

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 059 of 2008**

Between : **KITONE SANOKO** Appellant

And : **STATE** Respondent

Date of Hearing : 24<sup>th</sup> March 2009

Date of Judgment: 31<sup>st</sup> March 2009

Counsel : Appellant in person

Ms. Senibua for the Respondent

**JUDGMENT**

**Conviction**

1. The accused had pleaded guilty to one count of abduction and two counts of rape in the Lautoka Magistrates Court. He was sentenced to a total of eight years and six months imprisonment. He appealed against both conviction and sentence.

2. He appeals against conviction on the ground that he was prejudiced by lack of legal representation. However the Magistrates Court records do not bear the appellant out. They show that the appellant had the benefit of legal representation. Counsel from the Legal Aid Commission appeared for him.
3. On 9<sup>th</sup> December 2007 the duty solicitor informed the Magistrates Court that the Legal Aid would decide whether it would represent the appellant. On 24<sup>th</sup> January 2008, Mr. Tarere of the Legal Aid appeared for the appellant. He informed the Court that the appellant had indicated his wish to plead guilty.
4. The plea was deferred until 7<sup>th</sup> February 2008 thereby giving the appellant ample time to consider his plea before pleading it in court. He pleaded guilty in the presence of his counsel. The facts were admitted. The matter was stood down for mitigation. There was written mitigation as time was given to mitigate. Further a witness mitigated orally on his behalf as well.
5. These circumstances show that the appellant was at all points, where material decisions were made represented by counsel. There was no prejudice. The conviction was proper. The Learned Magistrate had not formally entered a conviction but he referred to that in the sentencing remarks saying "You have been convicted of a single count of Abduction contrary to Section 251 of the Penal Code and two counts of Rape contrary to sections 149 and 150 of the Penal Code Cap 17."

## Sentence

6. On 2<sup>nd</sup> August 2007 at about 8.00pm the two complainants Ita Losana Jane aged 20 and Adi Raba Taraivini 27 years went to deliver dinner to their uncle who worked as a security officer at Telecom. On the way back to their home, the complainants came across the appellant with some of his friends. The appellant pulled Ita's hand. Then the appellant with three others followed the complainants and went past them. Later a seven seater van came and stopped beside the complainants. The appellant with two others came out of the van, grabbed Ita and pushed her into the van. Ms. Taraivini ran away but was later caught by the van and one of the occupants of the van who was Ms. Taraivini's ex-boyfriend persuaded her to come into the van.
7. The van then moved with the appellant and his friends together with the two ladies to an isolated spot. The appellant then got off the van, got hold of Ita punched her, dragged her into the bush and with the assistance of his friends forcefully took off her clothes. The appellant first raped her followed by others.
8. Soon after and not too far away the appellant met Ms. Taraivini who was lost. She asked the appellant for directions to the main road. He tried to make advances towards her but she pushed him away. The appellant then punched her on the mouth, dragged her to a harvested cane field, wrestled her to the ground, punched her on her thighs and then raped her.

## **Magistrates approach correct**

9. The Learned Magistrate in detailed sentencing remarks considered his guilty plea, his relative young age of 21, his family and religious background, the fact that he was a first offender and his co-operation with police.
10. He correctly started off with the tariff of 7 years for rape and reduced it by two years for the mitigating factors but then noted the aggravating features of a group attack, the appellant being the ring leader, assaults prior to rape, and imposed a sentence of 8 years on each count of rape. He sentenced him to 6 months for abduction. He made the rape sentence concurrent but consecutive to the count of abduction.
11. The appellant argued that the sentence is harsh and excessive for some one who is a young first offender, and who has pleaded guilty and has a family who will suffer due to his incarceration.
12. Ms. Lidise submitted that the sentence was not harsh but somewhat lenient in view of the aggravating features of this case. She submitted that the two counts of rape should not be concurrent as they are not part of the same transaction but are rapes of two different persons.
13. Lord Lane in **R v Roberts** (1982) 1 All ER 609 stated that in sentences of rape the sentence should be such as to reflect the following:

“First of all to mark the gravity of the offence. Second to emphasize public disapproval. Third to serve a warning to

others. Forth to punish the offender and last but not the least, to protect women.”

14. In **Mohammed Kasim v State** (1994) Criminal Appeal 21 of 1993 the Court of Appeal noted the gravity of offence of rape and recommended a starting point of seven year term of imprisonment for rape without aggravating or mitigating features. In **Asesela Drotini v the State** AAU 1 of 2005 the Court of Appeal endorsed the **Kasim** starting point but also added that a court “should not hesitate to increase the sentence substantially where there are further aggravating factors.”
15. I have already referred to the mitigating factors which the learned magistrate took into account. The aggravating factors were that this was a gang rape. There was an element of persistence in the conduct of the appellant from the first time the appellant had seen the complainants that night. The appellant and others followed them, arranged a van to carry them away to an isolated spot so they were not detected, there was violence used albeit it may not be serious violence. The State submitted that to be raped by once in itself is terrifying but the fear is multiplied in gang rapes. On the facts the appellant was the principal offender.

### **Abduction**

16. As far as abduction is concerned, there was force used to push Ita into the van and then taken an isolated spot. The purpose of the abduction was to further commission of another offence namely rape. This must have been a harrowing experience for her – not knowing where she was being taken to and at night surrounded by

- a group of hostile men. The complainant was on a lawful business in the city. Persons who walk around a city or anywhere for that matter should be able to feel safe from the practice of street crawling that is persons who go around in vehicles hassling women, as in this case, and acting like predators using force to subdue women. When children are late for home especially daughters' parents feel anxious and worry.
17. The maximum penalty for abduction is seven years imprisonment. The circumstances of abduction, even if there were no rape, but the complainant had been left unmolested at the isolated spot would attract at least 18 months sentence. The six months sentence imposed by the learned magistrate was extremely lenient in spite of the mitigating factors.
  18. The totality principle, though not referred to by the learned magistrate, was it appears at the back of his mind when he made the two rape sentences concurrent to ensure that the overall sentence was not excessive which it would be if they were made consecutive.
  19. Accordingly the appeal against conviction is dismissed. The appeal against sentence is also dismissed.
  20. The sentence in respect of count 1 is varied from 6 months to 18 months. The sentence in respect of rape remains unaltered. On count of abduction the appellant is sentenced to 18 months imprisonment. On count of rape 8 years each concurrent to one another but consecutive to the sentence of 18 months for abduction. The appellant will therefore serve 9½ years from the

date of sentence by the learned magistrate that is 9½ years from 4<sup>th</sup> July 2008.

[ **Jiten Singh** ]  
**Judge**

At Lautoka  
31<sup>st</sup> March 2009.