IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 20 of 1982

Between:

1. ECELA GAUNAVOU
2. TEVITA BABA NUKUVOU — Appellants

and

REGINAM — Respondent

1st Appellant in Person.
D.K. Jamnadas for the 2nd Appellant.
K.R. Bulewa for the Respondent.

Date of Hearing: 6th July, 1982.
Delivery of Judgment: 23.7.82

JUDGMENT OF THE COURT

Speight J.A.

This is an appeal by the two above named appellants against convictions in the Supreme Court of Fiji on the 1st March 1982 after a lengthy trial. The charges contained in the Information were as follows:-

" FIRST COUNT

Statement of Offence

ASSAULT OCCASIONING ACTUAL BODILY HARM: Contrary to Section 277 of the PenalCode.

Particulars of Offence

ECELA GAUNAVOU, on the 31st day of May, 1981 at Nasinu in the Central Division, assaulted one Niranjan Singh s/o Sadhu Singh thereby causing him actual bodily harm.

SECOND COUNT

Statement of Offence

ABDUCTION: Contrary to Section 146 of the Penal Code.

Particulars of Offence

ECELA GAUNAVOU and TEVITA BABA NUKUVOU, on the 31st day of May, 1981 at Nasinu in the central division, with intent to carnally know TARA WATI d/o RAM SINGH took the said TARA WATI away and detained her against her will.

THIRD COUNT

Statement of Offence

RAPE: Contrary to Section 143 of the Penal Code.

Particulars of Offence

ECELA GAUNAVOU and TEVITA BABA NUKUVOU on the 31st day of May, 1981 at Nasinu in the Central Division, had unlawful carnal knowledge of a woman namely TARA WATI d/o Ram Singh without her consent. "

The assessors expressed unanimous opinions of guilty in respect of each accused person on their respective charges. The Learned Chief Justice concurred in the opinions and convicted the first appellant whom we will refer to as accused No.1 on all three charges and the second appellant (accused No. 2) on the two charges laid against him. Very briefly the evidence called for the prosecution was that these two young men had been to a dance at or near Nasinu on the evening of Saturday, 30th May and in the early hours of the Sunday morning they arrived, apparently by chance, at the house of Niranjan Singh. Mr. Singh, his wife Tara Wati and others were asleep within the house. They were awakened by the intruders who demanded a light and under some fear a young man from within the house gave them a hurricane lantern. The two intruders remained outside for a while creating something of an uproar to the alarm of the people within the house and then, so it was alleged, accused No. 1 went into the house with the light and assaulted Mr. Niranjan Singh and then

commenced to drag his wife Tara Wati outside. It was alleged that accused No. 2 assisted him in getting her out of the door, that she was dragged across some ground, through a small creek and that she was then forced to the ground and despite her struggles and protests each accused person had sexual intercourse with her against her will. Accused No.1 was first followed by accused No.2. The offenders then made off and some member of the family summoned the police. Consequent upon investigations by the police they were each interviewed. Each acknowledged having been at the dance but claimed to have left some hours before the incident we are concerned with and denied any involvement. Identification parades were held. Tara Wati identified accused No. 1 at one parade but failed to identify accused No.2 at another parade picking instead a different and presumably innocent person. Three other witnesses from within the house each identified both men successfully. At the trial the defence of mistaken identity was maintained but no challenge was made to the prosecution case that some persons had acted in the way described and that assaults and rapes had been committed. Grounds of appeal on behalf of accused No. 1 are:-

" 1. The complainant claimed that on the night in question, I was wearing a red tracksuit when in fact I was wearing a long blue Lee trousers and a long sleeve brown singlet. The police still have these clothes in their custody.

2. The Indian lady (complainant) was able to identity me because the police had taken me to their home where she saw me before the Identification Parade. "

And accused No. 2:

" (i) Learned Trial Judge misdirected the assessors on the issue of identification hence there was a gross miscarriage of justice.

