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

CRIMINAL APPEAL NO. AAU0011 OF 2006S
(High Court Criminal Case No. HAA 118 of 2004S)

BETWEEN:

JOSEPH BEN VASU

Appellant

AND:

THE STATE

Respondent

Coram: Ward, President
Scott, JA
Wood, JA

Hearing: Tuesday 14th November 2006, Suva

Counsel: J B Vasu in Person as Appellant
A Prasad for the Respondent

Date of Judgment: Friday, 24th November 2006, Suva

JUDGMENT OF THE COURT

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[1] On 2 July 2004, the appellant was convicted, after trial in the Magistrate's Court, on a count of rape, and was sentenced to 6 years imprisonment. His appeal to the High Court against conviction and sentence was dismissed on 17 May 2005. On 13 June 2006, he was granted leave to appeal, out of time, on a single question of law, confined to the finding in the High Court that the complainant's complaint to her grandmother, constituted corroboration of her evidence.

The Prosecution Case

[2] The complainant gave evidence that, on 26 August 2000, when she was aged 15 years and six months, she was raped first by the appellant, and then by another accused, Rupeni Roko. She said that the appellant approached her as she was walking home and invited her into a house. She was taken to a bathroom, the door of which was locked, by the appellant. Once in there he instructed her to remove her clothes. When she refused he unbuttoned her blouse and pulled down her pants. She said that she resisted when he pulled her towards him, but he was too strong for her.

[3] Thereafter she said he forced her to sit on his penis on two occasions, ejaculating each time. She claimed that she had made it clear that she wanted to leave, but was ordered by the appellant to remain.

[4] After the appellant had sexual intercourse with her in this fashion, the other accused pulled her into a bedroom. He forced her to remove her clothes, and instructed her not to scream. She said that, by this time, she was crying and feeling weak. In cross examination she agreed that she had not been crying or feeling weak when she had been in the company of the appellant in the bathroom: She said that this second accused had vaginal intercourse with her once, against her will.

[5] Each accused admitted to having had sexual intercourse with the complainant, but said that it had been with her consent. This was the sole issue in the trial. Neither accused gave sworn evidence but each made a brief unsworn statement to the effect that the complainant had consented.

[6] The complainant went directly home and spoke to her grandmother. This witness gave evidence to the effect that the complainant was "crying continuously and asking for help," and that she also asked to be taken to the hospital. She said that the complainant told her that she had been raped by "*three* boys", and named two

persons "Ben and *Vili.*" It would seen from the record that "Ben" was the appellant, and "Vili" was an associate "Viliami" who had been drinking with the two accused earlier that day. There was no mention in the complaint of the second accused.

[7] A medical report was tendered in relation to the examination of the complainant which was conducted that evening at the Hospital. Physical signs were detected consistent with recent sexual intercourse. The history provided by the complainant, as recorded by the Doctor, was that she had been forced to have sex earlier that day at around 4 pm "in the bathroom (5X) then in the bedroom (X2)". This entry continued: "said 2 men took turn having sex (sic) to her. Names: Jovesa and Rubeni are the guys who raped her." Jovesa and Rubeni it is common ground are the appellant and the second accused.

[8] It can be seen that this history differs somewhat from the complainant's evidence, as to the number of times that she was raped, and also differs in the identity of one of the named culprits when compared with the complaint given to the grandmother.

The Proceedings in the Magistrates Court

[9] The Magistrate found each accused guilty of rape, as a consequence of which there was no occasion to consider the alternative counts of carnal knowledge, and defilement of a girl aged between the years of 13 and 16. It may be observed that the appellant did not assert, in his unsworn statement, the existence of any honest mistake as to the age of the complainant, although in his submission to the Court he asserted that he was not aware of her age.

[10] The Magistrate correctly directed himself as to the law concerning corroboration as at the date of the trial, namely 2 July 2004. He observed:

> "This is a sexual offence case, and the Court is therefore warning itself of the danger of convicting the accused, on the basis of the

uncorroborated evidence of the complainant. The Court is also aware that if after looking for corroborative evidence, it finds none, it may nevertheless, convict, after bearing in mind the above warning, if it accepts the complainant's evidence as the truth, and finds the charge proved: ***Walota Smith v. The State*** Criminal Appeal No. HAA0032 of 1995."

[11] The Magistrate noted the evidence of distress and complaint to the grandmother, and observed correctly, as a matter of law, that the "evidence of recent complaint shows the consistency in the complainant's conduct in reporting the alleged rape soon after the event."

[12] It is evident from this passage that the Magistrate did not fall into the error of treating the recent complaint as corroboration of the complainant's evidence. It does not however appear that any consideration was given to whether there were aspects of the complaint to the grandmother, or for that matter aspects of the history given to the examining Doctor, that raised any question of inconsistency in the complainant's conduct.

[13] The reasons are silent as to whether the evidence of distress was regarded as corroboration, although, as a matter of law, it would have been appropriate for the Magistrate to have so treated it: ***Maika Soqonaivi v. The State*** Crim App. No. AAU0008 of 1997S, and ***R v Redpath*** [1962] 46 Cr. App. Rep 319.

[14] It also does not appear that any consideration was given to the possibility whether the complainant's distressed condition and complaint were solely attributable to the conduct of the second accused.

[15] In a troubling passage, to the significance of which we will return, the Magistrate posed the question why did the complaint rush home in a distressed state and make a complaint to her grandmother of having been raped by some boys?

