IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.15 of 1980

JEREMAIA CAKACAKA — Appellant

v.

REGINAM — Respondent

K.C. Ramrakha & N. Dean for the Appellant
Suresh Chandra for the Respondent

Date of Hearing: 20 March 1981.

Delivery of Judgment:

J U D G M E N T

Marsack, J.A.

This is an appeal against a conviction for rape entered in the Supreme Court sitting at Suva on the 24th January 1980, and also against the sentence of 8 years' imprisonment imposed upon that conviction.

At the hearing six men were jointly charged, accused 1 and 2 with murder, and accused 3, 4, 5 and 6 (appellant being No.6) with rape.

The basic facts upon which the prosecution was brought were these. Some time after midnight on 14th September,1979 an Indian woman, who apparently had been drinking, was walking up Struan Street, Suva, looking for a taxi. She was taken in

hand by first, second and third accused and pushed up the hill into the darkness under a mango tree. There she was seriously assaulted by first and second accused, and all six persons charged had sexual intercourse with her, fourth, fifth and sixth accused having come on the scene later. The injuries suffered by the young woman were so serious that she finally died. At the trial the first and second accused were found guilty of manslaughter and the other four of rape.

The body of the young woman was found on the morning of the 18th September. The doctor who conducted the medical examination of the body found much bruising on different parts of the body, and a broken rib and sternum. The cause of death in his opinion was bleeding within the pleural cavity resulting from the fracture of the rib and sternum.

The time of death was not conclusively established. In the course of his summing up the learned trial Judge said:

> " It is clear from the Inspector's evidence and other evidence in the case that at a later stage during the night Saras Lata was moved from the site of the mango tree and taken to the place where she was found dead. That was done no doubt because she had become unconscious and there may have been a feeling of anxiety and fear among some of the persons concerned. What must have been obvious to these men was that Saras Lata had become so weak and helpless as the night progressed. Her grossly weakened condition was clearly caused by her injuries and this was in turn aggravated by the fact that she had to endure numerous sexual contacts from various young men."

The original grounds of the present appeal were filed by the appellant himself. At the hearing of the appeal counsel for the appellant was given leave to withdraw those grounds and substitute the following new grounds which he filed:

> " 1. The learned trial Judge, in directing himself and the assessors, erred in not stating that on the issue of whether or not there was consent of the alleged victim, the statement of the accused made to the police should not be treated as a confession unless and until the inference could be drawn that the said statement was unambiguous and a confession of guilt as to the crime charged, and thereby there was a miscarriage of justice;

2. The learned trial Judge further erred in law and in fact in not directing himself and the assessors that, if the victim was in fact dead at the time the sixth accused had sexual intercourse with her, then the appellant was not guilty of the offence charged;

3. The sentence is harsh and excessive having regard to all the circumstances."

On the first ground Mr. Ramrakha argued that there was no evidence establishing the three constituent elements of the offence of rape, namely:

(a) that appellant had sexual intercourse with the victim;

(b) that the act of intercourse occurred without the woman's consent; and

(c) that the man intended not only to have sexual intercourse with the woman but intended to have it without her consent.

(Archbold 39th Edn. para. 2871)

He pointed out that the case against the appellant is substantially based upon the charge statement deposed to as having been made to the police by the appellant. The relevant portion of that statement is in these words:

" I told the Indian girl that I wanted to have sex with her. The Indian girl did not say anything. After that I had intercourse with her. As soon as my penis entered but it could not stand. I tried to have it erected but it failed. I left the girl there with the rest of the youths at the same place where I have shown the police and then came away."

In a statement made a few hours earlier, in reply to questions by D/Sgt. Manoa, appellant gave more particulars. The Record reads:

" Q. How many times did you have sexual intercourse with the Indian woman?

A. Once only, before I leak my semen my penis subsided.

Q. For how long it took you having sexual intercourse with the Indian woman?

A. Not long, my penis was erected and I penetrated into her vagina, then my penis subsided. I tried to have another erection but I couldn't.

Q. At the time you having sexual intercourse with the Indian woman, was she still alive or not?

A. I do not know whether she was still alive or not, the only thing I know that she did not talk or move or yell, or angry. She was lying still all the time."

In his evidence at the trial appellant claimed that he was misreported by the police, and he did not in fact have any sexual intercourse with the girl because he was unable to raise an erection. It was accepted at the trial that the evidence concerning the police statements made by appellant could be taken as substantially correct. Although appellant in those statements averred that through a physical infirmity he had been unable to bring that intercourse to a satisfactory conclusion, he did at least admit penetration; and upon penetration the offence is complete. Counsel for the appellant submitted that even if the statements to the police are accepted as the truth, there is nothing in that statement to fulfil requirements two and three of the constituent elements of rape as quoted from Archbold (supra).

It was quite clear from appellant's own evidence that in no way did the young woman give any indication that she consented to sexual intercourse with the appellant. His own statement confirms that she was not in possession of all her physical and mental faculties. He was certainly not entitled to assume her consent from her silence. That being so the assessors could properly infer that the victim was not a consenting party; and that appellant intended to have intercourse whether or not she consented to the act. In these circumstances we are satisfied that the assessors were entitled to find, as they did find, that appellant was guilty of rape, and for the learned trial Judge to accept their opinion on this point. Accordingly the first ground of appeal cannot succeed.

On the second ground counsel contended that it lay on the prosecution to prove beyond reasonable doubt that the victim was alive when appellant had intercourse with her, failing which he must be acquitted as rape cannot be committed with a dead person. We have already quoted the passage from the summing up of the learned trial Judge relating to this point. This would appear to indicate that the Judge was of the opinion that the victim was in all probability alive but unconscious when she was carried to the place where she was subsequently found. There is some slight corroboration from the evidence of Akanisi, the girl-friend of the third accused, that she was with some friends, including the appellant, who went to the scene the following morning, when these words were said by one of them in the presence of the appellant: "we don't know whether she would live or die". It can hardly be thought that any such comment would have been made if the woman were already dead; and it must be remembered that this was several hours after the last of the sexual assaults had taken place.

Altogether the only conclusion that, in our opinion, can be drawn from the evidence is that the victim was alive when appellant had sexual intercourse with her. In the result the second ground of appeal also fails.

There remains the appeal against sentence. It has already been pointed out that fourth, fifth and sixth accused came on the scene after the lethal assault had taken place; and for that reason the sentence imposed on fourth and fifth accused for rape was two years less than that imposed for the same offence on the first, second and third accused. It is a little difficult to understand why the appellant, who admittedly was guilty of no violence towards the victim, should have received the same sentence for rape as first, second and third accused. No doubt the learned trial Judge took into account the lengthy previous criminal record of the appellant. We, however, feel that due allowance should have been made for the fact that he took no part in the brutal attack on the girl, that he had intercourse with her only at the suggestion of one of the others present,

and that he inflicted no physical injury on her whatever. That being so we find that the sentence of 8 years' was in the circumstances unduly severe. Accordingly we quash that sentence and substitute one of 5 years' imprisonment, to take effect from the date when the first sentence was imposed.

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(Vice-President)

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(Judge of Appeal)

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(Judge of Appeal)