IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 58 of 1986

Between: SAMUEL SUBHASH CHANDRA

Appellant

- and -

R E G I N A M

Respondent

S. M. Koya for the Appellant.
J. Semisi for the Respondent.

Date of Hearing : 2nd March, 1987

Delivery of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against conviction only on a charge pursuant to section 156 of the Penal Code of having unlawful carnal knowledge of a girl under the age of 16 years.

It is unnecessary for the purposes of this appeal to traverse the facts in detail.

On the 18th September, 1984 Gita, the girl in question, who was then 14 years 7 months, had arranged with a fellow student, a 16 year old boy Leslie, that they would not attend school on that day but would go out together. Gita left for school that morning wearing her school uniform, but unbeknown to her mother had a dress in her schoolbag and changed into it at school. She then left the school and met Leslie who had arranged for a taxi to pick them up. This was driven by the Appellant, a distant relative of Leslie's. They were taken to a cabin at a beach resort

where both Leslie and the Appellant were alleged to have had intercourse with Gita and subjected her to a variety of indecent acts.

Leslie pleaded guilty to unlawful carnal knowledge and was called as a prosecution witness in the Appellant's trial. The appellant himself admitted meeting the young couple and taking them to the beach resort but was consistent in his denials, both in his statement to the police and in evidence at his trial, that he had any sexual involvement with Gita.

The Appellant was duly convicted in the Magistrate's Court and sentenced to two years imprisonment. He then appealed to the Supreme Court against both conviction and sentence. Rooney J. who heard the appeal, concluded that the trial magistrate had misdirected himself in certain respects but dismissed the appeal on the basis that no substantial miscarriage of justice had resulted.

This being an appeal from the Supreme Court in its appellate jurisdiction it follows that our consideration is limited to questions of law only. In short, it must be shown either that Rooney J. applied the proviso on a mistaken view of the law relating to the case, or that in applying the proviso he followed wrong principles.

The first ground of appeal reads:-

> "THAT the Learned Appellate Judge erred in law in not holding that the Learned Trial Magistrate erred in presiding over the trial against the Appellant on the 8th July, 1985 and in not holding that the Learned Trial Magistrate thereafter erred in exercising his jurisdiction to complete the trial."

When the case was first called it came before Mr. M. J. Sheehan, then Resident Magistrate. Mr. Singh for the Appellant requested that the case be heard by another magistrate as Mr. Sheehan had presided over Leslie's trial. Mr. Sheehan acceded to that request and the case then came before Mr. J.R.M. Perera, whereupon Mr. Singh made a similar

application on the ground that Gita's father, a Social Welfare Officer, was personally known to Mr. Perera. It appears that Mr. Perera made no decision on the application but referred it to the Chief Magistrate, who apparently said that the application should be refused as most magistrates would know Gita's father. Mr. Perera passed this information on to counsel with the intimation that the Chief Magistrate would see them in Chambers in relation to the application if they so wished. After their attendance in Chambers the Chief Magistrate made this ruling:-

> "In this case I cannot feel that the magistrate is not capable of excluding any possibility of bias."

The trial then proceeded before Mr. Perera. Although it is not of great moment Rooney J. did comment that on the resumption of the trial Mr. Singh made no further reference to the magistrate's disqualification "as if the point had been abandoned by the defence". That is hardly a fair comment. Mr. Singh had already raised the matter before both Mr. Perera and the Chief Magistrate. What more could he have done? It was accepted by the Crown before Rooney J. that the procedure adopted was "a little odd" and before us as "somewhat irregular", but it was submitted that it was saved by section 69 of the Criminal Procedure Code which reads:-

> "If in the course of any inquiry or trial before a magistrate the evidence appears to warrant a presumption that the case is one which should be tried or committed for trial by some other magistrate, he shall stay proceedings and submit the case with a brief report thereon to the Chief Magistrate".

In our opinion section 69 has nothing whatsoever to do with the matter. We are not concerned with a case where the evidence appeared to warrant a presumption

that the case should be tried by some other magistrate, such as might occur where the evidence indicates that the matter may be beyond the jurisdiction of the class of Magistrate hearing it.

Rooney J. described section 69 as "an usual provision" and concluded that the Chief Magistrate should not have expressed an opinion, but should have directed Mr. Perera's attention to the section so that he could first decide whether he should disqualify himself.

