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

CRIMINAL APPEAL NO. AAU 0014 OF 1997S
CRIMINAL APPEAL NO. AAU0059 OF 1999S
(High Court Criminal Case No.HAC0022 of 1997)

BETWEEN:

1. KITIONE VESIKULA
2. SAKIUSA SIRINATURAGA

Appellants

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: Friday, 18 May 2001, Suva

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

Date of Judgment: Thursday, 24 May 2001

JUDGMENT OF THE COURT

The appellants were each convicted on a charge of rape following a trial in the High Court at Suva. Each was then sentenced to 10 years imprisonment. Both appealed against conviction and sentence. Both accused represented themselves at the trial. They were for a period represented by counsel on the appeal, who put forward written submissions on behalf of each of them and these were before the court. Counsel did not however appear at the hearing of the appeals and the appellants again represented themselves.

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The complainant in this case was 21 years old at the time of the trial. She alleged that on the 31st of December 1995 she went alone to Signals nightclub where she met two other persons, one of whom was Timoci Waitawa. She remained at the nightclub until closing time 1: 00 a.m. in the morning when she left with her friend and Timoci, together with certain other persons not known to her. She went with the others to Toorak by taxi and they got out of the taxi beside the Dudley church. They walked up Amy Street to Brewster Street. There were said to have been some ten persons in the group. She claimed to have walked away from the group and to have had sexual intercourse with Timoci. They then returned to the others in Brewster Street. She said that when they got back to the steps in Brewster Street they were empty. They returned to Amy Street when she saw a boy coming who said something to Timoci. This boy, she claimed, took hold of her and said he wanted to talk to her. She said she did not want to talk to him. She claimed that he held her hand and pulled her towards Brewster Street. She was shouting she did not want to go with him. She said that Timoci had disappeared.

She said that she was pulled to the cassava patch behind the stairs where her friends had been. She said that there was a stone slab there from the remains of a house, that she was pulled there, pushed to the ground and fell onto the slab. She claimed that the boy tried to take off her underpants. She shouted for assistance and saw some more boys coming towards them through the cassava patch. She claimed that she saw a Fijian man who was strongly built, a very big man who came and said to "give herself". Without going into further detail she claimed that she was forced by the first boy to have sexual

intercourse with him which included penetration. After that intercourse had finished she stood up and put on her pants and she claimed then that a big man who had spoken to her before came towards her, pushed her to the ground, took off her pants and did the same as the first one, having sexual intercourse which included penetration. While the second man was still on top of her she saw a light approaching. Those approaching were police and their presence brought the incident to an end.

The first ground taken on appeal involves an allegation that in his summing up, in referring to the question of demeanour the Judge's comments to the assessors were unbalanced. The appellants claimed that in referring to the evidence of the complainant the Judge made a comparison between the possibility that she was a scheming devious girl or a soft feminine not overly robust girl, and then made the contrast as to how strong she would have needed to be to resist a man of the build of the appellants. The appellants complained that this part of the summing up appeared in the context of a reference to demeanour but had nothing to do with demeanour and was likely to unfairly influence the assessors. It is true that the comment appears in the context of a reference to demeanour but the context in the summing up was wider than this. The Judge was in fact referring to matters which the assessors could take into account in deciding whether or not they could rely upon the evidence of the complainant. The Judge put the matter on the basis that how the complainant appeared was a matter for the assessors. Although the comment does appear favourable to the complainant the Judge went on to remind the assessors that the appearance of the complainant at the time of trial might have been different from her

appearance at the time of the alleged incidents pointing out that at the time of the trial she had just given birth. Such a comment was favourable to the appellants.

The appellants then submit that, although the Judge correctly advised the assessors of the necessity to reach a verdict beyond reasonable doubt, this was not specifically directed at the right of the appellants, nor did it take into account discrepancies in the evidence from the prosecution witnesses which might have led to such a doubt. We cannot agree with this submission and do not consider that the assessors would have been misled by the way in which this aspect of the summing up was put to them.

The third point taken on appeal related to a lack of injury. The complainant said she was forced down onto a concrete slab. The Judge in his summing up noted that she did not have any injury which she might have been expected to sustain from a forcible placing onto a concrete slab which had projecting material, saying that this may have occurred on the slab or partly off the slab or "whatever". The point taken by the appellants is that if she had been on the slab (as she had stated in her evidence) then the lack of injuries was a significant point in determining whether or not there had been consent to intercourse which had taken place. The Judge told the assessors to consider all those things. While his summing up may be interpreted as including an explanation favourable to the prosecution, this is not necessarily so, nor would it have been an improper exercise of the Judge's obligation to refer to the material before the Court. The appellants took particular exception to the use of the term "whatever" and this was

emphasised by Mr Vesikula. We do not think that this assists them. The question in the end is whether or not the assessors believed the evidence of the complainant overall. The absence of injuries was no doubt a factor to be taken into account but it is plainly only one aspect.

