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

CRIMINAL APPEAL NO. AAU0003 OF 2004S
(High Court Criminal Action No. HAM047 of 2003S)

BETWEEN:

SEREMAIA BALELALA

Appellant

AND:

THE STATE

Respondent

Coram: Ward, President
Penlington, JA
Wood, JA

Hearing: Tuesday, 8th November 2004, Suva

Counsel: Appellant in Person
Mr D. Goundar for the Respondent

Date of Judgment: Thursday, 11th November 2004

JUDGMENT OF THE COURT

The appellant was convicted in the Magistrates Court on one count of wrongful confinement (maximum sentence: imprisonment for 1 year or a fine of $400) and three counts of carnal knowledge without consent (maximum sentence: imprisonment for life). The trial Magistrate committed him to the High Court for sentence for the reason that the case called for a higher sentence than he was empowered to pass.

In relation to the offence of confinement, he was sentenced to imprisonment for 1 year. In relation to each of the other three offences, he was sentenced to concurrent sentences of imprisonment for 10 years. Those sentences were directed to be served

cumulatively upon the sentence for the confinement offence. The effective sentence, overall, was accordingly one of 11 years imprisonment, although when added to the period of 18 months, which the appellant had served awaiting trial and sentence, it was somewhat longer. He now appeals by leave given on 18 March 2004 against the conviction and sentence.

It was the prosecution case that on 11 July 2002 the appellant went to the Colo-i-Suva Forest Park, carrying a cane-knife. He noticed, and then followed, the female complainant, who was a tourist taking a walk in the forest. It was asserted that he seized her from behind and dragged her to an area near the pools, where he detained her over night, raping her on three separate occasions during the night, and also performing oral sex on her.

The detention occurred between the hours of 3 p.m. on 11 July 2002, to 7:30 a.m. on the morning of 12 of July 2002, and the complainant was found that morning in a wet, cold and distressed state.

It was the prosecution case that the appellant used the cane-knife to secure her submission, that he jabbed her in the side with it, and that he kept her in his effective control by means of force.

There was evidence which came from the security officer who found her, from the investigating officer and from a Medical Practitioner of distress on the part of the victim, and of signs of bruising and scratch marks to her person. Semen was found on her clothing. Spermatozoa was recovered from a vaginal swab. There was no DNA testing or other forensic test conducted to determine whether any of these samples came from the appellant. Her drink bottle was found in the area where she said that it was thrown by the appellant.

There was an identification parade conducted on 13 July 2002 at which the complainant identified the appellant. Evidence was received from her at trial.

In a caution interview conducted at 8:45 p.m. on 12 July, the appellant agreed to having had sexual intercourse, three times, with the complainant in the park, although by implication he suggested that this was consensual. Later, when charged, he admitted his guilt of all offences.

The appellant had a prior conviction in 1988 for the rape of a tourist which also involved the use of a cane-knife, which attracted a sentence of 4 years imprisonment. He had convictions for offences of robbery with violence, larceny and assault between that time and 1998, as well as a history of escaping from lawful custody. He was aged 47 years and had been working as a grass cutter.

The Reasons for Sentence

In sentencing the appellant, the Court took into account the following considerations:

(a) The maximum sentence should be imposed for the confinement offence because of its length, the motive for it, the use of a lethal weapon, and the fact that the victim was a tourist who was confined in a place specifically developed to encourage tourism;

(b) While the confinement to commit rape would normally warrant a higher starting point for the rape offences than the recommended 7 years imprisonment, this should be the starting point because of the separate count of confinement and the sentence which would be imposed for it;

(c) The appellant should receive a 2 year discount for the 7 year term by reason of the pre-sentence custody and the remissions which he would have earned had he been serving a sentence, as distinct from being held on remand;

(d) Having taken into account the appellant's objective and mitigating circumstances, a starting point of 4 years imprisonment was reached, which was scaled up to 10 years by reference to the serious objective circumstances of the rapes, the fact that the victim was a young and vulnerable tourist in a strange country with no family or friends, the prior record of the appellant, the fact that the earlier sentence for a similar offence had not acted as a deterrent, and the need to protect the women and children of the community.

