IN THE FIJI COURT OF APPEAL

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CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0009J.94S
(High Court Criminal Case No. 13 of 1993)

BETWEEN

JOSEFATA VAKAROROGO — APPELLANT

-and-

THE STATE — RESPONDENT

Appellant in person
Mr Dane Tuigeregere for the Respondent

Date and Place of Hearing : 16th November 1994, Suva
Date of Delivery of Judgment : 16th November 1994

JUDGMENT OF THE COURT

The Appellant was charged with the rape of Waqa Robanakadavu on 16 February 1991 at Tovata. After a trial before Judge and Assessors he was convicted on 5 May 1994 and sentenced to imprisonment for 8 years. All three Assessors expressed the opinion that the Appellant was guilty. The Appellant now appeals against both conviction and sentence.

The prosecution case was that, on the morning of 16 February 1991, Waqa met a school friend, Asinate Mataitoga, whom she had not seen for some time and it was decided she would spend the night with Asinate. They went to a supermarket at Tovata, and when they left the supermarket they saw three young men standing on the road. Waqa did not know them, but Asinate did. One was the Appellant who is related to her. Another was Sakiusa Soko

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who was subsequently also charged with rape, and the third was Jonetani Sereka. Asinate knew the latter two as they lived near her home.

Jonetani took hold of Waqa and led her to a house near a church. Asinate tried to follow but was restrained by the Appellant. Waqa's evidence was that she was stripped of her clothes inside the house and then raped by Jonetani. She had been a virgin and the whole experience was so painful and distressing for her that she lost consciousness. When she regained consciousness first the Appellant and then Sakiusa raped her.

Waqa was then taken from the house to a bush by the Appellant and Sakiusa and she said that both raped her again there.

The Appellant when interviewed by the Police denied having raped Waqa, and he gave evidence to the same effect at his trial.

The Appellant's Notice of Appeal is discursive and imprecise, but the main effect of it is that the identification of him as one of those who raped Waqa was unsatisfactory. A further ground was that the verdict was against the weight of evidence because of certain inconsistencies between the witnesses. Those inconsistencies were not, however, such as to overcome the undoubted effect of the evidence as a whole. The question of the proper identification of an offender, and

particularly where there are a number of people present in the vicinity of an alleged offence, is always one to be considered with care.

The Appellant's submission is that Waqa only sought to identify him by the description of his height and stature rather than by his facial features. He also says that the interior of the house in which the incident occurred was dark enough to cause real difficulty in clear identification.

The fact Waqa identified the Appellant in Court was not, of course, sufficient. The identity of the Appellant as one of those present was, however, clearly established. In particular, Asinate not only knew him, but was related to him. Waqa herself had ample opportunity to see each of those whom she said raped her both before going into the house, and in the bush afterwards. It is difficult to think that, in the middle of the afternoon, the interior of the house was so dark as to preclude any question of recognizing individuals. Waqa said that she was able to see and recognize each of the three whom she had just met outside the supermarket, and this was evidence which the Assessors were entitled to accept. In any event, the second rape occurred in the bush in broad daylight.

The Judge correctly directed the Assessors as to the need for corroboration of Waqa's evidence and told them, also correctly, that the evidence of Asinate was capable of amounting to corroboration. There was, in addition, the complaint made to

Asinate's mother at the first opportunity.

As the Appellant was unrepresented at his trial and also on his appeal we have paid particular attention to evidence which was given at the trial and to the matters he has sought to raise. We note that the Judge in summing-up did not make express reference to identification or refer to the matters set out in the well-known observations in Turnbull's case. That would have been a desirable course. We are, however, satisfied that there was evidence which entitled the Assessors to reach the opinions which they did and for the Judge to convict. The appeal against conviction must accordingly be dismissed.

As to sentence, the Appellant is now 25 years of age, and at the time of the offence was 22. He had been drinking and was no doubt materially affected by alcohol but of course this is not a mitigating circumstance.

The ordeal to which Waqa was subjected was a particularly brutal and vicious one. She had no sexual experience and there is little wonder that the stress was such as to cause her to lose consciousness. This, of course, was not solely attributable to the actions of the Appellant, but he played a full part in what happened. He raped Waqa twice and struck her in the process.

We note the remarks of the Judge on sentencing as to the increasing prevalence in this country of the offence of rape. We agree with him that a deterrent sentence was called for and do

not consider a term of 8 years excessive in the circumstances.

The appeal against sentence is also dismissed.

Sir Moti Tikaram
President Fiji Court of Appeal

Sir Peter Quilliam
Judge of Appeal

Mr Justice Ward
Judge of Appeal