FRANK KYIO -V- REGINAM

High Court of Solomon Islands
(Palmer C.J.)

Criminal Appeal Case Number 259 of 2004

Hearing: **22nd July 2004**
Judgement: **27th July 2004**

B. Pattinson for the Appellant
J. Caulchi for the Respondent

Palmer CJ.: The Appellant, Frank Kyio was sentenced by the Magistrates Court sitting at Lata on 15th May 2004 to a term of imprisonment for four years on a guilty plea, to a charge of incest by a male, contrary to section 163(1) of the Penal Code. The offence was committed sometime in April 1992. The facts disclosed revealed that the victim who was his daughter refused his advances but gave in as a result of a threat of violence made to her. She fell pregnant to this act of incest not long after in October 1992.

According to the very brief facts presented to the court, the Appellant was not charged until 1995. It should be pointed out that the brief facts presented to the Magistrates Court were unsatisfactory. If the issue of delay was to be addressed properly, it is the duty of **both** the prosecution and defence to ensure that all the correct and true facts pertaining to the delay are produced if not before the Magistrates court then before this court, on appeal. Objecting on material which may be relevant for purposes of consideration by the court to assist it in arriving at the truth about delay without producing alternative details is not satisfactory. Even at this point of time there is no explanation or information as to the true state of affairs regarding the delay factor. I do not think those details would be too difficult to find out if sought for. Having made those observations, it does not stop there because the presiding Magistrate should also have sought explanations, from the prosecution in particular.

The presiding magistrate took into account delay, guilty plea of the Appellant, his cooperation with Police, his remorse and the fact that he and his wife are now looking after that child. His Worship however balanced that with the fact that the offence was committed with a threat of violence; he pointed out that the Appellant was very fortunate he had not been charged with rape. He also took into account the element of breach of trust and that it resulted in the birth of a child. He also considered the fact that a sentence of imprisonment may deprive the child of his care and support, as he had taken it upon himself to look after that child. Despite taking every thing into account his Worship felt an appropriate sentence was one of four years.

In his appeal against sentence, the Appellant listed three grounds in support of his appeal. (i) Failing to give sufficient weight to the mitigating circumstances, (ii) failing to give sufficient weight to the mitigatory effect of the substantial delay in the prosecution of the case; and (iii) the sentence was manifestly excessive in all circumstances.

(i)(a) Previous good character and unlikelihood of repetition of offence. These are usual factors which the court should take into account. Sometimes however the court does forget to take such factors into account during the sentencing process. It is defence counsel's duty to bring these matters to the attention of the court. There is no indication in the transcripts of the court below that such factors were taken into account. That does not necessarily mean however that they were not taken into account. Whilst magistrates courts are courts of record and Magistrates are expected to publish reasons for judgment, they do make omissions of salient facts which they ought to have recorded. Whether these omissions should be viewed adversely or not is more a

matter of discretion for the appellate court. Depending on the context of the omissions and their significance they may or may not affect the overall decision of the lower court.

I do not regard the omissions of these factors to be critical in this Appellant's case. The previous good character of the Appellant must be balanced with the seriousness of the commission of this offence. It must be balanced with the fact that as a mature man of 43 years, he ought to have known better! As a man of previous good character and of very mature age, much was expected from him. One cannot go without the other. They should go hand in hand. Coupled with that fact was the inviolable relationship between father and daughter, which places this man in a very special relationship to his daughter; a position of trust.

If it is sought to be argued that this was an "out of character" behaviour and certainly not the way he normally behaves, then I would expect some sort of explanation provided to account for this deviant behaviour! Why did he behave in this very destructive manner to his daughter? If it is sought to be argued that he is a man of previous good character, then it can be argued to the contrary that that good character should sustain him and prevent him from such behaviour. I do not think it is proper to compare him to that of a 20 year old man. I expect more from him as a mature man and father than from a 20 year old man; his daughter expected much from him as a father who should be the first to protect and shield her from such behaviour. He should have been her role model as to how a man should behave and conduct himself. If this is how her father behaves, what would she expect from other men; this kind of behaviour can leave devastating scars and wounds deep in her life and can take many years before she can overcome them, never mind the consequences that they all have to live with.