<u>Appeal against conviction</u>

The appellant now appeals against the convictions upon the grounds that:

(a) There was no corroboration of the complainant, with the result that it would have been dangerous to convict him of the offences, upon her word alone;

(b) The presence of semen and spermatozoa, the evidence of distress, the bruising and scratching, and the finding of the complainant's water bottle in the area where she said the rape occurred, did not amount to corroboration, and rose no higher than evidence which was consistent with the complainant's account;

(c) The identification parade at the police station had been unfair in that the nine men who had joined the appellant in the parade had not fallen within the physical description, or the age group of 30 to 39 years, which had been supplied to the police when the complainant described her attacker;

(d) His Constitutional right to have a reasonable time to make his defence and to have counsel of his choice were denied.

Appeal against sentence

In relation to the sentence appeal it was submitted that:

(a) The sentences for the rape offences were manifestly excessive, having regard to the recommended starting point of 7 years for such offences, particularly taking into account the pre-sentence custody and the range for comparable offenders;

(b) All sentences should have been directed to be served concurrently since they arose out of the same events;

The Conviction Appeals

Corroboration

The primary issue which arises on this appeal, concerning the correct approach to the need for evidence corroborative of complainants in rape cases, is one of considerable public importance. It has a particular relevance since under Fijian law, rape can only be committed against women. (Section 149 of the Penal Code Cap.17).

It is first convenient to note that corroboration is evidence independent of the witness to be corroborated which "confirms in some material particular not only the evidence that the crime had been committed but also that the prisoner committed it": ***Reg v. Baskerville*** (1910) 2 KB 658. It means "confirmation" or "support" : ***DPP v. Hester*** (1973) AC 296. It does not have to prove, by itself, the guilt of the accused beyond reasonable doubt; it is sufficient if it confirms or tends to confirm the accused's participation, or involvement, in the crime charged ***Doney v.The Queen*** (1990) 171 CLR 207.

The evidence which was available, in the present case, concerning the forensic samples that were recovered from the complainant, her distressed state, the presence of bruising and scratches to her person, and the recovery of her water bottle, did not amount to corroboration of the involvement of the appellant in the offences that were charged. The position would have been otherwise had his finger prints been found on the water bottle, or had DNA from a sample provided by him been shown to have been of the same profile as that recovered from the complainant's clothing or vaginal swab. To amount to corroboration they needed to link him to the Commission of the offence.

His confession was potentially available as corroboration, subject to it having been obtained according to the law, particularly in so far as he may have disclosed events that were consistent with the complainant's account.

It is true that the evidence of bruising and of scratches, and of distress, was corroborative of the complainant's evidence of absence of consent: See ***Soqonaivi v. The State*** (1968) FJCA 64 and ***Reg. v. Redpath*** (1962) 46 Cr..App. Rep 319, although in the case of distress, consideration needed to be given to the possibility that the distress was due to some other reason.

Otherwise, none of the matters relied upon by the Magistrate rose above evidence of consistency with the complainant's account of the Appellant having been her attacker. The evidence, however still remained relevant for an assessment of her credibility as a witness.

To the extent that the Magistrate regarded these matters as corroboration of the appellant's involvement in the offences, the respondent concedes that this amounted to a misdirection in accordance with the law as it had been understood to the time of this appeal. However, it submits that the case is one which is fit for an application of the proviso to s.23(1) of the Court of Appeal Act Cap. 12, in that "no substantial miscarriage of justice has actually occurred." To that submission we will return.

Absence of Legal Representation

We next turn to the fact that the appellant was not legally represented during the trial. The record shows that he initially had representation, and that he sought, but was refused legal aid, as a result of a finding that he did not satisfy the merits test.

As a consequence, Ms Nair the duty solicitor, who had initially appeared for him, and who had cross examined the complainant on 17 July 2002, sought, and obtained leave to withdraw from the case on 31 July 2002. The appellant was given two weeks to find another lawyer, and the proceedings were adjourned for that reason. They were adjourned on several subsequent occasions, so as to ensure that he was given access to a telephone, and to a telephone directory, in order for him to engage a lawyer of his own choice.

On 11 September 2002, the trial was yet again adjourned to await the outcome of his appeal against the refusal of legal aid. Further adjournments were granted on 9 October and on 23 October, on the last of which occasions the appellant informed the Court that he could not afford a lawyer.

On 30 October 2002, the Court was advised that the legal aid appeal had been dismissed. Some evidence was taken that day from the medical officer who had examined the complainant. The remaining evidence was taken on 6 November 2002 and subsequently, and for the remainder of the trial, as was also the case on 30 October, the appellant was permitted, and took the opportunity of cross- examining the witnesses called by the State.