[16] In particular of concern is the fact that, when rejecting the unsworn evidence of the two accused that the complainant had consented to sexual intercourse, he repeated the question when observing:

> "If this was so, why then did (the complainant) repeat her ordeal to her grandmother crying continuously and asking to be taken to hospital? This is certainly not the action of a person who consented to having sexual intercourse with 2 boys earlier."

[17] The Magistrate, consistently with the warning which he had earlier given himself, made it clear that he had given careful consideration to the evidence of all of the witnesses, and to their demeanour. He found the complainant and her grandmother to be credible witnesses, and the accused not to have been credible. They were also found not to have had reasonable grounds for believing that the complainant had consented to have sex with them. In this regard, they were found to have been drunk and uncaring in relation to whether or not there was consent.

The Appeal to the High Court

[18] The appeal was dealt with in a way that demonstrated two errors of law. First it was noted that following this Court's decision in ***Balelala v. The State*** Criminal Appeal No. AAU0003 of 2004S, it is no longer mandatory for a corroboration warning to be given in sexual offence cases, and that such warnings "should be rare and only .. given when the reliability of some evidence is truly questionable."

[19] This is not an entirely correct statement of the result of the review which was undertaken in ***Balelala***. More correctly the case decided that "henceforth it would 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."

[20] The difference may be one of terminology. However, of more importance is that ***Balelala*** was decided after the present matter was decided in the Magistrate's Court, with the consequence that the Magistrate was bound to direct himself in accordance with the then existing law. Of itself this does not impact upon the correctness of the Magistrate's decision, since, as we have observed, a correct warning was given.

[21] The second error is of more relevance and emerges in the following passage in the judgment:

> "The evidence concerning the complainant's distressed state and ***recent complaint to the grandmother*** that she was raped is corroborative of her evidence of absence of consent.... However, and importantly in this case, this evidence also remains relevant for assessment of her credibility."

[22] The observation that the evidence of complaint amounted to corroboration was wrong in law. ***R v Whitehead*** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: ***Basant Singh and Others v. The State*** Crim App. No. 12 of 1989; ***Jones v. The Queen*** (1997) 191 CLR 439.

[23] Error of law has accordingly been established in the judgment of the High Court. A question then arises as to whether the case is suitable for an application of the proviso to s.23(i) of the Court of Appeal Act, on the basis that there was no substantial miscarriage of justice.

[24] In favour of an application of the proviso is the circumstance that the Magistrate did not fall into the same error.

[25] There are, however, two matters that are counter indicative to the proviso being invoked.

[26] First, there is the fact that in the grandmother's account of the complaint there were inconsistencies with the complainant's evidence, in the number of boys who were said to have raped her, and in the naming of those responsible. This inconsistency was potentially compounded when regard is given to the further inconsistencies in the history given to the examining doctor as to the number of times that the complainant said she was raped by each accused.

[27] The second matter concerns the question which the Magistrate asked himself which we previously mentioned, as to why the complainant was crying and complaining of being raped. The question why would a complainant make up a story of being raped has been regarded as a forbidden question. It tends to reverse or diminish the onus of proof, in so far as it invites an accused to provide a satisfactory answer, that is one which is exculpatory of himself: ***Palmer v. The Queen*** (1998) 193 CLR 1. Put another way, it assumes that the absence of a persuasive reason for the complainant behaving in this way enhances the prosecution case.

[28] This point was not articulated in these precise terms in the High Court, or before us. However, in each Court, a ground of appeal was raised to the effect that there was a misdirection as to the onus of proof. In circumstances where the appellant was unrepresented, we are of the view that this ground is sufficiently wide to embrace the point. In any event, it is relevant to a consideration of whether there was a sufficient risk of a miscarriage of justice such as to prevent an application of the proviso.

[29] The manner in which the question was asked, in the context of a rejection of the evidence of the two accused, is critical in this case. It is one thing to

regard the evidence of complaint as a matter going to the credibility of the complainant. It is quite another thing to treat the apparent absence of any acceptable reason for the existence of distress, or the making of a complaint, as destructive of or a weakening of the credibility of the accused. A risk of a miscarriage of justice arises in this case because the somewhat circular question which the Magistrate asked falls into this latter category.

[30] An argument was advanced before us, although not in the Magistrate's Court or in the High Court, that the evidence of distress and of the complaint should not have been regarded as having any probative effect, in relation to the appellant, as their existence was capable of being attributable to the conduct of the second accused alone. The basis for the submission rested upon the complainant's concession that she was not crying or feeling weak while having intercourse with the appellant, but began to cry and feel weak when being raped by the second accused.

[31] This argument is less than persuasive having regard to the circumstances in which the events occurred, particularly their close proximity in time, and having regard to the complainant's evidence of being forced to submit to the will of the appellant, and of him being too strong for her to resist.

[32] Had this been the sole point in the appeal, then it would have been an insufficient basis for its success, or for this Court not applying this proviso.

[33] However, in the light of the unqualified acceptance of the complaint to the grandmother as one that demonstrated consistency of conduct on the part of the complainant, when there were in fact inconsistencies in her accounts; and the posing of a question in terms that suggested a diminution in the onus of proof, we are not persuaded that the proviso should apply.

Result

[34] The orders of the Court are accordingly as follows:

(1) Appeal allowed.

(2) Conviction and Sentence quashed.

(3) New Trial Directed.

Ward, President

FIJI COURT OF APPEAL

Scott, JA

Wood, JA

Solicitors:

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

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