(ii) The sentence was harsh and excessive in all the circumstances of the case. "

At the hearing of the appeal Mr. D.K. Jamnadas appeared for second appellant and he carried the burden of the legal argument. For some reason the first appellant appeared on his own behalf as he had done at the trial. His submissions to the Court were somewhat brief but we apprehend that he was making the same complaint as that made by accused No.2, that is to say that the identification problem had not been properly dealt with.

This was of course a sexual case. The primary complaint was of rape though associated with charges of abduction and one of assault, but these were incidental to the main charge. Unlike many such cases no attack was made on the woman's character either at the trial or on appeal. No suggestion of fabrication or of consent having been given was raised. No suggestion emerged from the defence at any stage to suggest that the offences charged had not been committed by someone. The sole issue was one of identity.

But being a sexual case the desirability of corroboration of the evidence of complainant that the accused person or persons were the offenders clearly arose and this was quite obviously in the forefront of the learned trial Judge's mind when he summed up.

He therefore, very properly subjected that identification by the lady to close scrutiny and he invited the assessors to analyse her evidence with care and to consider the support which it might gain from the other witnesses who had been in the house.

For reasons he thought appropriate the Judge made use of the tests which are suggested in R. v. Turnbull (1977) 1 Q.B. 224 as appropriate in examining the reliability not only of the complainant but of the other witnesses as to identity. This was of course a proper approach in the circumstances of this case.

Mr. Jamnadas did not specifically complain in this Court that the learned Judge did not use the word "corroboration" nor do we think his submission lost any point by his not doing so. Indeed the Court adopts the observations of Lord Hailsham L.C. in the case of Kilbourne (1973) A.C. 729 at 740 when he said:-

> "I agree with the opinions expressed in this House in Reg. v. Hester /1973/ A.C. 296 that it is wrong for a judge to confuse the jury with a general if learned disquisition on the law. His summing up should be tailormade to suit the circumstances of the particular case. The word "corroboration" is not a techincal term of art, but a dictionary word bearing its ordinary meaning; since it is slightly unusual in common speech the actual word need not be used, and in fact it may be better not to use it. Where it is used it needs to be explained. "

Again in Reg. v. O'Reilly (1967) 2 Q.B. 722 the question involved in a rape case was solely one of identity, and as here (in respect of one complaint) the complainant had failed to identify the accused at an identification parade. The trial judge had not used the word corroboration in his summing up, but had stressed the dangers of mistaken identity, and had told the jury to concentrate on the identification evidence available from a supporting scientific witness.

On appeal it was contended on behalf of appellant that the use of the word "corroborate" and its explanation were necessary ingredients of a summing up, irrespective of whether in fact the complainant's evidence was corroborated.

The Court of Criminal Appeal rejected this submission and at p. 727 Salmon L.J. said:-

> "But the rule that the jury must be warned does not mean that there has to be some legalistic ritual to be automatically recited by the judge, that some particular form of words or incantation has to be used and, if not used, the summing-up

> is faulty and the conviction must be quashed. The law, as this court understands it, is that there should be a solemn warning given to the jury, in terms which a jury can understand, to safeguard the accused. "

The passage was adopted by this Court in Subaiya Pillay v. Reginam F.C.A. No. 29 of 1981. In the case under appeal the learned Judge, in instructing the assessors on the crucial need to test the complainant's identification chose to express himself in the stringent terms commended in Turnbull's case and went on to advise that the assessors concentrate particularly on two of the supporting witnesses. We think it important to note that this slight departure from usual phraseology occurred in a case where unlike Subaiya Pillay's case the direction was being given not in respect of an uncorroborated complaint but concerning one for whose identification evidence there was substantial support. The wording used was adapted to the circumstances of the case, as it should be. Contrary to the views which counsel sometime seem to adopt, Turnbull's case provides no fixed and inflexible catechism, but basic principles on the need for caution in cases of visual identification particularly those of the fleeting glance or inadequate opportunity. See R. v. Keane (1977) 65 Cr.App.R. 248; R. v. Oakwell (1978) 1 All E.R. 1223 and R. v. Weeder (1981) 71 Cr.App.R. 228.

