IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 53 of 1985

Between:

1. BASANT SINGH (f/n Hari Prasad Singh) Appellants
2. SUBHASH CHAND (f/n Ram Rattan)

- and -

R E G I N A M Respondent

M. Krishna for the Appellants
G.E. Leung for the Respondent

Date of Hearing: 22nd October, 1985
Delivery of Judgment: 28 October, 1985

JUDGMENT OF THE COURT

Roper, J.A.

On the 28th January 1985 the two Appellants were convicted of rape in the Magistrate's Court at Labasa. They now appeal against the convictions, an earlier appeal to the Supreme Court having been rejected.

The offences were alleged to have occurred as long ago as the 19th November 1982 and according to the complainant these were the circumstances: A few days prior to the 19th the Complainant's child was admitted to the Labasa Hospital and during its stay the Complainant and her husband, who lived in Navai, stayed with a relative in Labasa.

On the 19th it was decided that the Complainant should return to Navai and the husband arranged for her to travel there in the Appellant Chand's van. Both Appellants are related to the Complainant or her husband, the association being such that both commonly referred to the Complainant as "Aunty".

In the van, when it left Labasa at about 4 p.m., were the Complainant, the two Appellants, and another man Kaulessar, the Appellant Singh's wife and his mother-in-law. On the way to Navai there were a number of stops, either to buy beer which the men drank in the van or to let off passengers. After Singh's wife had been dropped off at her home the Complainant was alone in the van with the two Appellants. The van then proceeded towards her home with a further stop to buy beer. Shortly after that the van came to a stop when she was told that a tyre was punctured. As the spare was also alleged to be punctured the two Appellants said they would walk with her to her house which was not far distant. The Complainant said that on the way she was seized by Singh. There was a struggle but finally he had intercourse with her without her consent in the ditch at the side of the road. She said that Chand then had forced intercourse. They then returned with her to the van and drove to her home where she was let off. At her home were her 16-year-old daughter, two teenage boys and her sister-in-law but she made no complaint to them of having been raped.

The sister-in-law gave evidence that the Complainant appeared "frightened and sad". There was soil on her clothes and her hair was in disarray. Her first complaint of rape was to her husband some 24 hours after the alleged rape when he returned from Labasa.

In their statements to the police, and in unsworn statements at their trial, both Appellants denied intercourse consensual or otherwise, and indeed the Appellant Singh said he had left the van with his wife when it arrived at his home.

The first ground of appeal concerns this passage from the Learned Magistrate's decision:-

> "PW1 has on oath described how she was raped by the 2 Accuseds. She has stated that both Accuseds had sexual intercourse with her. The 1st Accused forced her and then the 2nd Accused. She has said she did not consent. I am satisfied that PW1 had given truthful evidence. Her evidence has been supported by the evidence of PW2 that she complained to him when he came back. She sat and cried and then related the tale of woe."

The submission concerning it was that the Learned Magistrate made the fundamental error of treating evidence of recent complaint as corroboration. It is true that the Learned Magistrate did not use the word "corroboration" in the passage cited but corroboration means no more than evidence which "confirms" or "supports" other evidence, and it seems clear from his reference to being satisfied that the complainant had given truthful evidence, followed immediately by the reference to her husband's supporting evidence that he was treating the latter as corroborative. That was a clear misdirection. Evidence of recent complaint may establish that a complainant has told a consistent story, but not necessarily a truthful one.

Mr Krishna made the further submission that in any event evidence by the husband of what his wife told him in the course of making the complaint was inadmissible, and that his evidence should have been limited to the fact that a "complaint" was made without giving particulars of it. His authority for this surprising submission was R v. Lillyman [1896] 2 Q.B. 167. With respect to Mr Krishna he must have misread the report for it was that case which decided that the existing usage, which was not universal, of limiting evidence of a complaint to the bare fact that it was made was unsupported by authority. The Court held that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted in evidence to the jury.

The second ground of appeal is also concerned with the vexed question of corroboration, it being said that the Learned Magistrate failed to direct himself on the issue; or misdirected himself as to the evidence capable of being regarded as corroborative.

