IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 12 OF 1992
(High Court Criminal Case No. 23 of 1992)

BETWEEN:

MACIU GONEVOU — APPELLANT

-and-

S T A T E — RESPONDENT

Mr. G. P. Lala with Mr. T. Savu for the Appellant
Mr. Ian Wikramanayake for the Respondent

Date of Hearing : 2nd February, 1994
Date of Delivery of Judgment : 9th February, 1994

JUDGMENT OF THE COURT

The appellant was charged on an information that he had on the 18th April 1992 committed rape. He was tried before a Judge and three assessors on the 9th and 10th days of November 1992. All three assessors were of the opinion that he was guilty and the learned Judge shared their view. The appellant was accordingly convicted and was sentenced to five years imprisonment. He has now appealed against both conviction and sentence.

At the trial the appellant was unrepresented by counsel but on the hearing of this appeal he has been represented by Mr. Lala and Mr. Tui Savu and the Court is grateful to them for their assistance.

The circumstances of this matter, as disclosed by the prosecution evidence can be stated fairly shortly. The complainant said she and a woman friend went to watch volley-ball at Thurston Garden. Afterwards at 5.20 p.m. they went to catch a bus home which is at Suvavou. On the way to the bus stand they met the accused who is the complainant's cousin. He was, she said, drunk. He forced them, she said, towards the bus stand by pulling her hand and he then stopped a taxi and told them to get in, which they did. He sat in the back with the complainant, the woman friend in the front. He gave directions to the taxi driver which the woman friend said were to stop at Vugalei which is before you get to Suvavou. He then told the woman friend, according to her, to go home and threatened to punch her if she did not go; so she went. He took the complainant into a house, having pulled her there she said, and forced her to lie on the floor. He took her clothes off, having threatened to kill her if she shouted out, and had intercourse with her against her will.

The accused, who was not represented at the trial, cross-examined the complainant during the course of which she said she did not call out at the bus stand because the accused threatened to kill her if she complained, not withstanding that there were police officers at the bus stand. She also said, that the accused produced a knife, a pen knife, with which he threatened her. This was apparently the first reference to a knife for she said she had forgotten to mention the knife to the Police because she was too scared of the accused. She went on to say he might

have thrown away the knife into the bush and added that she had been scared of the knife when they were in the taxi.

The woman friend then gave evidence which reinforced the complainants account of what happened up to the time she left them at Vugalei. She went on to say that later in the evening, about 10 p.m. she saw the complainant at her home when she, the complainant, told her that the accused had taken her to Stirling Place and had forced sex with her.

There was some additional oral evidence from the complainant's parents though it was extremely brief. Her father said when she came home between 9 and 10 p.m. she was crying and looked distressed. Her mother confirmed that she came home between 9 and 10 p.m. looking stressed. Her clothes were dirty and she was crying. Her mother then said she told her her story but the particulars of the complainant's account were not given. The police were called.

The remaining prosecution evidence was given by a police officer. He produced, first, the record of the accused's interview with a police officer at Lami Police Station during the course of which the appellant denied he used any force but accepted he took the two women by taxi to Vugalei; he asserted that the complainant was willing to have sex with him, took her own clothes off but that intercourse did not take place because he was unable to obtain an erection.

The police officer also produced the report of the medical officer who examined the complainant. This was given in evidence.. apparently in terms of S.191 of the Criminal Procedure Code. This report becomes of critical importance in relation to the matter of corroboration.

The accused elected to give evidence. What he said was very brief indeed. He asserted that he did not commit the offence and that what he had told the Police was the truth. In an almost equally brief cross examination he repeated that he and the complainant wanted to have sex but that he did not get an erection so they did not. He said the complainant complained at home because she went home late. She lied to her parents.

In his petition of appeal the appellant complains he was refused an adjournment and so denied the opportunity of having counsel to defend him. He raised also a number of other matters which, however, are included in the particular grounds raised by his counsel in his submissions and it is more convenient to deal with them in dealing with counsel's submission. We deal, however, with the adjournment point first.

The record shows that the case was called before Jesuratnam J. on the 7 July 1992. The accused was not present. The learned Judge directed notice be served on the accused for the 13 October 1992 and on that date the case was again called before Jesuratnam J. and this time the appellant was present. The Judge fixed the 9th November 1992 as the hearing date and granted the accused

bail. In these circumstances we do not think there is any substance in the appellant's complain. There was plenty of time for him to arrange counsel.

