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

CRIMINAL APPEAL NO. AAU0025 OF 2004S
(High Court Criminal Action No. HAC 020 of 2002S)

BETWEEN:

ELIKI MOTOTABUA

Appellant

AND:

THE STATE

Respondent

Coram: Ward, P
Tompkins, JA
Smellie, JA

Hearing: Tuesday, 15 March 2005, Suva

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

Date of Judgment: Friday, 18 March 2005

JUDGMENT OF THE COURT

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[1] On 29 March 2004 the appellant stood trial in the High Court on 7 charges. The first for abduction on 5 April 2002 (s.152 of Penal Code) the second for wrongful confinement between 5 April 2002 and 9 April 2002 (s.251 of Penal Code) and 5 counts of rape (ss. 149 and 150 of the Penal Code) committed between the 5 and 8 of April 2002. The trial lasted 6 days at the conclusion of which the assessors after a short adjournment found the appellant guilty on all counts, the trial Judge agreed and entered convictions. Throughout the trial the appellant was unrepresented.

[2] The grounds of appeal lodged in support of the petition of appeal (the appellant again acting for himself) may be summarized as follows:

(i) The trial Judge obliged the appellant to proceed to trial unrepresented.

(ii) The evidence did not support the convictions and guilt beyond reasonable doubt was not proved.

(iii) The trial Judge directed there was no corroboration in respect of the rape charges yet convictions were entered.

(iv) The trial Judge directed that corroboration was available on the abduction charge when there was none.

(v) The alleged offending was not reported to the police until 13 April 2002 which was 4 days after the complainant left the appellant's house.

[3] On the appeal without objection from the State Counsel the above grounds were somewhat expanded to include a complaint about the way the trial Judge dealt with the issue of cross-examination by the appellant relating to drugs and a further complaint that he was prevented from cross-examining in that regard. Also the trial Judge should have overruled the assessors because of inconsistencies in the evidence (an aspect of ground 2 above) and that after conviction and sentence the appellant was not advised of his rights of appeal or assisted by the trial Judge in preparation of grounds of appeal. There was also a complaint regarding the trial Judge's ruling dismissing the appellant's submission made at the end of the prosecution evidence that there was no case to answer.

[4] Although not raised by the appellant State Counsel fairly and properly drew the attention of both this Court and the appellant, to the fact that the information for count 2 did not state the specific mens rea required under s.251 of the Penal Code.

Citing ***Serupepeli Cerevakawalu v. The State,*** Crim. Appeal No. AAU0024 of 2001S Counsel submitted the proceedings in respect of count 2 were a nullity and invited the Court to quash the conviction and sentence in respect of it. The conviction and sentence in relation to count 2 are quashed. That makes no practical difference to the period the appellant is to remain in prison because the sentence imposed in respect of count 2 was less than that imposed for the rape convictions and was to be served concurrently with them.

We mention in passing that the appellant sought to argue that the defect in count 2 should result in all the convictions in the other 6 charges being quashed also, but of course that is an untenable proposition. We return now to a consideration of the appeals in respect of the other counts.

[5] On the issue of representation the record shows clearly that between 30/1/03 and 7/11/03 the Court granted the appellant repeated indulgences to apply for legal aid and to challenge initial refusals. Finally on 7/11/03 legal aid was granted but an adjournment was sought and granted to 23/2/04 with a pretrial conference on 19/2/04. The appellant did not appear on the 19/2/04 and the hearing was further adjourned to 22/3/04. On 22/3/04 the appellant confirmed to the Court that he had withdrawn instructions from the Counsel assigned by the Legal Aid Commission. Counsel in those circumstances was given leave to withdraw and the trial was set for 29/3/04. When the case was called on 29/3/04 the appellant said he wanted a lawyer of his own choice to be paid by the Legal Aid Commission because he could not pay for Counsel himself. By then the case was almost 2 years old. The trial Judge considered the appellant had had ample opportunity to engage Counsel and the trial had been delayed long enough.

The right to representation is governed by s.28(1)(d) of the Constitution (Amendment) Act of 1997 which provides.

"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 own expense, by a legal practitioner of his or her choice or, if the interest of justice require, to be given the services of a legal practitioner under a scheme for legal aid."

But as pointed out by this Court in ***Ratu Jope Seniloli and Others v. The State*** Crim. Appeal No. AAU0041 of 2004 the right is not absolute. Here the appellant was accorded representation under the Republic's scheme of legal aid but then withdrew instructions from that Counsel. The appellant then wanted representation outside the provisions of the scheme in circumstances where he was not entitled to ask for it. It follows that the fact that he proceeded to trial without the services of Counsel was a situation of his own making. The Court had delayed for over a year to enable him to qualify for legal aid. There is no merit in this ground and it fails.

[6] The second ground contends that the conviction should not stand because the evidence did not establish guilt beyond reasonable doubt. This ground is also without substance. The assessors after a 15 minutes retirement were unanimous that all charges had been proved. The summing up could have left them in no doubt that the criminal standard of proof was required. The trial Judge immediately agreed and entered convictions. We have considered the evidence and are of the clear view that the prosecution case was a very strong one especially as the appellant, although making an unsworn statement, called no evidence. The second ground fails.

[7] The third ground complains that the convictions were entered on the rape charges in the absence of corroboration. There is no statutory requirement for corroboration in a rape case. The rule of practice requires a warning that it was dangerous to convict on the uncorroborated evidence of the complainant but there is no basis for the contention that convictions cannot be entered unless corroboration is present.

Indeed in a comprehensive review of the subject this Court in ***Seremaia Balelala v. The State*** (Crim. App. No. AAU0003 of 2004S) declared at page 19 of the judgment that the rule of practice that a corroboration warning should be given need no longer be followed.

[8] In this case it may be said the trial Judge gave the appellant the benefit of the doubt when she directed there was no corroboration on the rape charges, whereas the medical evidence could be said to provide it in respect of consent. Be that as it may, this third ground provides no basis for interfering with the rape convictions.

[9] The fourth ground contends for a lack of corroboration in respect of the abduction charge. Again none is required in law but in fact corroboration was present in the form of compelling evidence from the appellant's mother. Her testimony was that she saw her son dragging the complainant from the taxi and forcing her up the hill to his house despite her screams and physical resistance.

[10] The fifth ground challenges the convictions on the ground that although the complainant left the appellant's home on 9/4/02 she did not complain to the police until 13/4/02. There is no substance in this. The complainant did complain to her sister-in-law on 9/4/02. In view of her distressed condition and her families decision that the appellant should be confronted, the delay is understandable. The appellant drew this delay of 4 days to the attention of the assessors in his closing address. Obviously they did not find it significant. Neither did the trial Judge nor do we.

[11] Turning now to the supplementary grounds advanced at the hearing. First the appellant complained that the Judge had sent the assessors out when he wanted to cross-examine regarding drugs in his home. Her Ladyship warned the appellant of the possible prejudicial effect of opening up the subject. The appellant apparently heeded that advice because when the assessors returned he did not pursue the

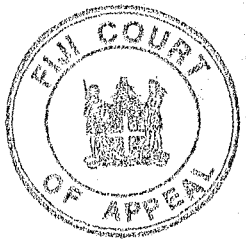
point. Now, as we understand him, the appellant seeks to elevate what happened to a position where he was prevented from cross-examining the complainant on the point. The record does not support him in that regard and in any event the proposition is preposterous. The trial Judge was a very experienced and highly respected judicial officer. There is no possibility that she denied an unrepresented accused the right to cross-examine. Furthermore the assessors were firmly instructed in the summing up to ignore a brief reference to drugs which the complainant had made, contrary to an indication from prosecution Counsel that she should avoid the topic.

[12] The penultimate point was that because of inconsistencies in the complainants evidence the Judge should have overruled the assessors guilty verdicts. We have looked at the evidence. On the essential ingredients of the charges the appellant faced there are no inconsistencies in the complainant's evidence that could possibly justify the trial Judge in taking the rather rare step of overruling the unanimous view of the assessors. We deal summarily with the final point that the appellant was not advised of his appeal rights or assisted in framing the grounds of his appeal by the trial Judge. First the trial Judge was under no obligation legal or moral to provide assistance in framing the appeal and secondly the appeal was lodged in time so that there is no substance in the other point, quite apart from the fact that there was no obligation resting upon her Ladyship to advise the appellant of his appeal rights.

[13] The appellant also argued that his submission of no case to answer at the close of the prosecution evidence should have been accepted and the trial stopped at that point. All we can say is that at that point the case against the appellant was extremely strong if not overwhelming. The trial Judge applied the correct test and properly, indeed, inevitably, ruled the appellant had a case to answer.

[14] In the result all the appellants arguments are rejected and the appeal is dismissed save for the quashing of count 2 as explained in para 4 above.

Ward, P



Tompkins, JA

Smellie, JA

Solicitors:

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

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