

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No: HAA 108 of 2008

Between: DAVID MUKESH RAJ **Appellant**

And: THE STATE **Respondent**

Hearing: 23rd January 2009

Judgment: 6th February 2009

Counsel: Appellant in person
 Ms S. Hamza for State

JUDGMENT

[1] The Appellant was sentenced to 3 years imprisonment for the offence of attempted rape. He appeals against conviction and sentence on the grounds that he did not know that the complainant was under the age of consent, that he did not use any force on her, that she was not medically examined for 2 days, and that the sentence is harsh and excessive for a first offender who is married with two children.

[2] The charges, filed on the 6th of November 2007 alleged that on the 26th of September 2004, the Appellant attempted to have unlawful carnal knowledge of Cema Keni Teana, without her consent, and in the alternative that he attempted to defile a girl namely Cema Keni Teana aged 15 years, 1 month and 10 days. There was an earlier charge on the 23rd of November 2006, containing the same counts, and the first set of charges on the 12th of July 2005 of attempted rape and of defilement of a girl between 13 and 16 years of age.

[3] On the 12th of July 2005, the Appellant appeared in the Nasinu Magistrates' Court and asked to defer plea to get legal advice. The matter was adjourned for that purpose. He was then represented by counsel on the 4th of August 2005, and the 25th of August 2005. He pleaded not guilty on the 27th of September 2005 and there were then several adjournments for disclosure and the setting of a hearing date. Hearing dates in 2006 and 2007 were vacated because of the unavailability of the court, and the withdrawal of defence counsel on the 19th of March 2007.

[4] On the 28th of March, the Appellant asked for another adjournment to find alternative counsel. On the 14th of August 2007, he was represented by new counsel. Plea was taken again and he maintained a plea of not guilty. The defence asked for a further adjournment but the court advised counsel that the case had been delayed enough and that it would only be stood down for 20 minutes to allow the Appellant to discuss the case with counsel. The court resumed after 20 minutes. The Appellant pleaded not guilty to attempted rape, but guilty to defilement.

[5] There were then several adjournments to allow the prosecution to prepare facts for sentencing.

[6] On the 9th of October 2007, facts were finally read. The record shows that penetration was disputed. There were then several adjournments for the prosecution to decide what to do next. On the 6th of November 2007, the charges were amended to attempted rape and attempted defilement and the Appellant pleaded not guilty on both counts. A hearing date was set, which was later adjourned because the prosecution had not served summons to witnesses.

[7] On the 10th of April 2008, a date set for hearing, defence counsel did not appear. When asked, the Appellant said that counsel was in another case and wanted an adjournment. The trial was adjourned to the 1st of May 2008.

[8] On that day defence counsel did not appear at first, then appeared to withdraw for lack of instructions. The Appellant objected. The application to withdraw was refused. Another trial date was set. The trial finally proceeded on the 7th of May 2008. The complainant then gave evidence, almost 4 years after the alleged offence.

[9] Her evidence was that her birth date was the 18th of August 1989. On the 26th of September 2004, she was sent to the shop by her grandmother. She went to Kundan Singh Supermarket. There she met the Appellant for the first time. When he asked her for her name, she gave him a false name. He then forced her into a taxi and took her to Colo-i-Suva. At Colo-i-Suva, he took her into the bush after giving the taxi driver \$10 and telling him to go. She said that the Appellant “had sex with me” but in the following paragraph said:

“He pushed me to the ground. He lay on top of me. He took his penis and tried to insert it into my vagina. I tried to shout. He closed my mouth, by putting his hand on my mouth.”

[10] He then left her there telling her to find a taxi to take her home. She walked to the road and found the same taxi which had brought her to Colo-i-Suva. There was no sign of the Appellant. She went home and told her aunt Katarina what had happened. She went with her aunt to the Samabula Police Station. On the 27th of September 2004, she went to Valelevu Police Station to identify the Appellant. She identified him there and in the dock in court.

[11] Under cross-examination she was asked if he had inserted his penis into her vagina and she said he did. She agreed that in her police statement she said: “This was the first time I had ever had sex and I really cannot make out whether the Indian boy had full sex with me or a little bit of penetration.” She said she was not a willing

passenger in the taxi, that the Appellant's penis entered her vagina and that it was painful.

[12] There then was evidence from ASP Volau on the identification parade, and evidence from Katarina Makitalena. The latter said that on the 26th of September 2004, between 10am and 11am, the complainant was sent to the Kundan Singh Supermarket. She did not return and at midday her family started to search for her. She returned home at 2pm. The witness said: "She looked miserable. Her clothes were dirty. I asked her where she was. I did ask her 3 times. She told me one Indian guy took her in a taxi. She told me she met accused at the new USA Embassy, on Princess Road. She said the accused is David Mukesh and he stays at Khalsa Road." When she told her aunt what had happened, she was crying. Recounting the incident in court, the witness also cried. She said the complainant told her that "David's penis entered her vagina. She said she screamed."

[13] The Appellant's interview record was tendered without objection. In it, the Appellant said that he was near Kundan Singh Supermarket on the 26th of September 2004 conducting his business of house to house repairs of shoes and bags, when he met the complainant. He said she was interested in him and that he stopped a taxi because she wanted a ride along Princess Road with him. He then took her first to the Wailoku Waterfall and then to Colo-i-Suva. He said that they just talked and did not have sexual intercourse. He said he touched her private parts but when she said she only wanted to have sexual intercourse in a hotel, he got angry and left her. He denied raping her.

[14] The trial was then adjourned to the 15th of May 2008. Doctor Esala Nainoca gave evidence that the complainant was examined by Dr. Taniela Timoteo on the 26th of September 2004. The report recorded that there was a ½ centimeter laceration on the posterior fourchette which is the outside of the opening of the vagina. The hymen was intact. The injury was consistent with sexual assault with moderate force

by a blunt object which could include a penis. He said that penetration was possible but “very unlikely.” The medical report was tendered. It contained a history related by the complainant of penetration of the vagina by the penis, and penetration of the anus by the finger. The doctor found grass stains on legs, and the ½cm laceration on the posterior fourchette with mild bleeding. The injury was consistent with forced sexual assault. Antibiotics were prescribed.

[15] The Appellant gave sworn evidence. He said that he met the complainant near Kundan Singh Supermarket. She told him her name was Elizabeth and they went to Tamavua in a taxi together. They went to Colo-i-Suva where “she offered herself” to him. He said she asked him for \$50 and was behaving like a “mental person.” He said that he kissed her then walked away to Tamavua Village. He denied taking off her clothes and forcing himself on her. He admitted kissing her breast but said he did not go on top of her, and did not attempt to rape her. He said she told him she was 17 years old and he believed her.

[16] Under cross-examination, he said that when the police interviewed him, he did not tell them that he thought the complainant was 17 years old. He agreed that he had gone to Colo-i-Suva with the complainant for sexual intercourse but again denied trying to rape her. He said he did not cause the laceration on her vagina. He agreed that he left her behind at Colo-i-Suva and said that he was afraid of her.

[17] There were then several adjournments for the Appellant to bring the taxi driver to court. Finally, on the 1st of July 2008 Ronald Binay Prasad gave evidence. He said that on the 26th of September 2004, the Appellant hired his taxi opposite the U.S. Embassy on Princess Road. They told him to go to Wailoku. The Appellant sat in the front seat and the complainant sat in the back. On the way the Appellant got out at a shop to buy snacks and drinks. At Wailoku, the gates were closed so they asked him to go to Colo-i-Suva. He dropped them there. He said that throughout the

journey the complainant did not complain about anything and did not require assistance.

[18] Under cross-examination, he said he could not recall the date of the trip, that he had only seen the Appellant 3 or 4 times since the incident, that the “girl” was quiet in the taxi and the Appellant was doing most of the talking, and that he did not pick the complainant up again after the incident. He said she was lying.

[19] In closing submissions, defence counsel said that there was no attempt to rape or to commit sexual intercourse and that the complainant had in any event consented. State counsel said that the Appellant did not rely on the provision to section 156(2) (that is as to belief that the complainant was over the age of consent), and said that on the complainant’s evidence, the Appellant used force to have sexual intercourse with the complainant. There was evidence of distress and of recent complaint. State counsel asked the court to disregard the evidence of the taxi driver, saying that it lacked credibility.

[20] The court then asked the defence to reply, giving them until the 8th of July 2008 to do so. Judgment was delivered on the 13th of August 2008. After reviewing the evidence and the elements of the offence, the learned Magistrate said he accepted the complainant’s version of the evidence. He said he did so because the Appellant under cross-examination admitted that he had approached the complainant in order to have sexual intercourse. He did not accept that her resistance to sexual intercourse was a “mental” reaction but said that it showed that she did not consent. Lastly, her evidence was supported by the medical evidence that there was a laceration on the outside of the hymen which was intact. This was consistent with a sexual assault by a penis. For these reasons, the learned Magistrate preferred the complainant’s version of the evidence and found the Appellant guilty on Count 1, that is, of attempted rape.

[21] In mitigation the Appellant said he was 32 years old, married with two children aged 9 and 13, self-employed earning \$19 to \$100 a week and willing to pay a fine. He expressed remorse. The prosecution said that the tariff for attempted rape was 12 months to 5 years imprisonment and where the victim is a child, a tariff at the higher end of the tariff was justifiable.

[22] On the 1st of September, the learned Magistrate sentenced the Appellant to 3 years imprisonment after taking into account the mitigation, the age of the victim and the age difference between her and the Appellant.

The appeal

[23] In his petition of appeal, written and verbal submissions in court, the Appellant asked why the victim had not escaped in the car or at the shopping centre, that her evidence was inconsistent with that of the taxi driver, that her hymen was not broken so a rape was unlikely, that the complainant on that day was willing to have sexual intercourse and “any man would have [been] attracted to a girl of good looks” and that the only reason she complained of rape was because he had not given her money. In relation to sentence he said he was assaulted by inmates during his remand period and that the sentence was harsh and excessive.

[24] The State opposed the appeal saying that the Appellant’s evidence about his belief that the complainant was 17 years old was incredible because it was raised for the first time in court, that the learned Magistrate accepted the complainant’s evidence as credible and reliable and that the medical report was consistent with her evidence. On sentence State counsel referred me to a number of comparable cases including Josefa Biu v. The State HAA 085 of 2000, Leslie Brown v. The State HASS 0053j.1999b and Aunima v. The State [2001] HAC 0033J, all decisions of the High Court, to submit that the 3 year term imposed was correct in principle.

Conviction

[25] The learned Magistrate correctly summarized the evidence and the elements of the offence. Because the conviction was in relation to Count 1, of attempted rape, the age of the victim was relevant only to sentence. The prosecution had to prove lack of consent, the Appellant's belief as to lack of consent and an attempt to have sexual intercourse. Section 380 of the Penal Code defines an attempt as an act done, with intention to commit an offence which is an overt act committed to put that intention into execution. An attempted rape requires proof of an intent to have sexual intercourse where the victim is not consenting and the perpetrator either knows she is not consenting or does not care whether she consents or not and of an overt act which manifests that intention. It is irrelevant whether the completed offence is impossible or whether the perpetrator himself had a change of heart and decided not to proceed with the rape. In *Epironi Levukaiciwa & Alifereti Tokona v. State* [2002] HAA 087/015, an act of lying on top of the victim with the intention of having sexual intercourse was held to be an overt act sufficient to prove an attempt. In *Tiare Bobo v. The State* [1999] HAA 0049/99B, Fatiaki J held that where the accused undressed himself, the only irresistible conclusion to be reached was that he intended to have sexual intercourse with the victim who was struggling. In *Rusiate Bulimaiwai v. The State* [2005] HAA 068/055 the accused pulled the complainant up against a wall, pushed up her skirt, touched her genitals, pushed her to the floor, unbuttoned his own trousers and bent down saying "shut your mouth" and "come here." That was held to be sufficient for an attempted rape.

[26] In this case the evidence of the complainant was accepted. From her evidence it is clear that she believed that there was penetration, perhaps partial penetration of the vagina. On her evidence, the Appellant forced her into the taxi, made her lie down at Colo-i-Suva, lay on top of her and tried to insert his penis into her vagina. She tried to shout and he closed her mouth.

[27] These facts which were accepted by the learned Magistrate, proved both the actus reus and the mens rea of attempted rape. They showed an overt act (indeed several overt acts), an intention to have sexual intercourse without consent, and acts which showed that the Appellant knew very well that the victim did not consent. The medical evidence was consistent with the victim's evidence. There was more than sufficient evidence of an attempted rape. There is no substance in the Appellant's complaint that the medical examination was delayed. Nor is the victim's apparent age an issue relevant to conviction.

[28] It is correct that on the Appellant's version of the evidence, and according to the taxi driver, the victim was not an unwilling passenger. However the learned Magistrate did not accept this evidence. The victim herself said that she did not agree to go in the taxi, she could not escape because the back door was locked and that she did not consent to sexual intercourse. This, the learned Magistrate accepted.

[29] The conviction is safe and I decline to quash it.

Sentence

[30] In *Josefa Biu v. The State* HAA 085 of 2000, I upheld a 5 year term of imprisonment for the attempted rape of an 11 year old child by her uncle. There was evidence of psychological trauma, physical injury to the vagina and a severe breach of trust. In *Jioji Aunima* (*supra*) the overt act was that the accused grabbed the victim, forced her to lie down and pulled her panties down. The victim was an adult. After a review of local and overseas authorities, I found that the accepted tariff for attempted rape in Fiji was 12 months to 5 years imprisonment. A 3 year term was imposed.

[31] The facts of that case were less serious than the facts of this one. In this case there was an injury to the vaginal opening, the victim was 15 years old and there was an abduction in a taxi which was an aggravating factor. The age difference between the victim and the Appellant was another aggravating factor as was the Appellant's admission that he left the victim in the bush at Colo-i-Suva to find her own way home. There was evidence of distress and pain.

[32] In these circumstances the Appellant was fortunate to receive a sentence of 3 years imprisonment. Another court might have imposed a higher sentence. The 3 year term is however within the tariff, and the learned Magistrate's sentencing remarks show that he took all relevant factors into account.

Result

[33] This appeal is dismissed.

Nazhat Shameem
JUDGE

At Suva
6th February 2009