exposed to a term of 10 years imprisonment, on each count.
- [13] It must also be remembered that under the principle of separation of powers, the imposing of penalties following conviction of an offence is a judicial and not a legislative function. The powers of the court and the legislature must be kept separate, as a measure to safeguard against legislative exercise of the judicial

function or more simply, trial by legislature. This is another reason why criminal statutes imposing penalties may not be given a retrospective operation.

[14] For these reasons, I hold the 2003 Amendment to the Criminal Procedure Code, increasing the jurisdiction of the Magistrates' Court to impose a sentence of 10 years imprisonment, does not have a retrospective effect. In the present case the maximum sentence that the court could have imposed on each count was 5 years imprisonment. By imposing a term of 15 years imprisonment on each count when the law permitted only 5 years to be imposed, the trial Magistrate committed jurisdictional error. Again, it is rather unfortunate that counsel for the State had not brought to the attention of this Court the error any earlier in order to correct it.

[15] I now proceed to revise the sentence imposed on the applicant pursuant to section 323 of the Criminal Procedure Code.

[16] The applicant committed a dreadful crime against a child complainant in breach of trust. The victim was 10 years old when she was sexually assaulted. The applicant was 48 years old and was the victim's uncle. Except for his previous good character, there is no compelling mitigating factor. In these circumstances, the maximum sentence of 5 years imprisonment that a Magistrate could impose is justified. Each count represents two separate episodes of rape. I am satisfied that ordering the sentence to be served consecutively will not offend the totality principle. A term of 10 years imprisonment will reflect the gravity of the offence.

[17] In the exercise of the revisionary powers of this Court, a term of 5 years imprisonment is substituted on each count of rape, to be served consecutively. The total overall sentence is 10 years imprisonment.

.....  
Daniel Goundar  
**JUDGE**

At Suva  
10<sup>th</sup> June 2009

**Solicitors:**

Office of the Director of Public Prosecutions for State  
Applicant in person