As we have said, it is our opinion that section 69 is irrelevant, but we agree with Rooney J. that it was Mr. Perera who should have made the decision whether to sit or not. After all he was the one who knew how close his association with Gita's father was, and whether it went beyond the formal relationship of magistrate and Welfare Officer.

Rooney J. dealt with the matter in this way:-

> " The girl's father gave evidence at the trial. His evidence had no direct bearing on the enquiry. It added little to the prosecution case. There is nothing to support the view that Mr. Perera's acquaintance with this witness influenced his judgment in any way.
>
> Mr. Perera is an experienced and respected magistrate and this was not a case where there was a likelihood of bias or where a reasonable person might suspect that the magistrate was incapable of impartiality and detachment at the hearing because of an interest in the parties or the subject matter of the proceedings."

We do not see it as important that the father's evidence was of minimal significance. The real question was whether the magistrate's association with the father might preclude him from approaching his task with total detachment. We accept without question that Mr. Perera is an experienced and respected magistrate. No evidence

was offered which might need evaluation as to the impression an impartial onlooker might form as to the propriety of proceeding with the hearing. In the absence of anything of that sort the matter rested entirely on the magistrate's own assessment and the fact that he elected to proceed with the hearing indicates that he felt able to do so with a clear conscience. There is absolutely nothing before us to suggest that justice was not manifestly seen to be done, we therefore reject that ground of appeal.

The second ground of appeal reads:-

"THAT the Learned Appellate Judge erred in law:-

(a) In not holding that the failure of the Prosecution to draw to the attention of Defence Counsel and or to the Court that the Complainant P.W.2 GITA ROHINI PRASAD had given to the Police three (3) statements (admitted by consent at the hearing of the appeal before the Supreme Court) relating to the subject matter of the charge in question, and that such statements contained matters which were at variance with her evidence given at the trial and which affected her credibility; and that the failure of the Prosecution to produce the same to the Defence or before or at the trial to the Court constituted the denial of natural justice of the Appellant.

(b) In not holding that such failure on the part of the Prosecution:-

(i) deprived the Learned Trial Magistrate the opportunity of assessing the Complainant's credibility at the trial;

(ii) caused a material irregularity at the trial;

(iii) and therefore caused substantial miscarriage of justice."

We set no merit in this ground and did not call on Mr. Semisi to argue it. We know of no rule requiring the Crown to make available statements by its witnesses as of right, and in the circumstances of this case justice did not call for the disclosure of Gita's statements. It was accepted that Gita involved the Appellant in each of the statements and the only variation between them and her sworn testimony that Mr. Koya could point to concerned the Appellant's degree of penetration in the alleged act of intercourse, but whichever version was accepted it was still within the definition of "carnal knowledge".

Apart from that if Mr. Singh had wanted to view the statements he could have called for them, but he did not.

The third ground of appeal claims that Rooney J. erred in not holding that the magistrate should have rejected Gita's evidence out of hand because she made no "complaint" when she returned to the school on the afternoon of the 18th September, and refused to tell her teachers or parents when they came to the school, what she had been up to.

We agree with Rooney J. that it was obvious why she volunteered no information. She had been involved in deceitful and shameful conduct and been caught out. It may have been a good deal more shameful than she had bargained for but it must be accepted that she was more or less a willing party for she did not allege rape or lack of consent in any of the statements, or in her evidence.

Apart from that, failure to make a complaint does not necessarily destroy credibility particularly where consent is not in issue.

All but one of the remaining grounds of appeal, which can now be considered together, relate to the magistrate's consideration of the credibility of Gita and Leslie and the

evidence available to corroborate their evidence, for corroboration was required in each instance, Gita being the complainant in a sexual case, and Leslie an accomplice of the Appellant.

In the course of his decision the magistrate said:-

" I propose to deal with PW10's evidence as that of an accomplice and do not propose acting on his evidence unless it is independently corroborated although no purpose has been disclosed as to why PW10 should give evidence implicating the accused unless it is true. PW2 who was a complete stranger to the accused and against whom nothing has been alleged by the defence in so far as the accused is concerned, has corroborated PW10's evidence with regard to the first act of sexual intercourse by the accused on PW2 on 18.9.84.

Although the medical evidence given by PW3 is consistent with all the injuries found on PW2 being caused, when PW10 had sexual intercourse with PW2, it is also consistent with being caused by sexual intercourse being committed both by PW10 as well as this accused.

The medical evidence given by PW3 as to the injuries found on PW2 is corroborative evidence of PW10's evidence that the accused did have sexual intercourse with PW2.

Further the evidence of PW1 that on the evening of 18.9.84 PW2 had shown her body with the injuries and informed her that both PW10 and the accused had committed sexual intercourse with her on the morning of 18.9.84 as a further item of corroboration evidence in relation to PW10's evidence."

PW1 was Gita's mother, PW2, Gita, PW3 the Doctor who examined Gita, and PW10 Leslie.

The first complaint made concerning this passage was that the magistrate had reversed the onus of proof by, in effect, casting an obligation on the defence to show some reason why Leslie might give false evidence

against the Appellant. Rooney J. did not accept that interpretation of the passage and neither do we. In assessing Leslie's worth as a witness it was appropriate to speculate whether he might have some reason for lying. The magistrate could not detect one and said so.

It is Mr. Koya's further point which is of more importance. The magistrate held that there was corroboration of Leslie's evidence from Gita, the Doctor who examined Gita, and Gita's mother. It is common ground that the evidence of the Doctor and Gita's mother could not possibly be corroborative of Leslie's evidence, and indeed it is questionable whether the mother should have been called at all to give evidence of a complaint which could hardly be called spontaneous.

That aside, the question is whether Gita's evidence was available as corroboration of Leslie's.

It is appropriate at this point to consider the magistrate's approach to corroboration of Gita's evidence, she being a complainant in a sexual case. The magistrate held that she too was corroborated by the Doctor and the mother, but again their evidence was not capable of being corroborative.

Rooney J. concluded that Gita's evidence corroborated Leslie's, and vice versa. There was no other evidence capable of being corroborative in the sense that it involved the Appellant.

There is no common law rule of general application that evidence of a witness which is itself suspect and calls for corroboration is incapable in law of amounting to corroboration of the evidence of another suspect witness, whose evidence also calls for a warning concerning the need for corroboration (See Director of Public Prosecutions v. Hester (1973) 57 Cr. App. R. 212).

Again, following Hester, while there is no general rule against mutual corroboration it is clear that in general one accomplice cannot corroborate another where each is an accomplice of the accused in the same crime. Leslie was an accomplice of the Appellant in the present case and Mr. Koya argued that Gita should also be so regarded. Although we are not prepared to go that far we believe this is a case where the same approach should be made as where accomplices of an accused in the same crime give evidence. We are dealing with the evidence of young people who might wish to seek some sort of excuse for their conduct and the possibility of a jointly fabricated story must also be borne in mind.

Having said that we now consider whether Rooney J. erred in applying the proviso which is contained in section 319 of the Criminal Procedure Code, and is in these terms:-

> "That the Supreme Court, may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

Rooney J. concluded that even if the magistrate had not misdirected himself, there was no "reasonable possibility" that he would have reached any verdict other than guilty. That may be an understatement of the test to be applied. In Stafford and Luvaglio v. Director of Public Prosecutions (1974) 58 Cr. App. R. 256, Viscount Dilhorne said at page 264:-

> "It is well settled that the Court of Appeal should only apply the proviso if it is of opinion that, if the jury had been properly directed it would inevitably have come to the same conclusion."

That aside we are not satisfied that if the magistrate had properly directed himself a verdict of guilty would have

been inevitable. He would, for example, have been in some difficulty with Gita's evidence for he said:-

> "I accept the evidence of PW2 (Gita) as truthful evidence as I find independent corroboration of her evidence."

None of the evidence he referred to was corroborative, and as we have indicated it would be unsafe in the circumstances of the case to use Leslie's evidence as corroborative of Gita's.

The magistrate made such basic errors, which went to the very heart of the case, that it is impossible to say that a conviction would have been inevitable had he properly directed himself.

Because of the lapse of time we do not see it as appropriate to order a new trial.

The appeal is allowed and the conviction set aside and the sentence quashed.

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Vice-President

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Judge of Appeal

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Judge of Appeal