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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0003 OF2000S
(High Court Criminal Appeal No. HAC006 of 1998L)

BETWEEN:

INOKE BULI

Appellant

AND:

THE STATE

Respondent

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Rodney Gallen, Justice of Appeal
The Hon. Mr Justice John E. Byrne, Judge of Appeal

Hearing: Wednesday, 16th May 2001, Suva

Counsel: Appellant in Person
Mr. J. Naigulevu for the Respondent

Date of Judgment: Thursday, 24th May 2001

JUDGMENT OF THE COURT

The appellant Inoke Buli was convicted in the High Court of Fiji at Lautoka on a charge of having had unlawful carnal knowledge of Belinda Margaret Carroll without her consent. He was sentenced to 12 years imprisonment. He appealed against both conviction and sentence. The appellant was not represented by Counsel in the High Court and he has represented himself in this Court.

The complainant is the step daughter of the appellant. She said that at a time when her mother was sick the appellant wanted her to go with him to the funeral of his brother. They went in a red van and also took the nephew of the appellant. She said that they arrived at a disco at 1.00 a.m. after midnight and that the

appellant was drinking. She said that she drank only lemonade. She claimed that he took her to the beach and asked her for sex. He then dropped off the nephew at a petrol shop. She claimed he parked down near sugar cane near a bridge on the highway and again said he wanted to have sex with her. She claims to have said that was wrong because she was his step daughter. She claimed that he then said to her "come here". She said no and he then said "this is your step father talking to you. If I say you have sex with me, you have sex with me". She then claimed to have refused. She then said that he had threatened her and had said "I could kill you right now, I could smash your face with your glasses". She alleged that certain touching then took place and that he said to her "I'm going to teach you what a boy does to a girl". She said that he told her to lie down and had intercourse with her. The appellant denied that any intercourse took place and he maintained that denial in an unsworn statement made during the trial.

His first ground of appeal is that the prosecution failed to prove beyond reasonable doubt the necessary ingredients of the charge with particular emphasis on an allegation that the prosecution had failed to prove sexual intercourse between the appellant and the complainant. The substance of his submission is that the evidence of the complainant was too unsatisfactory to establish the necessary ingredients of the charge. He contended that the evidence of the complainant as given in court contained contradictions and that her evidence substantially conflicted with the statement she had previously made to the police.

Before considering either of these submissions it is necessary to draw

attention to the fact that the complainant although 20 years of age was said to have the mental capacity of a 7 year old and the social capacity of a 14 to 16 year old. In considering therefore the submissions made the court must bear in mind her mental capacity is a factor.

Dealing with contradictions the appellant contends that there was a contradiction in the evidence of the complainant when she accepted that it was dark at the time of the alleged incident but that she was nevertheless able to ascertain that the person who had assaulted her had what were described as three lumps on his penis. He submitted that not only was this a contradiction but it was evidence in any event supplied by the mother of the complainant with the purpose of incriminating him.

When further examined by the prosecution the complainant stated she knew "he had three hard things on his penis because "I felt; it I saw there were three when he was rubbing his penis". The appellant expressed concern that in answer to a question in cross-examination as to whether or not there was any witness to what was supposed to have happened, she answered "No, it was dark" and this matter was not further pursued in cross-examination. The appellant contends if it was so dark a witness could not see what happened she could not have seen the lumps. We do not see that there is a necessary contradiction. There is a distinction between what a witness (if there had been one) could have seen and what the complainant in close proximity could have been aware of.

The appellant also stated that the evidence as to lumps on the penis of

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the accused had not been included in the statement the complainant made to the police. He asserted that such an identification was a matter of importance and her failure to mention it cast doubt on her later evidence. In evidence the complainant emphasized her knowledge of identity by reference to the relationship between herself and the appellant. It is understandable that when speaking to the police she would not have considered identity in question.

The appellant refers to the evidence of the complainant subsequent to the alleged rape. She claimed to have had to push a vehicle because it would not start. He submits that there is doubt on her evidence as to whether or not the vehicle was a van or car or whether she would have been in a position to assist in this way if she had been treated as she claimed. We do not think there is any necessary inconsistency in this material which would throw sufficient doubt on her evidence to make it unsafe to convict.

