IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 16 of 1980

Between:

ASIVOROSI LOGAVATU Appellant

and

R E G I N A M Respondent

Appellant in Person
Mr. D.C. Maharaj for the Respondent

Date of Hearing: 12th June, 1980
Delivery of Judgment: 27/6/80

JUDGMENT OF THE COURT

Spring J.A.

The appellant was convicted on 3rd August, 1979 by the Magistrate's Court at Levuka of the charge of Burglary contrary to section 332(a) of the Penal Code. The particulars of the offence are that on the 18th June 1979 at Vagadaci, Levuka, appellant broke and entered the dwelling house of Rama Panikar by night with intent to rape Maya Wati.

Appellant appeared in person; pleaded not guilty and at the conclusion of the hearing the learned Magistrate found the charge proved; convicted the appellant and sentenced him to 5 years imprisonment.

Appellant appealed to the Supreme Court against his conviction and sentence; the petition of appeal was obviously prepared by the appellant in prison; the burden of his appeal was that he did not go to the home of Rama Panikar, the husband of Maya Wati, and that he had not committed the offence.

On 25th October, 1979 the learned Chief Justice of Fiji summarily dismissed the appeal pursuant to section 294 (2) of the Criminal Procedure Code which reads as follows :-

> "294 (2) Where an appeal is brought on the grounds that the decision is unreasonable or cannot be supported having regard to the evidence or that the sentence is excessive and it appears to the judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing be summarily dismissed by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint."

Appellant has now appealed to this Court against his conviction and filed a notice of appeal containing six grounds of appeal. By virtue of section 22(1) Court of appeal Ordinance (Cap.8) a second appeal is limited to a question of law alone; matters of fact cannot be raised. 5 of the grounds of appeal raised questions of fact only, all of which had been dealt with at the trial before the learned Magistrate. Ground 5, however reads :

> "5. That a drunkard man, it was impossible from such person to wisely decide to spend two hours from 1 to 3 o'clock after knocking to sit at the back door (as alleged by the complainant) then at 3 o'clock decided to force the screen then went inside, but only to return without breaking the entrance to where the complainant was sleeping for purpose of having sex when it was clearly understood that the husband was away."

The appellant appeared in person before this Court and acknowledged that he had prepared the grounds of appeal with the assistance of a gaoler. The immediate question before this Court is whether there is before us a question of law which has not been dealt with by the learned Chief Justice when the appeal was before him.

This Court is cognisant of the fact that grave injustice could well result to convicted persons if it were to be accepted as a limitation upon the powers of the Court that the Court can deal only with questions of law which have been explicitly raised by the convicted person. The Court of Criminal Appeal in R. v. Hinds Cr. App. R. (1962) Vol. 46 327 at p.334 said :

> ".....The Court must have an inherent jurisdiction and an inherent duty to determine whether a question is raised explicitly; or because some member of the court may well have detected the point when carefully studying the papers that there is a point of law involved in a case which should be determined on appeal; and equally there must be in the court an inherent jurisdiction to determine that the contrary is the case and that that which has been put forward as fit to be determined upon appeal is in fact not, when examined, a question of law alone, but either a question which does not merit further consideration or a question which is one of fact or mixed law and fact."

In the opinion of this Court it is always a question of law which will warrant the interference of this Court whether there was any or sufficient evidence to support the finding of fact in the lower court and whether inferences drawn from those primary facts are possible inferences.

We turn now to the facts. On 18th June, 1979 appellant who is well known to Maya Wati, went to her home while her husband was absent, shortly after midnight and knocked on the door and called out "open door". Maya Wati stated she knew it was appellant by his voice; appellant lives about 2 chains away; he continued knocking until 1 a.m. and then sat at the back door until 3 a.m. He was asking Maya Wati to open the door so he could come in.

Maya Wati stated in evidence :

"..... When clock struck 3 a.m. Koki tried to tear the screen - I quietly locked my bedroom door from inside. Then I heard band of screen falling on my table and I heard him jumping into the house. This was in the sitting room. I was very frightened when he came inside. This lock to my bedroom is common lock - can open with key from outside.

Koki came right at door of my room. He tried the key which was on outside door - he said "hey open door". He said 'I want to suck you'. I knew he wanted to have sex. He said 'Rama is too weak come and try me I am strong.' I was frightened; baby woke up. I shouted at him to go away - 1st time I spoke out. I shouted for Police. No one came for my help. I was very much alarmed. Koki said 'O.K. I am going away, goodnight'. I knew he was still inside my house the way he was walking inside the house and my daughter woke up because of disturbance.