On the issue of unlikelihood of repetition, that came about because of the actions of responsible and mature relatives, the uncles, the mother and others who took the victim away from this Appellant. Again much cannot be made of that ground and the fact that it may have been omitted from the records of the presiding magistrate should not be made much use of.

(b) Assistance to Police and Plea of guilty

These are recognized mitigating factors; that he has cooperated with Police and entered a guilty plea at the first available opportunity. It demonstrates remorse and contrition and a willingness to face up to his actions. That has allowed the process of reconciliation and healing to take place with the victim and the mother and others. It has also saved unnecessary court time and the victim from re-living such frightening and embarrassing experience, more so when it is clear she has now settled down and sought to move on in life with a new family in another province. I accept that the longer the delay the more difficult it may become for the prosecution case to be able to establish its case, with memories fading, witnesses being difficult to locate and so on. I accept this increases the value of the guilty plea in such circumstances[1].

(c) Contrition and Remorse

Payment of compensation to the victim of $500.00 for the offence committed upon discovery that she was pregnant. I accept customary payments of compensation have a place in the cultures of our community. They do not annul the offence or the penalty prescribed under the Penal Code, but they do go towards mitigation[2]. It allows the relationship between the parties affected to be resumed. I noted that compensation was paid only to the victim but no mention of any compensation payments to the mother, the brothers (if any) and especially the uncles of the victim from the mother's side. Normally some form of compensation would be expected to be paid to those other persons as well so as to allow him to be accepted back into the community. I accept

[1] Patterson Runikera v. DPP HCSI-CRAC 14 of 1987; see also R. v. John Mark Tau and Others (Unreported Criminal Case 58 of 1993)
[2] Michael Bureka v. R (Unreported CAC No. 31 of 1991)

that has occurred and that he has been living in the same community since. Not only that but that he has taken full responsibility for the upkeep and well being of that child. The mother has also accepted the child and Appellant and they have continued to live together in the same village.

The victim, naturally was removed from his care and transported to Honiara for her good. She has now remarried and has two children of her own. I accept that the actions of the appellant and conduct display remorse and an attempt to make good for his actions[3]. I accept too that it shows that a certain level of rehabilitation had taken place and that the possibility of repetition of the offence with the same victim is reduced.

(d) Personal Circumstances of incarceration on the Appellant

Any form of incarceration will always cause hardship on the close family members. The personal circumstances of the Appellant enumerated before me therefore are not unique or peculiar to him. It has always been said that those are the things, the consequences, he should have thought about before committing the offence. Part of that means he must be prepared to face up to the prescribed penalties set out under our laws and the hardships that may follow from any such consequences; in this case incarceration. Those laws are there purposely to protect innocent victims, children and persons of young age, weaker persons and those who may not be able to look after themselves. In the **Attorney Generals's Reference (No 1 of 1989)**[4] the report of the Wolfendem Committee on Homosexual Offences and Prostitution (Cmnd 247 (1957) was referred to which expressed in very clear terms the function of the criminal law in the field of sexual offences as follows:

> *"To preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence."*

The hardships that will be faced by his family must be balanced with the seriousness of the offence committed and the importance of making it clear that those who commit such offences must expect a custodial sentence. The imposition of a custodial sentence in this instance was therefore entirely appropriate. As to the question of length of time, that will depend on the existence of aggravating features such as:(i) if the girl has suffered physically or psychologically from the incest; (ii) frequency of the incest and period of time it has been committed; (iii) where threats or violence had accompanied the offence; (iv) if the offence is accompanied by perversions abhorrent to the victim eg. buggery or fellatio; (v) if the victim had become pregnant thereby; (vi) if similar offences had been committed against other girls – guidelines set out in the **Attorney General's Reference (No. 1 of 1989)** (ibid).

There was clear evidence in the facts admitted before the learned Magistrate that the victim was not a willing participant. Secondly, that she was threatened by the Appellant. He could easily have been charged with the offence of rape and therefore has been very fortunate in that respect. That does not take away the aggravating feature of threats of violence being used to achieve compliance. Thirdly, there was a clear abuse of trust which would have had untold pain, anguish and unnecessary shame and embarrassment on the victim for the brutal behaviour of the Appellant. As a consequence she fell pregnant resulting in the birth of a child and the stigma attached to the actions of the Appellant.

The sentence of four years imposed by the learned Magistrate for such offences cannot by any standards be described as manifestly excessive.

---

[3] Saukoroa v. R. (1983) SILR 275 at 278

[4] [1989] 3 All ER 571 at page 573

This brings me to consider **ground 3** of the Appeal grounds; that the sentence imposed was manifestly excessive and to look at comparative sentences that had been imposed by the courts in this jurisdiction.

The first case **Bebini v. DPP**[5] cited by Ms. Pattinson involved three charges of incest by the defendant with his daughter. He was sentenced to three years imprisonment and upheld on appeal to this court. Although the offences were repeated, there was considerable mitigating factors in favour of the defendant. These included his age, at time of trial he was 61 years of age, a victim of polio and therefore in continual pain and deformity. His wife died in 1965, and the victim had been brought up by an aunt and uncle. She only came to know him as her father when she was about 16 years old and at which time the offences were committed shortly thereafter. His son committed suicide sometime before the trial and just before trial another daughter aged 28 years died leaving 8 children. The court also took into account his guilty plea, remorse and genuine contrition and cooperation with the police. There was a short time delay of 2 years.

The second case referred to was **Bollen Toke v. Reginam**[6]. The defendant was charged with one count of incest and one count of rape. He pleaded not guilty, matter went to trial and he was convicted on both charges. The girl was about 15 – 17 years. The court took into account the element of violence in the rape charge and that there was repetition. As well the fact that he did not plead guilty and thereby causing the daughter to relive the outrageous act in a public court. He was sentenced to 8 years for the rape charge and 5 years for the incest charge, made concurrent.

The third case cited was **Peter Roko v. Regina**[7]. The victim was the youngest daughter of the accused and 16 years old when intercourse began. She became pregnant as a result. The offence repeated on a number of occasions. The defendant entered a guilty plea. He was sentenced by the Magistrates Court to six years; on appeal it was reduced to five years.

The fourth case which is relevant for the purposes of this appeal relied on by the Appellant was the case of **Regina v. Joseph Atkinson**[8]. The offence was repeated on a number of occasions; two years consecutive on each count, total four years.

When the facts of this case are compared, they are much more serious. The facts indicated that the offence may have been pre-planned, telling his daughter to accompany him to the bush to collect sticks for rafters for their house and then turning on her and committing incest with her with the threat of violence when she had enough sense to resist his advances. As a result of that she fell pregnant to him. An appropriate sentence in the circumstances would have been one of five years taking everything into account apart from the element of delay which I will now address.

Delay

The second ground relied on in this appeal is the element of delay in the prosecution of this case. From 1992 date of commission of offence to the time he was first charged of the offence was in 1995. There is no record to account for any reason for the delay. I think Counsels owe a duty to the court to provide as much detail where possible of the sequence of events and any explanations for the delay. Bearing in mind the distance where the offence was committed and the transportation difficulties associated with any travels to and from Temotu Province and bearing in mind the state of the Government's finances to fund court circuits on a regular basis to the outer provinces, not to mention the difficulties Police would find anyway to police such remote areas with limited

---

[5] HCSI-CRAC No. 44 of 1986 per Ward CJ
[6] HCSI-CRC No. 50 of 1998
[7] HCSI-CRC No. 36 of 1990
[8] HCSI-CRC No. 39 of 1998

support, delay is not unusual. In the absence of any other evidence explaining how or what the delay was and whether it was justifiable or unreasonable and if so why, this case highlights the problems remote places like Temotu experience in the due administration of justice. It is the duty of Government to ensure that the criminal, legal and judicial processes are adequately funded so that the rule of law is not compromised or made ineffective by such delays. Quite often where serious crimes are committed and where circuits are not frequently made to such provincial center, the police would ask that such persons be remanded and then transferred to the Magistrates Court in Honiara. Such practice however is depended on the availability of funds for the police to carry out.

The length of delay in this case is not 13 years per se. It is more like 9 years from 1995, date he was charged. And from date of offence to date he was charged it is about three years. The relevant periods from date of arrest to date complaint was first reported and what happened thereafter with the police docket once it was filed or any details regarding carriage of that complaint especially in relation to the allegations of delay ought to have been properly documented and placed before the court for its consideration. I have pointed out that if delay is to be described as unreasonable, then there must be sufficient details placed before the court. The court cannot simply assume or take for granted that because the period was something like 9 years or 12 years that therefore delay was unreasonable[9]. It must be justified or explained as it is vital to the process of sentencing. Unless the details are before the court it cannot make an informed decision one or the other as to what weight to attach to the element of delay. I accept though that in the absence of anything else and with what little has been submitted the substantial delay in the timely prosecution of this case cannot be laid at the feet of this defendant.

Having said that, I accept delay is a relevant factor in mitigation[10]. In **Patterson Runikera v. DPP**[11] his Lordship Ward CJ was very critical of a delay of five years describing it as scandalous and likely to cause injustice. In **Dalo v. Reginam**[12] where there was delay of 3 years and no reasonable explanation provided his Lordship Ward CJ pointed out that magistrates should consider reducing the sentence substantially because of the aggravating effect of a sentence imposed long after commission of the offence.

Section 10(1) of the Constitution provides that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. It may be argued that the rights of the defendant may have been compromised through the delay in the prompt prosecution of his case. That has not been pursued on his behalf, though that was an alternative open to him.

Delay does not eliminate or annul the penalty. The most that can be given to it is to recognize that it must result in a substantial reduction of the sentence which would have been imposed.

I have pointed out that the appropriate sentence for a case as serious as this taking into account all other mitigating factors apart from the delay factor would have been five years. The substantial delay in the timely prosecution of this case must mean a substantial reduction of the sentence; that would have meant a period of three years being taken off. That leaves a sentence of two years to be served. I have thought long and hard whether the circumstances put before the court, his cooperation with the police, his guilty plea, his contrition and rehabilitation would entitle him to a further reduction of the sentence. The most I can do more as an act of mercy is to suspend half of that two years. I take into account the fact that in the circumstances, a shorter term

---

[9] R. v. Fakatonu [1990] SILR 97 at page 100
[10] Billy Emilio Foki v. Reginam HCSI-CRAC 51-04
[11] HCSI-CRAC 14-87 at page 2
[12] HCSI-CRAC20-87 23rd June 1987; see also R. v. Fred Gwali and John Morrison (Unreported HCSI-CRAC 21-97 and 1-98

of imprisonment would be of benefit not only to his family but for his own good as well. He has demonstrated contrition throughout and taken responsibility for his stupidity and behaviour and sought to make amends for his actions. He must be commended for that. Also he has demonstrated that he has reconciled with his wife, the mother of the victim and others in the village and has been accepted back into the community. And despite the existence of the stigma he has been prepared to stay on and fulfill his obligations to his family. He must understand however, that the offence was a very serious one and the court must demonstrate its repugnance at such behaviour by continuing to send out a clear message that those who commit such offences must expect a custodial sentence.

Orders of the Court:

1. **Uphold appeal against sentence.**
2. **Quash sentence of four years imposed.**
3. **Substitute a sentence of two years with one year suspended for one year on condition that he does not re-offend on a similar offence.**
4. **Certify sentence to the court below for action.**

THE COURT