

IN THE FIJI COURT OF APPEAL
SUVA, FIJI
CRIMINAL JURISDICTION

[Criminal Appeal No. AAU 0051 of 2008]

BETWEEN : (1) **SELEVASIO BARUA**

: (2) **JOSAIA NAVONO** **APPELLANTS**

AND : **THE STATE**

RESPONDENT

BEFORE THE HONOURABLE
JUSTICE OF APPEAL : **Mr. JUSTICE JOHN E. BYRNE**

: **APPELLANTS IN PERSON**

: **MS N. TIKOISUVA (For the Respondent)**

Date of Hearing and : **8th of September 2009.**
Judgment

JUDGMENT

- [1] The appellants seek leave to appeal out of time against a ruling of Madam Justice Shameem made on the 12th August 2006 when she dismissed an appeal against sentences of ten years imprisonment imposed on them by the Magistrates' Court at Kadavu on the 24th of August 2005.
- [2] They were unrepresented in the Magistrate's Court but on the appeal were represented by Mr. A. Seru.
- [3] The reasons they gave for not appealing in time, namely 1 month from the 4th of August 2006, were that the matters were being handled by their Legal Counsel and that the Appeal Judge had failed to inform them of the time in which an appeal against her judgment could be made.
- [4] When I asked them when they last spoke to their Counsel in the Appeal, Mr Seru, they said after Shameem, J gave her judgment on the 4th of August 2006. They filed Notice of Appeal on the 6th of November 2008 so that they were two years and two months overdue under the Court of Appeal Act.
- [5] I found they had no satisfactory explanation for leaving their appeal so long but in the circumstances, and probably being over generous, I granted leave to appeal out of time.
- [6] As to the failure of the High Court Judge to inform them of their rights to appeal, there is no such obligation on a Judge to do this and my experience in this Court leads me to believe that the majority of prisoners know the time limit governing appeals to this Court. Nevertheless, as Counsel for the respondent did not object to my granting leave out of time, I did so. That then left the questions of whether the sentences imposed in the Magistrates Court and upheld by the High Court were excessive. In my judgment they were not for reasons which I now give.

[7] The facts of this case were particularly serious. Both appellants were charged with the rape of a 12 year old girl in Tavuki, Kadavu on the 19th of August 2005. The complainant gave evidence that in 2005 she was 12 years old and in Class 7 at Tavuki District School. On the 19th of August 2005 she was watching a DVD in a house 100 metres away from her home at the house of Josaia Rayawa. There were 11 people watching with her. While watching, she heard the sound of a whistling call outside. It was the first appellant. She went outside. He blocked her mouth with his right hand and took her to the 'bure' of Inosi. He held her by her waist. She could not shout and was very frightened. At the 'bure', he lay on top of her. He smelt of alcohol. He then locked the door and went away. He then came back with the second appellant. The first appellant raped her. She said it was very painful. The second appellant then raped her. He also smelt of alcohol. During the incident the complainant screamed because of pain.

[8] In her evidence in the Magistrate's Court the complainant gave a detailed description of the manner in which she had been raped. Among other things she said she was just wearing her T-Shirt and was half naked.

When she stood up the blood was still coming out. She was crying on her way home.

[9] The complainant then took a shower when she got home and told her step mother and then was taken for a medical examination.

[10] The appellants were subsequently charged.

[11] Both the appellants were first offenders. They both looked after an elderly parent and grandparent and said they had presented the "**i bulubulu**" which had been accepted.

- [12] The Learned Magistrate started at seven years imprisonment. He added a year for the group offence, and two years for consumption of alcohol. He added another two years for the pain and injury suffered by the complainant. He then reduced the sentence from 12 to 10 years for the appellants youth and good character. They were sentenced to 10 years imprisonment. They claimed before the High Court that this sentence was excessive and that the Magistrate and Shameem, J had erred in law in not considering a line of sentencing in prior cases. They mentioned five, *Eliki Raco v. The state*, *Viliame Nasici v. The State*, *Avorosa Nalima v. The State*, *Jope Nacagibalavu v. The State* and *Dominiko Voreqe v. The State* which were heard during the last five years. They did not claim before this Court that the facts in those cases were similar to those here although the sentences were much lower.
- [13] Shameem, J who was a most experienced Judge mentioned three cases during the last ten years which concerned rapes of young girls aged between 13 and 14 years old.
- [14] In *State v. Nacanieli Marawa HAC 016 of 2003*, Gates, J as he then was sentenced the accused to 13 years imprisonment for the rape of a 14 year old child and the accused's daughter. This was reduced on appeal to 10 years imprisonment in Criminal Appeal WAU 32/05.
- [15] In *State v. Navuniyani Koroi HAA 050 of 2002* the Fiji Court of Appeal also reduced a 12 year term for the rape of a 13 year old school girl who was the daughter of the accused and became pregnant as a result of the rape to 11 years in prison.
- [16] Shameem, J stated that the rape of children has attracted sentences of around 10-11 years imprisonment. The Court of Appeal in *Mark Lawrence Mutch v. State CRIM. APP AAU 0060/99* described 10 years imprisonment for the rape of a girl as "the minimum appropriate".

[17] The Learned High Court Judge stated that although the appellants were young first offenders, the offences were so serious and the physical harm inflicted on the complainant so significant that a sentence of less than 10 years could not be justified.

I agree.

[18] **I consider neither the Learned High Court Judge nor the Magistrate committed any error in principle and I therefore dismiss the appeal.**

Dated at Suva this 8th of September 2009.

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JOHN E. BYRNE
JUDGE OF APPEAL