When clock struck 4 a.m. I heard him trying to go out same window. I peeped through window I saw him outside. This man is Koki (Court : Pointing to accused). There was enough light - it was coming from my bedroom - I had a lantern on - he was just going - I saw him immediately after he went out of window."

The learned Chief Justice having dealt with the appeal summarily under section 294 (2) supra made the following Order :

"ORDER: The grounds of appeal amount to no more than that the decisi on was unreasonable or cannot be supported by the evidence. I certify that I have perused the record and am satisfied that the evidence is sufficient to support the conviction, and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right.

While it is a stern sentence there is no material in the circumstances of the case to lead me to the opinion that it ought to be reduced.

The appeal has been lodged without any sufficient ground of complaint and is summarily dismissed."

In our view section 294(2) of the Criminal Procedure Code should be used only where it is patently clear to a judge that the appeal is limited to the grounds that the conviction was against the weight of evidence or that the sentence was excessive. Where there are other matters raised, or which appear on the face of the record indicative that the conviction may be vitiated then the section should not be used and the appeal should be heard and determined in the normal way.

It is clear that the learned Chief Justice did not have his attention directed to the possibility that the finding of intent to commit rape might be an inference drawn from the evidence and not fully justified by that evidence. Both in the Magistrates' Court, and in submitting his notice of appeal, the appellant acted personally and without legal assistance. His defence, in Court, was that he did not go to the house at all; and that rendered it impossible for him to claim that when he asked complainant to have sexual intercourse with him he intended to have that intercourse only if she agreed. But it lies on this Court to examine the evidence carefully and to come to our own conclusion as to whether the learned Magistrate was entitled to make the finding which he did as to the intention of the appellant. There is no direct evidence of any attempt to have sexual intercourse with the complainant against her will. The Magistrate's finding on that point is definitely an inference from the accepted evidence. On an appeal, this Court, is still entitled to form an independent opinion as to what inference should properly be drawn from the evidence : Benmax v. Austin (1955) A.C. 370. This is a point of law; and ground 5 of the notice of appeal, though very inaptly drawn - as could only be expected in the circumstances - the appellant raises the point as to whether he had the mens rea necessary to establish the crime of intent to commit rape.

We turn now to consider the point of law. The Crown proved that the appellant broke into the dwelling house. The question is did the appellant intend to have sexual intercourse with Maya Wati without her consent. The evidence reveals that the appellant entered the house; invited Maya Wati to have sexual relations with him; she refused and appellant appeared to accept her refusal by saying 'O.K. I am going away goodnight'; shortly afterwards he left the house without further ado.

The Crown in our view failed to prove that the appellant intended to have intercourse with Maya Wati without her consent and the charge was wrongly conceived; the evidence while it does

not support a charge of breaking and entering a dwelling house with intent to commit rape would support a charge under section 218(2) of the Penal Code which reads :

> " Any person who enters by night any dwelling-house, or any verandah or passage attached thereto, or any yard, garden or other land adjacent to or within the curtilage of such dwelling-house, without lawful excuse, is guilty of a misdemeanour, and is liable to imprisonment for one year."

In the circumstances we do not consider it is necessary to send this matter back to the Supreme Court for hearing. The trial was satisfactory in all other respects and it is clearly our duty to quash the conviction of burglary and set aside the sentence of 5 years imposed in respect thereof and to substitute a conviction under section 218 (2) of the Penal Code.

We do this in exercise of our powers under section 24(2) of the Court of Appeal Ordinance (Cap. 8) and it is quite clear that the learned Chief Justice must have been satisfied of facts which proved the appellant guilty of the last mentioned offence.

Accordingly we convict the appellant of the offence under section 218 (2) of the Penal Code and impose a sentence of 10 months imprisonment in respect thereof; such sentence to run from the date of the commencement of the original sentence.

The suspended sentence of 3 months imprisonment imposed on 5th April, 1979 at Levuka Magistrate's Court is hereby activated with the original term remaining unaltered and we order that it take effect from the expiration of the said sentence of 10 months imprisonment. To the extent only that we have indicated above the appeal is allowed.

(Sgd.) C.C. Marsack
Judge of Appeal

(Sgd.) G.D. Speight
Judge of Appeal

(Sgd.) B.C. Spring
Judge of Appeal