Mr. Jamnadas on behalf of accused 2 acknowledged that the Judge warned on the specific need for caution and that the relevant matters to be taken into account as discussed in the foregoing cases were drawn to the assessors attention - this all appears clearly at pages 134 and 135 of the case on appeal. This concession was properly made - the trial Judge could hardly have been more forceful. He referred to the details which the complainant had given of the men who had sexual intercourse with her down by the creek at a time when she was evidencing her lack of consent and he went on to say:

" First of all I must warn you of the need for caution before accepting the correctness of the identification evidence in this case. I feel I must give you this warning because the last thing this Court would want to do is to wrongly convict an innocent person. So every care must be taken in assessing and evaluating the quality of the identification evidence. There is also another factor to be borne in mind and that is a mistaken witness as to identification could be convincing and that several such witnesses could all be mistaken.

What is required in this case is for you to examine closely the circumstances in which the identification by each witness came to be made. Some of these circumstances will readily occur to you and to which the Crown Prosecutor has rightly made reference. These are -

(i) how long did the witness have the accused under observation;

(ii) at what distance was the observation of the accused made by the witness;

(iii) in what sort of light was the observation of the accused made by the witness;

(iv) had the witness ever seen the accused before the day of the incident;

(v) how long was it between the time of the original observation of the witness and the subsequent identification to the police;

(vi) was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance.

These are some of the important matters you must bear in mind in deciding whether the identification made by a witness is sound and reliable and can be completely relied on as correct. Because of its importance in this case, it is necessary for me to review the identification evidence as given by the main witnesses for the prosecution. "

Mr. Jamnadas acknowledged that this was a correct direction "in a general way". His submission is that thereafter the learned Judge in examining the evidence did not highlight with sufficient particularity the ways in which the individual's evidence did not (as he submits) measure up to

the "Turnbull tests". In particular he says the following matters were not stressed.

(a) Both assailants were strangers to the witnesses;
(b) The time interval was brief;
(c) The light was unsatisfactory;
(d) There were discrepancies between witnesses on certain points, primarily on their description of clothing.

It must be borne in mind that it is not for an appellate court on an issue such as the present to substitute its views on the credibility of witnesses it has not seen. The question on this appeal is, Did the learned Judge properly instruct the assessors prior to their deliberations and himself prior to pronouncing his judgment? In our view he did. It would be giving the assessors less than proper credit if one is to assume that having heard such a powerful warning as was given in the passage quoted above they did not bear it in mind as their recollection was immediately thereafter refreshed by a reminder of the salient points in the evidence of the identifying witnesses. This summary occupies nine of the total of 21 pages in the transcript of the summing up and thereafter an even greater time appears to have been taken in reading to the assessors the full note of the evidence given by the two accused persons.

The Judge started by reminding the assessors of the complainant's evidence (page 136) including the fact that at the first encounter Kamal Jeet Singh had taken the light to the door, that it was fully turned up and that complainant there saw the face of the Fijian of fair complexion (accused 1) but she could not see the second man's face at that time. She saw his face later when he returned and helped the first offender to drag her out the door. When the men returned, the light had been put on the table and she watched the fair man attack her husband and she was close to him. She then struggled with this man face to face in the lighted room and the second man joined in. The Judge referred to her

failure to identify accused No. 2 at an identification parade and the assessors were reminded of this and were told that it was entirely for them to be satisfied as to her identification beyond reasonable doubt.

Similar detail was discussed concerning the supporting witnesses particularly Niranjan Singh and Kamal Jeet Singh. Matters referred to were the light, the clothes, particularly the inconsistencies and discrepancies between witnesses on that topic, the distance between the people, the length of time, the dramatic behaviour of the intruders focussing attention on them and of course the observations of these men at the identification parades.