At the beginning of his judgement the Learned Magistrate referred to the question of corroboration in general terms. He said:-

> "I warn myself that the prosecution must prove the case beyond all reasonable doubt and also that there should be corroboration on the relevant matter."

In the circumstances of the case intercourse having been denied, what was required in respect of each Appellant was corroborative evidence that confirmed in some material particular that not only had intercourse taken place but that it had taken place without the Complainant's consent.

We now turn to consider the various passages in the judgment where the Learned Magistrate considered the question of corroboration.

The first, which dealt with the "supporting evidence" of the complaint to the husband we have already dealt with and nothing more need be said. Later the Learned Magistrate said:-

> "The evidence of PW1 is further strongly supported by the fact that a button hook was found at the scene with a piece of cloth attached to it. The cloth similar to that of the blouse from which a button hook was missing. P/S Amrit said he found the hook button at the scene in the grass. He made a note on the day he took charge of the blouse from Abhimanu that a button was missing. This is a piece of very strong evidence to show that PW1 had been forced and her clothes removed by force. The evidence of PW1 is very strongly corroborated."

The finding of the "button hook", which was a small hook fastening the Complainant's blouse, supported the Complainant's story that she had been in a particular place but falls far short of confirming intercourse by the Appellants' without consent.

The Learned Magistrate then said:-

> "PW1 was found with her clothes in disorder by Hemant Kumar and Chandra Wati when she came off the van that night. They said she never looked that way before. This also corroborates the evidence of PW1."

The Complainant's statewhen she returned to the home might suggest that something untoward had occurred but in no way corroborates her allegation of rape by the Appellants; and neither does the final passage in the judgment to which we need to refer:-

> "The medical report supports that she had recent injuries. These have been caused in the course of her struggle. She could not have been injured if she had a safe trip home. It was the fall and the struggle when her lower part of the body was bare caused the injuries at the scene. There is also the burn made on the neck. According to the medical report there is also tenderness of the vulva even though examined after 2 days. She is a woman married 17 years. The medical report corroborates the evidence of PW1 on all aspects."

The injuries were comparatively minor and the Learned Magistrate erred when he referred to "tenderness of the vulva." There was no such medical evidence and in fact the medical report produced states "No obvious marks of violence on the private parts."

The Learned Magistrate concluded his judgment with these words:-

> "I have no hesitation in holding that PW1 gave truthful evidence and that her evidence has been corroborated on all material matters."

In our opinion there was no evidence in this case capable of corroborating the Complainant's story that she had been raped by the two Appellants. It follows that there was a clear misdirection and the convictions cannot stand.

It was a case where the Learned Magistrate was required to warn himself that it was dangerous to convict, unless of course he was wholly satisfied as to the complainant's truthfulness. For reasons which we will now mention there would have been real difficulties for the Learned Magistrate on that score.

Quite apart from any question of misdirection a situation arose in this case which may well have resulted in an injustice. This matter was not raised by Counsel.

The offences were alleged to have occurred on the 19th November, 1982, and the Appellants' first appearance before the Court was on the 14th December, 1982. They were finally convicted and sentenced on the 28th January, 1985. In the intervening two years they appeared before the Court on no less than 25 occasions, on 13 of which evidence was taken. By the time the Learned Magistrate gave his decision it was 18 months since he had seen and heard the complainant give evidence. Any advantage the Learned Magistrate may have had from hearing and seeing the witnesses and in particular the complainant, must have been completely lost and there are advantages in the Court being able to involve itself in the atmosphere of a trial but that too was lost.

In the case of one witness, Hemant Kumar, who saw the complainant when she first returned home, six months elapsed between his evidence in Chief and his cross examination. Kumar was one of the witnesses whom the Learned Magistrate considered corroborated the evidence of the complainant in that he had said in cross examination that the complainant's clothes were in disorder. Because of the lapse of time the Learned Magistrate may not have recalled that in evidence in chief six months earlier Kumar had said that he had not noticed the complainant's clothes.

Apart from the period of six weeks when the Appellant's Counsel was ill there was no excuse for this protracted hearing. It was quite unacceptable.

There is nothing to be gained by ordering a new trial and we do not see it as a case for the application of the proviso.

The appeal is allowed, the convictions are set aside and the sentences quashed.

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VICE-PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL