IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0001 OF 1995
(High Court Criminal Case No. 17 of 1993)

BETWEEN:

SUNIA BANUVE NEMANI LALABALAVU	APPELLANTS
-and-	
THE STATE	RESPONDENT

Mr. T. Savu for the First Appellant
Mr. V. Tuberi for the Second Appellant
Mr. S. Senaratne for the Respondent

Date and Place of Hearing	:	14 November 1996, Suva
Date of Delivery of Judgment	:	15 November 1996

JUDGMENT OF THE COURT

The Appellants, after a trial lasting 65 days, were found guilty of rape, by a majority decision of the assessors. They were convicted by the learned trial Judge, and following the preparation of antecedent history reports, they were, on 2 December 1994, each sentenced to 8 years imprisonment.

The Appellants now appeal against their convictions only.

The Complainant Miss Druguivalu, was a 23 year old staff nurse employed by the Fiji Public Health Service who had been posted to the Health Centre at Solevu village on the island of Malololailai. She took up her position as staff nurse to administer the islands medical and health requirements on 13 May 1993.

On 20 May 1993 she met the Appellants who were arranging to transport by boat a tourist who wished to visit Plantation Island. It was about 4 p.m. in the afternoon and when the Complainant expressed an interest to visit the island the Appellants agreed she could accompany them. After the tourist alighted at Plantation Island the Complainant spent the next 6 or 7 hours with the Appellants in their boat visiting adjacent islands. At the same time the 3 of them consumed substantial quantities of liquor. Consequently by midnight when they disembarked near the village of Yaro which is about half an hour walking distance from Solevu where they had set off from earlier in the afternoon, they were all heavily intoxicated.

Upon disembarking from the boat, which by this time had run out of petrol, the Appellants, in giving evidence in their own defence, explained how they all continued to drink on the beach and in turn had sexual intercourse with the Complainant which she willingly and actively encouraged.

The Complainant on the other hand in her evidence explained how she became so concerned with the Appellants attitude towards her that she ran away; was caught from behind; was forcibly held down on the ground and raped first by one of the Appellants; and then in turn by the other Appellant while being held down by the Appellant who first attacked her. As a result of the intensity of the attack she lost consciousness for what she estimated was about 3 hours. When she recovered she went to a nearby house for assistance, and subsequently reported the incident to the Police.

Both Appellants were separately represented by Counsel during the lengthy trial. They are now separately represented before us at this appeal hearing. It will be appropriate therefore if we consider each appeal separately.

The first Appellant is Sunia Banuve and the grounds of his appeal are as follows:-

> *"1. That the learned trial Judge erred in law in treating the medical report as corroborative of the Complainants testimony in his giving of directions to the assessors;*
>
> *2. That the learned trial Judge erred in law in directing the assessors as to what is corroboration instead of allowing the assessors to determine that fact themselves."*

Dr. Osea Tuidraki who was in charge of the maternity section of the Nadi Hospital provided the medical report produced as Exhibit 1. The Doctor's report was not tendered as evidence pursuant to the provisions of section 191 of the Criminal Procedure Code 1978 (Cap.21). Rather the Respondent called the Doctor to give evidence at the trial. The record shows that he was subjected to extensive cross-examination over two days of the trial. His evidence is recorded from pages 58 to 70 of the record.

Counsel submits that the format of the medical report prepared in part by the Police and completed by the Doctor "should not have been accepted by the trial Judge as

corroborative evidence". However he goes even further and claims "... that the Medical Practitioner's objectivity and independence has been greatly compromised and subsequently highly questionable ...". Why the format of the questions contained in the printed medical report should attract such offensive criticism of Dr. Tuidraki we are at a loss to understand. The Doctor has practised his profession for more than 34 years and we can find no justification in all the evidence before us to suggest that his objectivity and independence has been in any way compromised. We totally reject that submission.

However the first Appellants real challenge to the medical report is whether it can be treated as corroborative of the Complainants testimony. The learned trial Judge carefully directed the assessors, that they were entitled to accept or reject the evidence of Miss Druguivalu. He went further and stated at page 564:-

> *"Finally, I must direct you about a very important aspect in this trial. You are entitled to find each accused guilty of rape on the evidence of Miss Druguivalu alone. That is to say, if you believe Miss Druguivalu's evidence and reject the evidence of each accused, then you are entitled to find each accused guilty. However I must warn you that it would be very unsafe to do so. You must be very very careful and extremely cautious in doing so, for it is unsafe to reach a finding of guilt unless you are absolutely sure in such circumstances."*

Having cautioned the assessors in such strong terms the learned trial Judge then referred them to the independent

evidence which was available to corroborate Miss Druguivalu's evidence. He addressed the assessors in this way:-