The fourth point taken by the appellants relates to corroboration. They submitted that it was unfair of the Judge to advise the assessors there was a considerable amount of corroboration and in particular they complain that one of the aspects of the evidence which the Judge accepted as being corroborative was not as a matter of law corroborative. That was a reference to an admission by the appellant Sirinaturaga that he was there. His presence is a part of the prosecution case and the Judge was correct in accepting that it linked the appellant to the incident at least to some limited extent, even if it did not corroborate other necessary ingredients of the offence. The appellants complained that the Judge did not specifically state to the assessors that it was dangerous to convict in the absence of corroboration and cited authority to the effect that such an omission was serious. The Judge informed the assessors that they could convict without corroboration but went on to say that it was very advisable to look for it. The Judge specifically noted that there was only the uncorroborated evidence of the complainant that any intercourse which took place was without consent. While it is usual for the direction to include the word "dangerous" that is not essential provided the meaning is otherwise adequate and the assessors made fully aware of the dangers. (*R v. Spencer & Others* [1986] 2 All E.R. 928 (House of Lords)). We are satisfied that in the circumstances of this case and

in the context of the summing up as a whole, the assessors could not have been left in doubt about the risk of convicting without corroboration.

The fifth ground on which the appellants rely is that the Judge put too much emphasis on the distress of the complainant as material negativing consent. He said "the law says that distressed state is not something to be over-exaggerated by assessors. Certainly in a particular case it can be quite powerful. You might think it is here." He then referred to the particular evidence. He went on to say "So you ask yourself is this all put on or is it a very genuine rape victim and you can take account of the distressed state on the question of consent or otherwise." We do not think that this criticism of the summing up can be sustained.

The sixth ground on which the appellants rely is one of balance. The appellants claim that the defence put forward by the first appellant is dealt with in 8 paragraphs out of a summing up which contains 133 paragraphs. The second appellant has his defence dealt with in two paragraphs. We do not think that a submission based on mathematical proportions such as this can succeed. While an unbalanced summing up amounting to real prejudice to the defendant may give grounds for an appeal, this is not such a case. The question is whether or not the defences were put and here they were.

Finally the appellants relied upon an alleged inconsistency in the medical report. This point was further emphasised by the appellants at the hearing before us. The

medical report is contained in a document of two pages. The first page refers to an allegation that the complainant had been raped by one Fijian man. It is the appellants' contention that since this was patently contrary to the evidence of the complainant the Judge ought to have informed the assessors that it was a serious inconsistency. In fact the first page on which the statement appears is the police instruction to the Doctor. It was plainly not filled out by the Doctor who completed the medical report and his report quite expressly states that the complainant said she was raped by two Fijian men. The fact that the police docket refers to a rape by one Fijian man is a factor which the appellants might have raised as an inconsistency in a complaint to the police. But it was not so raised at the trial and is quite inconsistent with the other evidence from police officers. There is no substance in this ground.

The grounds referred to above were those contained in a submission prepared by counsel who was then acting on behalf of both appellants. Those submissions were dated the 15th of March 2000. In November of 1999 grounds of appeal prepared by the appellant Sirinaturaga were filed. Those were of course prepared before the submission of Counsel on which the appellants relied in this Court. They were substantially in line with that submission but we note that they contain an allegation that the prosecution failed to tender in court a statement made by the complainant to the police. This is not referred to in the submissions made by counsel. In the absence of any direct reference to inconsistencies the failure to produce such a statement would not at this stage be sufficient to support the appeal.

For the foregoing reasons the appeals against conviction cannot succeed and must be dismissed.

Both appellants also appealed against sentence. The Judge in his sentencing remarks expressed in very strong terms his view of the behaviour of the appellants. Having had an opportunity to hear directly the evidence it plainly convinced him of the seriousness of what had occurred. In this case the complainant was held to have been raped by two

men one after another in the presence of a number of onlookers. This is very close to gang rape which will always be regarded by the Courts as extremely serious. In the circumstances there were aggravating features which took this above the normal starting point for sentences for rape. We could not hold that the sentence as imposed was so excessive as to justify the interference of this Court. The appeals against sentence will also be dismissed.

Result

The appeals against conviction and sentence are dismissed.

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Sir Maurice Casey
Presiding Judge

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Sir Rodney Gallen
Justice of Appeal

FIJI COURT OF APPEAL

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Mr Justice John E. Byrne
Judge of Appeal

Solicitors:

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

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