We have reached the conclusion that this appeal must be allowed and in those circumstances we do not intend to discuss all the grounds argued by Mr. Savu. The reasons for our decision relate to the learned Judge's direction on corroboration. He very properly told the assessors that he was required by law to warn them that it was unsafe to convict on the uncorroborated testimony of the complainant in a rape case and the reason for that requirement. He then went on to say:

> *"So the law in its wisdom requires you to look for corroboration of the story of the complainant. Corroboration is any supportive evidence which shows that the story related by the complainant is true. I can do no better than cite to you the definition of corroboration by Lord Simon in an English case.*
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> *In the case of DPP v. Kilbourne (1973) 1 AER 440 at 441 Lord Simon said:-*
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> > *"Corroboration is therefore nothing other than evidence which confirms or supports or strengthens other evidence ... It is, in short, evidence which renders other evidence more probable".*
>
> *See whether there is some evidence, some other evidence besides the evidence of the complainant which confirms or supports or strengthens her evidence. It is some evidence which will render the evidence of the complainant more probable.*
>
> *Such evidence need not mean the oral testimony of some other witness, it can be furnished by any other material provided it supports or confirms the story of the complainant."*

This direction, correct as far as it goes, is unfortunately not sufficient in that it is not a complete or accurate definition of corroboration. It is necessary to make clear that to constitute corroboration it is not just evidence that confirms or supports or strengthens the complainant's evidence but also that it comes from a source independent of the complainant and that it confirms, or tends to confirm, in some material particular, that both the crime alleged was committed and that the accused committed it. See **R v Baskerville** (1916) 2 KB 658 at 667. Here the Judge has left the clear impression that any evidence that confirms, supports or strengthens the complainant's evidence could constitute corroboration and specifically he has not made clear that it must be in a material particular. It may be helpful at this point to add that, generally speaking, a Judge should in his direction also say that the evidence relied on as corroboration that the crime was committed may, of course, be quite different from the evidence relied on to corroborate that the accused committed it; and, further, that it is desirable to include a warning that there is no need for there to be independent evidence of everything the complainant says. Further, the Judge should tell the assessors that they may convict even if there is no corroboration if they are wholly satisfied and convinced of the accuseds guilt by the complainant's evidence.

It is the Judge's duty to point out to the assessors the evidence that is capable of amounting to corroboration. In this instance no question of the identity of the accused arises and

therefore the corroborative evidence must go to the question of whether the crime was committed. In other words it must be evidence that confirms, supports or strengthens the complainant's evidence that the accused had intercourse with her against her will. The learned Judge referred to three matters. The first related to the complainant being pulled by the accused at the bus stand and into the taxi. That is not really a material particular in this context in that it does not bear upon the issue of forced intercourse, though the evidence of the woman friend may well strengthen the complainant's credibility generally. The second related to the evidence of the complainant's distressed condition when seen later by the woman friend and by her parents. On this aspect we accept Mr. Savu's submission that the learned Judge overstated the position. The weight to be attached to evidence of this nature varies greatly. As was said in **R v Redpath** (1962) 46 Cr. App. R. 319:-

> *".....the circumstances will vary enormously and in some cases quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any, weight to that evidence because it is all part and parcel of the complaint. The girl making the complaint might well put on an act and simulate distress"*

Also see generally Archbold "Criminal Pleading Evidence and Practice" 42nd Edn. 16-9 at p.1139. The learned Judge plainly did

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not, on this aspect, give the assessors any such direction as was indicated as being necessary in **Redpath**.

The third matter referred to is the crucial one. The learned Judge said this:-

> *"Now another item of corroboration is the medical report in this case. The doctor could not be summoned to give evidence because the doctor had left the country. The medical report was produced. Now the medical report says that....."*

(We understood from counsel during the hearing that the doctor has now returned to this country).

If this Court was satisfied that the doctor's report was acceptable evidence then it would, we think, be capable of amounting to corroboration; but we are not so satisfied. In our view it is not acceptable evidence and our reasons for this view we now dicuss.

The medical report was put in evidence pursuant to S.191 of the Criminal Procedure Code, about which we have something to say later. The report is headed "Medical Officer's Report" and on its face is a standard printed Fiji Police form. It is addressed to the medical officer and requests him or her to conduct a medical examination of the named person and to complete the questions and paragraphs that follow. The form is divided into three parts, A, B and C. On the front page of this four page document in Part A there is this statement "She alleged that she

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was raped at Stirling Place, Lami tonight at about 7.15 p.m." Then follows what appear to be some questions for the doctor to answer and though there appears to be space on this page to deal with these matters nothing is recorded, but on the next page in Part B under another heading there are what one assumes are the doctors answers to these questions. These are handwritten, brief and most unfortunately very difficult to read. In respect of one question there are three lines and it literally is not possible to say, with confidence, what the words are. The position is not helped by the fact that there are two large gaps, which may or may not be intended, and that the doctor's pen appears to have been failing as several words are indecipherable by reason of faintness. One can speculate as to the meaning of all the words but one cannot be sure. There are references to specimens being taken to the laboratory but there is no reference anywhere to any result.

The other questions and paragraphs contain further handwritten, and in many instances, abbreviated answers. We have not been able to determine the significance of several matters contained in the report and in addition there is no explanation as to the results, or rather lack of them, of the specimen sent to the laboratory or in respect of other material upon which tests were apparently done.

In our view a document on a crucial issue which is so unclear, difficult to read let alone understand, is unacceptable as evidence on so important an issue on so serious a charge. No

assessors could reasonably be expected to rely upon it in reaching their decision. In our view on this basis alone it should not have been admitted in evidence. We add that there would, of course, be no objection should the doctor be available and be called as a witness for the prosecution for the defence, if it chose, to put the report to her and cross-examine her upon it. We wish to add, however, that what we have said does not in anyway imply criticism on our part of the doctor who made the report. He or she was acting perfectly professionally and properly and we do not for a moment think he or she anticipated that the report would be put in evidence in that form on a criminal trial in the High Court on an extremely serious charge.

There is a further reason why the medical report should not have been admitted. As already noted it was put in, with the leave of the learned Judge, in terms of S.191. That section provides for the putting in evidence, in certain circumstances, of plans, reports, photographs and other documents without calling the maker unless that maker is required to attend by the Court or the accused. If so required by the accused he must give notice to the prosecutor not less than three days before trial. There is a proviso to the Section to the efect that where the prosecutor intends to adduce in evidence such an item he must deliver a copy of the item to the accused not less than 10 days before the trial. Mr. Savu contended that this requirement had not been met by the prosecutor and therefore the report was not admissible; Mr. Wikramanayake, on the other hand, had submitted that it clearly had been met because the committal for trial

proceedings included this medical report and that would have been made available to the accused well before the trial. Mr. Wikramanayake invited the Court to examine the committal proceedings which he submitted had been made available to the High Court. It is no part of this Court's duty to fossick among the files of the High Court or those of the committing Magistrate; if counsel wishes to rely upon them he should search them himself and seek leave to put the relevant documents before the Court. The Court has, however, looked at the committal proceedings. There is, however, no record to indicate how the report was produced as an exhibit. The file record also shows that when the case was called on the 20th June 1992, the accused (appellant) then being present, the prosecuting counsel sought leave to submit the witnesses' statements and exhibits. The court then said that in view of the accused not being represented the matter would be adjourned to the 3rd July to enable him to consider the evidence. On the adjourned dated the accused did not appear. There is nothing to indicate that S.191 was complied with at that stage in respect of the medical report nor that the accused was at any stage served with copies of the statements and exhibits. In our view it was not established at the trial that S.191 had been complied with and accordingly the medical report should not have been admitted in evidence. We add that a question may remain as to whether delivery of a document for the purpose of committal proceedings would satisfy the requirements of S.191 in respect of the subsequent High Court trial and the prudent prosecutor would ensure that S.191 was

complied with in a separate procedure and not rely on what may or may not have happened at the committal.

We consider it desirable on this aspect to refer to the fact that the appellant was unrepresented. It is scarcely to be supposed that he would have had any knowledge of the provisions of S.191. It is, however, traditional practice for the Judge in cases where the accused is unrepresented to take special pains to ensure that he is informed of special provisions, procedures and legal technicalities which affect him and to assist him to understand the courses open to him. Unhappily that did not occur here.

For all these reasons we are satisfied that the conviction cannot stand. The appeal will be allowed, the conviction quashed and a new trial ordered.

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Sir Moti Tikaram
Acting President Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr Justice Savage
Judge of Appeal