In further allegations of inconsistency he notes she said that she and the appellant arrived at a disco at 1 a.m. and described drinking which took place subsequently. The appellant maintains that the disco closes at 1 a.m.

He draws attention to the fact that the complainant said that she had seen blood on her panties when she took her clothes off. Subsequently she was unable to remember the colour of the panties she was wearing on that day.

He says that there is a doubt as to the clothes which she was wearing at

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that time of the alleged incident.

He submits too that her evidence with regard to an alleged boy friend was inconsistent.

In his cross-examination the appellant put the disco time concern to the complainant and received the answer she did not know the exact times. He did not pursue the other matters on which he now relies.

All of this material was before the assessors, it was material which they could take into account in assessing the reliability of the evidence of the complainant, but there was nothing in it which necessarily vitiates the verdict.

The appellant's second ground was that the directions as to recent complaint did not place the emphasis on the purpose for which such evidence was admitted. There was a direction as to recent complaint at the conclusion of the summing up, at the request of the prosecutor. It is plain from reading this addendum to the summing up that the Judge did refer to the complaint being used for consistency only and at a time which gave emphasis to it.

The appellant's third ground was that the evidence of the complainant was fabricated by the mother of the complainant arising out of differences he had had with the complainant's mother before the incident the subject of the charge. The

mother gave evidence but she was not asked questions in cross-examination to this effect.

The appellant's fourth ground raises the question of corroboration. The Judge dealt with corroboration in the summing up in a number of passages. In referring to corroboration he correctly defined it for the purposes of the assessors and noted that according to law it was necessary as a matter of caution to look for corroboration on a complaint of this kind and that it was dangerous to convict without it. The Judge advised the assessors that there was corroboration of the complainant's evidence that there were three hard objects on the penis of the appellant in the evidence of the mother of the complainant who was the appellant's wife. He also considered that there was some corroboration of the evidence of the complainant in the statement made by the appellant in which he accepted that he was somewhere in the vicinity at the time of the allegations. He advised the assessors that the medical evidence to the effect that there was evidence of recent fairly rough inter-course could constitute corroboration. That evidence did not directly implicate the appellant but could amount to corroboration as to the element of lack of consent if the assessors were satisfied intercourse with the appellant had taken place. The Judge was careful to point out to the assessors that it was for them to determine whether or not there was corroboration and that they were in any event entitled to convict in the absence of corroboration. We are satisfied the criticism of the summing up with regard to corroboration cannot stand.

Finally the appellant put a considerable emphasis on the submission to which reference has already been made that the complainant had been put up to

complain by her mother because of the dispute she was having with the appellant. The Judge specifically advised the assessors that they needed to be careful in considering the evidence of the mother because of the closeness of the complainant to her mother. There was no evidence to support the contention.

We are satisfied that this was a case which raised questions of fact for determination by the assessors. We do not find that there is any basis for setting aside the verdict.

The appellant also appeals against sentence. He contends that the aggravating factors referred to by the Judge were not aggravating factors and ought not to have resulted in the sentence which was imposed. He points out in particular that a lack of remorse cannot be an aggravating factor when a person has quite properly relied upon his right to trial and insists the incident did not happen.

The Judge in sentencing noted that the appellant had had a previous conviction for rape followed by a sentence of imprisonment. He noted that the victim was mentally retarded and the step-daughter of the appellant given into his care by her mother who was ill. He expressed in strong terms his disapproval of the behaviour of the appellant.

The starting point for sentences of rape in Fiji is in the vicinity of 7 years imprisonment. In this case the fact that it was a second conviction must result in a longer term. We agree with the sentencing Judge that it is also appropriate to reflect

in the sentence the fact that the complainant was mentally handicaped and in the care of the appellant who was her step-father, and accordingly in a position of trust. We had only minimal material with regard to the level of sentences in cases of this severity. In our view however, while we regard the sentence which was imposed as being at a high level, we do not consider it so excessive as to justify its reduction.

Result

The appeals against both conviction and sentence are dismissed.

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Sir Maurice Casey
Presiding Judge

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Sir Rodney Gallen
Justice of Appeal

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Mr Justice John E. Byrne
Judge of Appeal

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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