On 10 January 2003, the appellant asked for the hearing to be deferred to allow him time to prepare. He drew attention to the refusal of his appeal in respect of legal aid, and to his lack of funds. He said that he had found a relative who was proposed to advance some money for a lawyer.

The request for an adjournment was opposed by the State, which pointed out that the appellant had been given time to look for a lawyer, but had failed to do so. It was also pointed out that the trial was coming to a close. By that stage the evidence of the complainant, and of 7 prosecution witnesses had been taken. The Constitutional requirement for completion of the trial within a reasonable time was also relied upon by the State.

The request for a further adjournment was refused, and the trial proceeded, with the prosecution case closing on that day. The Appellant was advised of his options, following a finding of a prima facie case. He elected to give evidence, which he proceeded to give. He also indicated an intention to call four witnesses.

For a number of different reasons, including illness, the proceedings were adjourned on the next day that they were due to resume (on 5 March 2003), but continued on 15 April 2003, when the appellant completed his evidence. His witnesses were called on the following day, and they were followed by submissions from the prosecution and the appellant, which he had reduced to writing.

The right of defence is embodied in the Constitution (Amendment) Act 1997, and it is to the following effect:

> "28(1) Every person charged with an offence has the right:
>
> ....
>
> (d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid."

The desirability of any accused person having legal representation at a trial is obvious, for the reasons stated in ***Dietrich v. The Queen*** (1992) 177 CLR 292; but it is not an absolute right – ***Robinson v. The Queen*** (1985) AC 956.

The absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted. In this case, the appellant sought, but was refused legal aid by reason of an assessment of a lack of merits in his defence. The decision was properly reviewed and dismissed. Section 28 of the Constitution does not require the provision of legal aid in absolute terms. The obligation which is implicit in that respect is one which arises where "the interests of justice so require."

At a time when legal aid resources in the country are both finite and severely limited, the provision must be given a practical application. It cannot be read as guaranteeing legal aid for every case that is presented in the criminal list, no matter how hopeless might be the defence. Legal Aid needs to be preserved for needy cases.

In the present case the prosecution case was obviously compelling, particularly having regard to the appellant's confession. It was a case where legal aid was properly refused for lack of merit, and it was not, in the particular circumstance which applied, one where the interests of justice required it to be given.

Otherwise the appellant has been given every opportunity through adjournments, to secure private representation. He did not have the means to do so, and by the time of his request for an adjournment on 10 January 2003,the prosecution case was all but complete.

Thereafter he had plenty of opportunity prior to the resumption of the trial on 15 April 2003, to be represented by a lawyer, had it truly been the case that his uncle was willing to advance the funds needed. He did not avail himself of this opportunity, and he made no subsequent complaint.

He was not unfamiliar with court procedures, having regard to his antecedent criminal record. Moreover he exercised his right of cross-examination thoroughly, gave evidence, and called several witnesses. In the result, they did not support the allegation which he had made, at one stage, but had later withdrawn during the trial, of having been assaulted by Police, before participating in the caution interview.

Accordingly this ground is not made good.

The Proviso

Assuming that there was error in accordance with the law as it stood at the time of the trial, the case clearly is one that is fit for an application of the proviso. There was some corroboration in relation to the involvement of the offender in the offences by reason of his confession to having had sexual intercourse, on 3 occasions during the night with the complainant. In those circumstances the absence of DNA evidence was of no importance to the outcome of the trial.

There was also evidence of corroboration in relation to the lack of consent in the form of the complainant's injuries and contemporary appearance of being wet, cold and distressed, in the absence of any other apparent reason for her being in that state.

Quite independently of those matters, there was evidence from the complainant who was judged by the Magistrate to have been a credible and reliable witness, going not only to the occurrence of the assaults and lack of consent, but also as to the identification of the accused in a police line up.

She had the advantage of having seen the appellant over a lengthy period, at close quarters, and during at least 5 hours of day light. There was no delay in the holding of the identification parade, and there is no suggestion other than that her identification of the appellant was positive. The Magistrate appropriately gave himself a warning in accordance with the guideline laid down in ***R v Turnbull*** (1976) 3 All ER 549.

Although a faint complaint was made upon appeal, as to the composition of the identification parade, there was no evidence adduced at the trial which questioned the age or appearance of the 9 men who participated in the line up, with the appellant. Nor has

any attempt been made to introduce new evidence on this aspect of the case, during the appeal.

The case is one where there was clear and cogent evidence of the appellant's guilt, and it is not one where the misdirection as to corroboration in accordance with the law as it was understood at the time of the trial, involved a substantial miscarriage of justice, as that expression has been understood: ***R v Weir*** (1955) NZLR 711 and ***Subhaya v. Regina*** CR.APP 29 of 1981. The appeal against conviction has not been made good, despite the error in relation to corroboration.

The appeal against sentence

The appeal against sentence is meritless. The circumstances of the confinement, and its duration brought it within the worst kind of case for this offence that comes before the Courts. As such it merited the maximum sentence reserved for it: ***R v Amber*** (1976) Crim. L.R. 266.

Similarly there was no error in the approach which was taken for the rape offences. They were very serious offences, which involved sustained criminality, and which involved the use of a knife – a form of conduct abhorrent to right thinking members of the community. The appellant had a bad criminal record, including a conviction for a similar offence, and the case was one that called for both personal and general deterrence. In that regard the fact that the victim was a tourist is not to be overlooked.

The confinement offence was a separate and serious matter. In order to achieve a sentence that was proportionate to the total criminality involved, the sentencing Judge was well entitled to direct that the sentences for the rape offences should be served cumulatively upon the sentence for the confinement offence.

Moreover, the sentences for the rape offences were well within the legitimate range of sentencing discretion which is evidenced by decisions such as ***R v Billam*** (1986) 8 Cr. App. (s) 48, and ***Mohammed Kasim v. The State*** Cri. App No. 21 of 1993.

It follows that the sentences were neither manifestly excessive, or wrong in principle.

Review of the Law of Corroboration

There is no express provision in the Penal Code Cap. 17 or in the Criminal Procedure Code Cap. 25 requiring corroboration in the case of the felony of rape or other sexual offences. The only statutory requirement for corroboration relates to the offences of perjury or subornation of perjury or the like offences referred to in s.124 of the Penal Code.

The rule of practice which required corroboration, or a warning that it is dangerous to act on the uncorroborated evidence of the complainant, in cases of sexual assault, depended on a generalization that female evidence in such cases is intrinsically unreliable. This rule found its way into the common law, at least by the eighteenth century and attracted comment by Sir Mathew Hale:

> *"It is true rape is most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." (Hale, History of the Pleas of the Crown, vol. 1, at page 635)*

Deane J. in ***Longman v. The Queen*** pointed out that in the 5th edition of Will's essay on the Principles of Circumstantial Evidence (1902), the rationale of the practice was explained thus:

> *"... there is often very great temptation to a woman to screen herself by making a false or exaggerated charge, and supporting it with minute details of a kind, which the female mind seems particularly adapted to invent. Unless, therefore, the story of the prosecutrix is corroborated, it becomes a*

mere question of oath against oath, and although the law does not, in these cases, technically require corroborative evidence..... judges are in the habit of telling juries that it is not safe to convict the prisoner upon the unsupported statements of the woman....."

To similar effect was the statement of Salmon LJ, as late as 1968, in ***Reg v. Henry*** (1968) 53 Cr. App. Rep 150 at 153, where his Lordship explained the rule of practice on the basis that:

"...human experience has shown that in these Courts girls and women sometimes tell an entirely false story, which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reasons at all....."

In some jurisdictions the rule has been applied to victims of either gender, and in other jurisdictions it has been confined to women and girls. Its effect has been to place victims of sexual offences in a special category of suspect witnesses ***Reg. v. Hester*** (1973) AC 296 at 325, and ***Reg v. Spencer*** (1987) AC 128. It has resulted in convictions which were solely supported on the complainant's evidence being regarded as unsafe and unsatisfactory and quashed on appeal: ***Longman v. The Queen*** (1989) 168 CLR 79 at 84. It has given accused, in cases of sexual offences, a protection which does not exist in other cases of serious criminality, and it almost certainly has had the effect, in many instances of deterring rape victims from reporting offences committed against them, or from co-operating in the prosecution of offenders.

Attempts have been made, from time to time, to justify the rule by reference to a wide range of reasons, including a supposed tendency in women to engage in fantasy, to be fickle or spiteful in sexual relationships, to be prone to sexual neurosis, or to be unwilling to admit to consent out of shame.

However forcefully these reasons are propounded, along with the associated rape myths which were lucidly identified by Madame Justice L' Heureux-Dube in ***Reg. v.***

Seaboyer (1991) 2 SCR 577 (Supreme Court of Canada), we consider that they have reflected a flawed understanding of the world, they have been unfairly demeaning of women, and they have been discredited by law makers, in more recent times.

In the detailed and careful submissions which were prepared by the respondent to this appeal, a review was undertaken of the jurisdictions in which, and the extent to which, the rule has been abolished or modified.

In Canada, the requirement for corroboration was abolished through section 8 chapter 93 of the Criminal Law Amendment Act; in New Zealand the Evidence Amendment Act (No.2) of 1985 prevents Judges from commenting on the unreliability of uncorroborated sexual assault evidence.

In Australia s.164 of the Uniform Evidence Act removes the need to warn a jury that it is dangerous to act on uncorroborated evidence, and in most States, which are not subject to this Act, similar provision has been made.

In the United Kingdom similar provision was made in s:32 of the Criminal Justice and Public Order Act 1994.

Internationally, the Rules or Procedure and Evidence for the International Criminal Court, and of the International Criminal Tribunals for the former Yugoslavia and for Rwanda respectively, exclude the requirement for any such direction in relation to crimes of sexual assault.

The requirement for corroboration in these cases has been struck down in decisions of the Supreme Court of Appeal of South Africa (*State v. Jackson* (1981) 1 SACR 470; of the High Court of Bangladesh (*Al Amin v. The State* 19 BLD (HCD) (1999)), and of the Supreme Court of Namibia in *S v. D* (1992) ISACR and in *State v. K*. (2000) 4 LRC 129. It has been regarded as an "increasingly outmoded rule of evidence in the United States: *Carmell v. Texas* (200) 963 S.W. 2nd 833 (US Supreme Court). It was also the subject of

stringent criticism by the Supreme Court of California in ***R v. Rincon-Pineda*** 14 Cal.3d 864.

In Fiji, the majority judgment of this Court in *Maika Soqonaivi v. State* (1998) FJCA 64, noted that the requirement:

> *"has been regarded as unsatisfactory in many jurisdictions. This is because of its inflexibility, the apparent assumption that complainants' evidence is inherently unreliable, and the direction may result in a guilty person being acquitted solely because of the effect of the direction."*

The majority judgment suggested that a similar amendment should be made to the law in Fiji to that which was made in New Zealand, and is now embodied in s.23 AB of the Evidence Act 1908; See ***R v Daniels*** (1986) 2 NZLR 106, and the discussion in ***R v. McClintock*** (1986) 2 NZLR 99, at p.103, concerning the justification for such an amendment.

Notwithstanding this criticism, it was held in *Mark Mutch v. The State* Cr. App AAU0060/1999 that the rule is:

> *"still the law in Fiji Islands, and assessors must be directed (and Judges bear in mind) that even if they believe the complainant, it is dangerous to convict on his or her evidence unless it is corroborated or supported in some material particular by independent testimony implicating the accused in the commission of the offence. It is for the Judge to determine whether there is any evidence capable of being corroboration, and for the assessors to decide whether to accept it, and if so, whether it amounts to corroboration. They should be told that they can convict bearing in mind this warning if they are convinced of the truth of the complainant's testimony" (at p.7)."*

Since these decisions the Court has had the additional benefit of the decision of the Privy Council in an appeal from the Eastern Carribbean Court of Appeal (Grenada) in *Regina v. Gilbert* (2002) 2 AC 531. A submission was advanced, in that appeal, that the rule could only be abrogated by statute. In the judgment of the Privy Council which was

delivered by Lord Hobhouse of Woodborough, this submission was rejected. Their Lordships said:

> *"There would be force in this submission if the rule in question was properly described as a rule of law or had itself been enacted by a statute. But the rule was in truth a rule of practice said to be based upon "long practical experience": per Salmon LJ in R v. O'Reilly [1967] 2 QB 722,726. It tells a judge how he should sum up in a sexual case. Its justification has to be that described in the passage quoted from the judgment in R v Chance [1988] QB 932, 941-942. The rule is always liable to be reassessed in the light of further experience or research and reformulated in order better to perform that function. If, as their Lordships consider in agreement with the Law Commission and the Court of Appeal in England, the rule has become counterproductive and confusing it is the duty of their Lordships so to hold. In their Lordships' opinion the rule of practice which now will best fulfill the needs of fairness and safety is that set out in the passage they have quoted from the judgment of Lord Taylor of Gosforth CJ in R v Makanjuola [1995] 1 WLR 1348, 1351-1352. The guidance given by Lord Taylor of Gosforth CJ should now be followed." (at p.9).*

The guidance which their Lordships considered should be drawn from Lord Taylor's judgment was to the following effect.

> *"Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretions by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.*

To summarise ....(2) it is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence. (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel. (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches. (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction. (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules."(at p.7)

The treatment of the rule as one of practice rather than one of law, as has been the case with accomplice evidence, is consistent with authority: See for example ***Longman v. The Queen*** at pp 85, 91, and 104. It is also consistent with the fact that the Penal Code of Fiji is silent as to corroboration in sexual crimes.

As such it is open for this Court to follow the guidance which has been given at the highest level in other jurisdictions, to hold that the Rule is counter productive, confusing and both discriminatory and demeaning of women; and, as a result to adopt the approach which was approved in ***Regina v. Gilbert*** and in ***Longman v. The Queen***.

Upon that basis it would henceforth be a matter for discretion, in accordance with the general law, for a Judge to give a warning or caution, wherever there was some particular aspect of the evidence giving rise to a question as to its reliability. That might arise, for example, where the complainant had been previously found to be unreliable, or was shown to have had a grudge against the accused, or where there had been a

substantial delay in the making of the complaint, or where the complainant was shown by reason of age or mental disability to be questionable as to her veracity, or where she had given inconsistent accounts.

These are but examples of reasons that might require a warning or caution. They are not meant to be an exhaustive statement, and the strength of the caution or warning would always depend both upon the issues in the trial, and upon the nature of the matter giving rise to a possible question of unreliability. It would remain necessary, in any event for the jury to be suitably directed that it is necessary for the prosecution to prove the guilt of the accused beyond reasonable doubt: ***R v. Daniels*** (1986) 2 NZLR 106 at 113.

To adopt such an approach would be to bring the practice in the Islands of Fiji into conformity with that now adopted in many other, if not most, common law, as well as international criminal jurisdictions, and civil code jurisdictions. It would place victim evidence in rape cases on the same basis, not only with the evidence of victims in other cases of criminality, but generally, that is subject to a caution where some aspect of unreliability arises justifying a caution particular to that case.

It would also conform with the provisions of s.38(1) of the Constitution (Amendment) Act 1997 which provides, as part of chapter 4, Bill of Rights:

"(1) Every person has the right to equality before the law.

(2) a person must not be unfairly discriminated against directly or indirectly, on the ground of his or her

(a) actual or supposed personal characteristics or circumstances, including .... . gender....."

This provision is to be considered in the light of s.2(1) of the Constitution which notes that it is the "Supreme law of the State", and in the light of s.2(2) which provides that "any law inconsistent with this Constitution is invalid to the extent of the inconsistency." Additionally, it is to be noted that s.21(1) provides that chapter 4 (The Bill of Rights) "binds the "Judicial branch of government"; and that s.43(2) requires the Courts, in interpreting the provisions of this Chapter,, "to promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the rights set out in (the) Chapter."

All major human rights instruments establish standards for the protection of women, including a prohibition on any form of discrimination against them: e.g. the Convention on the Elimination of All Forms of Discrimination against Women.

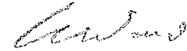
These considerations add weight to the conclusion that the rule of practice should be abrogated, not only by reason of the fact that it represents an outmoded and fundamentally flawed view, but also by reason of the need to give full force and effect to the Constitutional principle of equality before the law. By reason of the Constitutional Provisions, s.3(3) of the Criminal Procedure Code would not require continued adherence to the former corroboration rule, even though it represented the practice in force in England at the time of the Code's commencement in 1944.

We were informed that following the decision in ***Maika Soqonaivi v. The State***, the Law Reform Commission prepared a report recommending the repeal of the rule, which was tabled in Parliament in 1999. It has yet to be implemented. As the rule is one of practice, we consider that it is appropriate for us to declare that henceforth it need not be followed, although for mere abundant caution, we also recommend that any residual question should be put to rest by legislation.

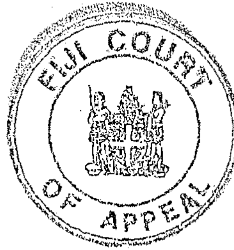
Orders:

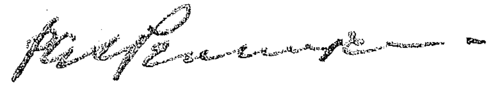
1. Appeal against convictions dismissed.

2. Appeal against sentence dismissed.

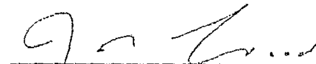


Ward, President





Penlington, JA



Wood, JA

Solicitors:

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

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