> *"If you accept Miss Druguivalu's evidence, there is independent evidence of her which corroborates her allegation of rape by each of the accused. The evidence in this regard is that of her physical injuries. She said that those injuries were inflicted upon her by the two accused when they raped her. Dr. Tuidraki gave evidence about the nature of those injuries. If you accept that evidence from Miss Druguivalu and Dr. Tuidraki, then those injuries amount to independent corroborative evidence in the circumstances of this case supporting the lack of consent on Miss Druguivalu's part, and the intention of each accused to either have sexual intercourse with her without her consent, or not caring whether she consented or not.*
>
> *Thus, if you accept Miss Druguivalu's evidence that the injuries on her body were inflicted by the two accused as she alleged then you have independent corroborative evidence which can satisfy you beyond reasonable doubt that she did not consent to the act of sexual intercourse with each accused, and, that at that time of sexual intercourse, each accused intended to have sexual intercourse with her without her consent, or at least was indifferent to, or couldn't care less whether she consented or not. Conversely, if you do not believe Miss Druguivalu in that regard and believe that her injuries came about as a result of falling over on the coral and the rocks, as well as passionate consensual sexual intercourse with the two accused, then you must acquit the two accused."*

That record discloses very clear directions to the assessors and the extreme caution they were to apply in evaluating Miss Druguivalu's evidence. The learned trial Judge then referred to the physical injuries identified by Dr. Tuidraki. He explained that, subject to the assessors accepting the evidence of those

two witnesses, the injuries amounted to independent corroborative evidence.

The real issue before the Court was the question of consent, and whether the trial Judge had directed the assessors either correctly or adequately when he said:-

> *"...whilst a court may convict a man of rape in a case where it is only the woman's word against that of the man, it is very unsafe to do so and it would be much better if there were independent evidence of the woman that supported, or corroborated her allegation of rape. For the purpose of this case such independent evidence should support, or corroborate the lack of consent to sexual intercourse..."*

We believe that the assessors were properly and adequately directed on the corroborative value of the physical injuries contained in the medical report, and that it was their responsibility to decide on the strength or weakness of that evidence.

We turn now to consider the second ground of appeal. Counsel suggests that the learned trial Judge in explaining the meaning of corroboration went beyond mere explanation, and "directed" the assessors instead of allowing them to make that determination. However assessors are always entitled to know what evidence they may or may not take into account as corroboration. In fact if the learned trial Judge had failed to so direct the assessors then that failure may have been ground for quashing the conviction.

Counsel for the first Appellant has referred us to the case of R v Farid (1945) 30 Cr. App. R. 168 which decided that whether evidence was capable of being corroborative was a question of law for the Judge; but it was for the jury to determine whether or not the evidence was corroborative.

Relying on that authority Counsel referred to the summing up on pages 564 to 566 where the assessors were directed that if they accepted the Complainant's evidence:-

> *"... there is independent evidence of her which corroborates her allegation of rape by each of the accused."*

and that if they accepted the Complainant's and the Doctor's evidence:-

> *"... then those injuries amount to independent corroborative evidence."*

Counsel submitted that such direction went beyond explaining what constituted corroboration. He put it this way:-

> *"... that the learned Trial Judge has virtually `directed' in the real sense, the Assessors into accepting his opinion as their own whereby pre-empting the Assessors from determining on their own their findings of fact and in effect the learned Trial Judge has played the role of both the Tribunal of Law, which is exclusively his domain and the Tribunal of Fact, which is exclusively the domain of the Assessors."*

We do not accept that submission. Counsel for the first Appellant has ignored the totality of the summing up to the assessors relating to this issue of corroboration which was contained in pages 564 through to 566. Throughout that portion of the summing up, the learned trial Judge issued the appropriate warnings which clearly indicated that it was the responsibility of the assessors to determine whether or not that evidence was corroborative. In fact he went further and emphasised that it was for them to decide whether any piece of evidence was credible or not.

For the reasons stated above we dismiss the appeal lodged by the First Appellant.

The grounds of appeal put forward on behalf of the Second Appellant were as follows:-

> *"1. THAT the Learned Judge erred in law in failing to properly direct himself and the assessors on the laws relating to corroboration.*
>
> *(a) He failed to direct himself to give a mandatory warning on corroboration as the case before the assessors involved accomplices in a complaint of sexual nature.*
>
> *(b) He failed to properly direct himself about his role on the nature of the corroboration warning.*
>
> *(c) He failed to properly direct the assessors on the definition of what that constituted corroborative evidence.*
>
> *(d) He failed to give sufficient warning about the laws on corroboration.*

(e) He failed to direct the assessors to the application of the laws of corroboration to each individual accused as both are accomplice in the allegation.

2. THAT in all circumstances of the case the conviction of the Second Appellant is unsafe and unsatisfactory"

Second Appellant's counsel put forward lengthy submissions in support of ground one. The submissions in the majority of cases however differed very little from those put forward on behalf of the First Appellant and were, with respect, frequently repetitious. We have dealt with them in the first part of this judgment.

When analysed the only additional point to those put forward on behalf of the First Appellant was that each accused was an accomplice to the alleged offence committed by the other.

In common parlance, the term `accomplice' describes one who has in some way been involved culpably in the wrongdoing in question. Such persons are sometimes called for the prosecution to give evidence against an accused. Frequently, they are persons who were originally charged jointly with the accused, and are therefore competent witnesses for the prosecution only because they have pleaded guilty or have had proceedings against them discontinued, or for whatever reason have ceased to be among the accused in the proceedings. Habitually, they agree to give evidence for the prosecution in return for not being prosecuted, or for having their plea of guilty to a lesser offence accepted

by the prosecution, or in the hope of attracting leniency in sentence. In other cases, the evidence given discloses that a witness may be implicated in the offence charged, and so stand in peril of being prosecuted subsequently. In all such cases, the common law recognises an obvious danger, arising from the motive of avoiding or minimising the witness's own involvement in the offence charged, and of emphasising, or it may be, fabricating, that of the accused. A warning must accordingly be given to the jury that the evidence of an accomplice is dangerous to act upon, in the absence of corroboration.

Each accused gave evidence but there were discrepancies between their evidence. His Lordship said:-

> *"Also Nemani Lalabalavu gave evidence that he and Sunia Banuve left for Beqa on the 22nd May 1993 i.e. the day after the incident whereas Sunia Banuve said that they left on the same day as the incident i.e. on the 21st May 1993. If you believe Sunia Banuve and believe Nemani Lalabalavu lied in that part of his evidence in order to show his presence in the village with Miss Druguivalu on the same day as the incident, which in turn, was in order to show that nothing wrong had happened the night before with Miss Druguivalu, and that they did not run away because they had no reason to run away, then such a lie in those circumstances would amount to corroboration of Miss Druguivalu's allegations of rape by the second accused because you would be accepting that the second accused lied in that regard on behalf of the first accused and himself in order to avoid guilt."*

Counsel for Second Appellant submitted therefore that there should have been a warning that it was dangerous to convict on

the uncorroborated testimony of an accomplice. Here however it was the testimony of the accused which it was suggested could be the corroboration of the evidence of the Complainant. The testimony of an accomplice was not being looked at to see if it corroborated the evidence of the other accused. Nor was it being put forward to implicate the other accused - it was intended to exculpate them both.

In Blackstones Criminal Practice 1993, page 1822 the learned authors say:-

> *"The accomplice rule applies only to witnesses called for prosecution. An accused who gives evidence in his own defence is not an accomplice for the purpose of making his evidence subject to the requirement of corroboration warning, even though that evidence may implicate a co-accused in the offence charged, (Barnes 1940 2 All E.R. 229)."*

The purpose of corroboration is to establish that the evidence corroborated should be accepted. Here the corroboration is said to be the lie told by the second accused. The assessors heard the two accused giving contradictory evidence. If the second accused lied that could corroborate the evidence of the Complainant. The Judge had already told the assessors about the desirability of such corroboration and left the matter to them. There was no misdirection by the learned trial Judge in the passage we have quoted, nor should he have directed the assessors that the evidence of the Second Appellant needed corroboration. That evidence was the corroboration of the Complainant's

evidence. Counsel for an accused who elected to give evidence in his own defence and exculpatory of the other accused would undoubtedly object if the Judge were to warn the assessors that it was necessary for his evidence to be corroborated because he was an accomplice to a co-accused. We do not find any basis in the further submissions put forward by the Second Appellant in ground one for allowing the Second Appellant's appeal. With regard to the second ground of appeal we find no merit in it and understandably no submissions were made in support of it.

In our opinion the learned trial Judge was amply justified in accepting the majority opinion of guilt in respect of both Appellants.

We find that there was sufficient evidence on record to independently corroborate the Complaint's credible testimony that she did not consent to intercourse with either of two Appellants.

We, therefore, dismiss both Appellants' appeal against conviction for rape.

Moti Tikaram

.....
Sir Moti Tikaram
President Fiji Court of Appeal

D. V. Hillyer

.....
Mr. Justice Peter Hillyer
Judge of Appeal

.....
Mr. Justice J. D. Dillon
Judge of Appeal

C:\WPDOCS\SALA\AAU0001U.95S