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

Criminal Appeal No. AAU 0093 of 2005
(High Court Criminal Case No. HAC 0040/2005S)

BETWEEN:

JOSUA NATAKURU

Appellant

AND

THE STATE

Respondent

Coram:	**Barker, JA** **Henry, JA** **Scott, JA**
Date of Hearing:	**12 July 2006**
Counsel:	***Appellant in person*** **Ms. A. A. Prasad for the Respondent**
Date of Judgment:	**14 July 2006**

JUDGMENT OF THE COURT

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[1] In October 2005 the Appellant was convicted on one count of rape by the High Court. He had earlier been tried for the same offence in the Magistrates' Court, however an appeal against that conviction was allowed and a retrial ordered. That retrial took place in the High Court.

[2] This is an application to the full court for leave to appeal against conviction and sentence brought pursuant to section 35 (3) of the Court of Appeal Act.

[3] The facts, briefly, are that on 8 February 2001 the complainant had spent the evening with her boyfriend. According to the complainant, he dropped her off at her home at Rewa Street between about 10 and 11 p.m. Unfortunately the house was closed up and she found herself locked out. While waiting in the driveway she met the Appellant. At his suggestion, and upon him offering her shelter for the night, she accompanied him. She went with him to an empty house close to the University of the South Pacific.

[4] The complainant told the court that the Appellant twice raped her at this house but that she had remained with him until about 6 o'clock the following morning. She then returned home to Rewa Street. She was a virgin when she was raped.

[5] The complainant's sister told the court that after she had seen the complainant return with her boyfriend she went into the house at Rewa Street. The complainant was still outside. She did not see the complainant again until the following morning, the 8th, at about 6 a.m. The complainant was in the bathroom and then went to her bedroom where she remained until after lunch. Some time during the afternoon the complainant told her sister that she had been raped the previous night.

[6] The complainant's boyfriend told the court that he had dropped off the complainant at about 12.45 a.m. on the morning of the 8th. He next saw the complainant some time later the same day when she told him to come and see her in the evening. When he again visited her she told him that she had been raped the previous night.

[7] At the suggestion of the complainant's sister and boyfriend the matter was first reported to the Women's Crisis Centre and then to the Police.

[8] The complainant's account of her movements of the night of the 7th/8th receive some support from a witness, Howard, who told the court that he had seen the complainant and the Appellant walking from Rewa Street to Flagstaff and then into Laucala Bay Road, which goes to the USP. Although he did not specify when he saw the pair it appears from his evidence that this was either late on the 7th or early on the 8th.

[9] Howard also told the court that about 5 or 6 a.m. on the morning of the 8th he again saw the complainant; this time she was on her way back from Laucala Bay Road to Rewa Street. He told the court that he saw that the complainant was "rushing and crying". In his cross-examination, he accepted that his statement to the police did not mention that he had seen the complainant a second time.

[10] The Appellant was not interviewed by the Police until four months after the rape had allegedly taken place. He was located in Ba and brought back to Suva. The Appellant's evidence was

that he was viciously assaulted by a number of police officers and that the cautioned interview which he gave was largely made up by the police and was based on a statement which had been provided by the complainant. He denied raping the complainant but admitted spending the night with her and having sexual intercourse with her. He maintained that the sexual intercourse was consensual. He admitted signing the charge statement in which he confessed that he had raped the complainant but stated that he had only signed the statement because of the violence inflicted upon him by the police.

[11] A trial within a trial was held and the cautioned interview and the charge statement were both ruled admissible. The Appellant's first ground of appeal is that the two documents were wrongly admitted.

[12] The Appellant suggested that the trial judge had misdirected herself when she described the cautioned interview as "largely exculpatory" and that she erred by not conducting an investigation into his claim that he had reported the police violence to a Resident Magistrate.

[13] While noting in particular the sharp contrast between the generally exculpatory cautioned interview completed at 22.30 hours and the complete admission contained in the charge statement taken just a few minutes later, we are not satisfied that it has been shown that the judge erred when she found as a fact that the Appellant's statements were voluntarily given and were consequently admissible.

[14] Following the admission of the Appellant's statements the trial proper resumed and the interviewing police officers again gave evidence. The Appellant in his cross-examination and examination in chief placed considerable emphasis on what he suggested was merely his scribbled signature placed upon those documents. This scribbled signature, he argued, went some way towards proving the truth of his allegation that the statements were not voluntarily given. He wished to call evidence to show that when previously interviewed in relation to other unconnected matters he had always freely confessed his guilt and had always signed his statements with his usual signature.

[15] It appears that the prosecution did not take issue with the Appellant's claim that he had only scribbled his signature on the statements and the matter was not mentioned again by the Appellant in his closing address to the assessors. While we understand the point that the Appellant was making and again made before us, we do not think that it significantly assists his claim not freely to have given the cautioned statements.

[16] The Appellant's second ground of appeal was that the trial judge failed to warn the assessors that when assessing the value of the complainant's evidence they should disregard what, we were told, was her distressed condition when she gave her evidence. While the demeanor of a witness is an important matter for the assessors to consider when evaluating a witness's credibility, we agree that it is usual for a judge in cases where a witness is overcome by emotion to direct the assessors that feelings of sympathy are not relevant to the evaluation of the evidence before them. Ms. Prasad accepted that it would have been

better if such a direction had been given in this case. While we agree, we do not think that the omission was so serious as to warrant interfering with the judgment reached.

[17] The Appellant's final ground of appeal was directed at the evidence of the complainant's sister and her boyfriend. With considerable skill and no little knowledge of the law the Appellant pointed out that what both these witnesses had said could only be placed before the court as evidence of recent complaint. Such evidence first requires a finding by the judge that it in fact amounts to evidence of a recent complaint and secondly, not being evidence of the facts complained of but only being capable of showing the consistency of the complainant's conduct with her evidence, requires a careful direction from the judge to the assessors (see Lillyman [1896] 2 QB 167 and R v. O'Dowd [1985] 1NZLR 388).

[18] One standard direction provided by the English Judicial Studies Board is as follows:

> "The evidence that X made a complaint soon after (the alleged occurrence) and the terms of that complaint cannot as a matter of law be treated as evidence of the fact that that occurrence happened or as to how it happened. The only relevance of the complaint, therefore, if you accept that it was made, is that it may show that X's conduct after the occurrence was consistent with her evidence about it."

(see also this Court's judgment in Peniasi Senikarawa – AAU 0005/2004 – 24 March 2006)

[19] Ms. Prasad conceded that the judge's failure to give a specific direction to the assessors along the lines recommended amounted to a misdirection but invited us to apply the proviso to section 23 (1) of the Court of Appeal Act.

[20] In all the circumstances of the case we are not satisfied that it would be proper to apply the proviso.

RESULT

The appeal will be allowed and the conviction quashed. A retrial is ordered.

R.J. Barker

Barker J.A.

FIJI COURT OF APPEAL

Henry J.A.

Scott J.A.

Solicitors:

Office of the Director of Public Prosecutions for the Respondent