As has been said the evidence contrary to this, as given by the accused persons, was read. In the case of accused No.1 this emphasized the question of the clothing that he wore that night and his claim of discrepancy in the matter of hair style. In concluding in respect of accused No.1 the Judge said at page 146 that his evidence "must be examined and considered carefully" to see whether it gave rise to a reasonable doubt on the identity issue.

Again the evidence of accused 2 was read to the assessors. It had of course been drawn to their attention that the complainant had failed to identify accused 2 at the identification parade but other witnesses, particularly Niranjan Singh and Kamal Jeet Singh, had. Having discussed the evidence of the second accused and his alibi witness Volau Repeka the learned Judge went on to say at page 147:

> " In view of the evidence given by both the second accused and his witness Volau Repeka in this Court it is necessary and indeed imperative that you should examine and consider with the utmost care the identification evidence relating to second accused particularly those of Niranjan Singh and Kamal Jeet Singh. You should only act upon their evidence if you are satisfied that their identification of second accused was completely reliable and certain. In deciding whether or not their identification of the second accused is reliable and certain you must

bear in mind this vital question namely was the time they had in observing that tall dark person at the door sufficient to enable them to identify him correctly? "

On the grounds of appeal advanced on behalf of both accused persons namely shortcomings in the summing up concerning identity, we are not persuaded that there has been any defect demonstrated. In our opinion it was detailed and clear and covered all necessary matters in an appropriate way.

The first accused also challenged the value of identification in his ground No. 2 namely that the complainant had seen him at her home after the event but before the identification parade. This point can be dealt with quite shortly. No question was asked of any prosecution witness suggesting such a possibility. Indeed the thrust of the evidence was all to the contrary. The identifying witnesses and some of the police witnesses had detailed the care which was taken to prevent the suspects being seen prior to the parades although this evidence was of course directed to the events at the police station, but given such evidence it is surprising that the accused No. 1 even though he was defending himself did not suggest to any police officer that he had been taken to the area of the alleged offence and shown to the witnesses on the Sunday or at any other time. It is apparent from the transcript that the accused's cross-examination of the various witnesses was direct and very relevant to the matters in issue indicating that he had a good grip of the proceedings yet there was not one question from him advancing any such suggestion though he covered other matters with some skill. The only basis in the ground now advanced is a passage in the written statment which he read to the Court. He said:

" At 7 a.m. on Sunday morning while I was sleeping some police officers were waking me up. I was surprised to see them. They asked me to wake Masi. He woke up and the officers asked him where he was

last night. He told them that he was drinking yaqona at his place. They also asked me and I explained my routine after the dance at the Public Employees Union Hall last night. When they heard my explanation they asked if I could accompany them somewhere. I do not know. I don't know what they were up to. The officers took me by where I came up last night and showed me to an Indian man's house near Namara Road. The Indian family were present at the time. They told me that an Indian woman was raped there last night at about 4 o'clock. I said that I don't know anything about the incident. They asked me whether I saw somebody on the road or somewhere when I came last night. I explained to them where I met some people on the road. They took me back home and thanked me. "

In the absence of any better foundation we do not feel that we can give any weight to the complaint now made. Consequently the appeals against conviction are dismissed.

Each appellant also appeals against the sentences imposed. Accused No. 1 was sentenced to three years imprisonment for the assault on Niranjan Singh, five on the count of abduction and seven years on the count of rape, all concurrent. Second accused was entenced to 5 years imprisonment for abduction and 6 years for rape. We have listened to all that has been said in support of the appeal against sentence. It is acknowledged that the sentences are severe but these were grave crimes. It is apparent that the learned Chief Justice in the remarks on sentence recorded at page 155-157 has taken into account all relevant factors including the distinction between the situation of the second accused as against the first. On the other hand he stressed the outrage of the intrusion into the home of the complainant and other surrounding circumstances where offences were perpetrated on her in the virtual presence of her family and we endorse the remarks made. In our view not only has it not been shown that the sentences were manifestly excessive, we take the view

that they were entirely appropriate to the gravity of the crimes committed and the appeals against sentences are also dismissed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL