

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

CRIMINAL APPEAL NO. AAU0050 OF 2006S
(High Court Criminal Action No. HAC 25 of 2004S)

BETWEEN:

DHARMEND CHAND

Appellant

AND:

THE STATE

Respondent

Coram:

Ellis, JA
Penlington, JA
McPherson, JA

Hearing:

Wednesday, 20th June 2007, Suva

Counsel:

Appellant in Person
S A Prasad for the Respondent

Date of Judgment: Monday, 25th June 2007, Suva

JUDGMENT OF THE COURT

- [1] This is an appeal against conviction and sentence.
- [2] The appellant was charged with one count of rape at Suva on 22 July 2004. He pleaded not guilty. At his trial in the High Court he appeared on his own behalf. He cross-examined the state witnesses, unsuccessfully challenged the admissibility of his caution and charge statements and gave evidence in his own defence. The three assessors unanimously found him guilty. The Judge accepted

that opinion. Later on 15 August 2006 the appellant was convicted and sentenced to 10 years imprisonment. He now appeals.

The Prosecution Case

- [3] The case for the State relied on the complainant's evidence, the evidence of her husband of a recent complaint made to him in the early hours of the morning following the rape and the appellant's confessional statements.
- [4] The complainant is a married woman living with her husband and children. On 21 July 2004 the appellant, whom she said that she had not seen before, came to her home at about 1 pm. He said that he was looking for a house girl, named Laota, who worked for a European couple. He told the complainant that the house girl had not turned up for work and that if he could not find her he needed a replacement. The appellant was to speak to his boss.
- [5] The complainant said that she was interested in obtaining work. She told the appellant that she wanted to speak to her husband about the proposed wages which she would receive if she took the job. The complainant's husband came home at about 5.30pm that day. She spoke to him about the matter. The appellant returned later to speak to the husband about the terms of the complainant's proposed employment.
- [6] On the following day, 22 July 2004, the complainant said that she went with the appellant by bus to Suva. They then took a taxi and stopped outside a white house which was closed. They then went to a public telephone where the appellant, so he told the complainant, called his boss who told him to "wait until 8 pm".
- [7] Afterwards they went to a taxi stand near the hospital and from there to what the appellant described as his "boss' office." They stopped at a house. The appellant

told her to go under the house to avoid harm, as male voices had been heard. Later they moved out from under the house. And it was at that time, according to the complainant, that the appellant picked up a glass louvre blade and threatened her. In her evidence in chief she described what happened in this way:

“He told me not to speak. He pulled me and said go to another house. He said come closer to me. He said he would kill me. He showed louvre blade to me. I said I didn’t realize he would do this. I said “I have got a family. I love my two children, don’t do that.”

Shut up not to speak.

He pulled me and tried to kiss me. He put his hand inside my blouse and started to fondle my breasts.

I could not do anything as I was afraid he might kill me with louvre blade. He told me to remove my underwear. I said I cannot. I am having my period. He then removed my panty. He took me to a smooth surface. He moved my thighs apart. He came on top of me. He put his penis into my vagina and he had sex with me.

He pulled up his long trousers. He told me to put on my panty. Told me to sit there a while then look for a taxi. I hid my disgust. I wanted to tell someone at home. I wanted something to be done to him. He told me he will come next day with wages.”

- [8] The complainant also said that when she tried to call out the appellant closed her mouth, pulled her hair and put the louvre blade to her neck.
- [9] The complainant ultimately arrived home at about 3 am having travelled part of the way in a taxi with the appellant. When she arrived home she woke her husband

and told him what had happened to her. The appellant was to call on the following morning. The complainant and her husband then planned to trap him when he called.

- [10] In the morning the appellant called. The complainant said that she told the appellant that her husband was at work. The appellant then went away but later came back. This time the complainant's husband was waiting for him. There was a confrontation. The complainant's husband punched the appellant and then they took him to the police station.
- [11] Under cross-examination by the appellant the complainant denied knowing him for 3 months prior to these events. She denied saying to the appellant that her husband was cruel to her and that he was not working. Further she denied that she told the appellant to look for a house to rent so that they could live together. Several times she denied that she was lying to the Court.
- [12] When the complainant was asked by the appellant did she scream she replied "I could not shout out for help because you said that you will kill me with piece of glass." She was asked why she had not complained to the security guards when a taxi was being obtained. She replied that she had not done so because the appellant "would run away". She gave the same reason for not complaining to the taxi driver and at a police check point during the taxi trip. She wanted to tell her husband first.
- [13] The complainant was medically examined at the request of the police. The doctor who examined the complainant, had left Fiji by the time of the trial. The doctor's report was introduced into evidence by another doctor at the request of the appellant and with his consent. The report stated that the examination did not disclose any sign of injury although the doctor producing the report, observed that the absence of injury did not exclude rape and that rape could occur without injury.

- [14] The complainant's husband deposed that he had not met the appellant before the day that he called to discuss a new job for his wife. He confirmed that there had been an evening conversation with the appellant on 21 July and that on the following day the appellant was to take the complainant to meet his (that is, the appellant's) boss.
- [15] The complainant's husband described the complainant's condition when she came home in the early hours of the morning. He said that she was crying unsteady and scared. She then complained to him that she had been raped by the appellant.
- [16] The complainant's husband confirmed that when the appellant visited the house in the morning there had been an altercation between the two of them.
- [17] At the police station the appellant made caution and charge statements. As we have stated earlier the appellant challenged the admissibility of both statements, on the grounds that they had been unfairly and oppressively obtained. The Judge held a voir dire. In evidence on the voir dire the appellant claimed that he was assaulted by two police officers, that he was stripped naked, that he was forced to the floor and that he had a leg put to his stomach. These allegations of violence were denied by the police officers. The Judge preferred the evidence of the police officers and rejected the appellant's allegations. He ruled that the statements were voluntarily obtained, that there was no element of unfairness and that there was no breach of the Constitution.
- [18] The caution statement contained a full confession by the appellant. He admitted going to see the complainant to ascertain if she was interested in being a house girl. He said that he met her on the next day and that he was with her on that day. He admitted having sex with the complainant without her consent instead of arranging a job. He admitted threatening her with a broken glass louvre blade and blocking her mouth with his hands. He identified a piece of broken louvre glass recovered from the rape scene. His statement contained a description of going to the

complainant's house on the following day and being punched by the complainant's husband. Towards the end of the caution statement he said:

"What I did with (the complainant) I feel sorry for that and next time I am not going to do with anybody."

[19] After the appellant was charged he made a charge statement in which he said:

"I want the Court to forgive me for what I did. I admit having sex with (the complainant) I am sorry for what I had done to her."

The Defence Case

[20] The appellants case at the trial was in complete conflict with the case for the State.

[21] The appellant, as we have said, gave evidence in his own defence. He claimed that the complaint was a false one. Rather, so the appellant asserted there had been an on-going secret relationship between the appellant and the complainant for sometime before 21/22 July 2004 (in contrast to the complainant who had said that she had only met the appellant for the first time on the day when he came to the house). He claimed in evidence that he was very close to the complainant in his friendship with her and that, indeed, he had started going to her house and sleeping there during the day when her husband was not there. He described going to the town with the complainant waiting for a woman called Loata to turn up, Loata failing to turn up, having a meal with the complainant, taking her in a taxi and dropping her at her place (when she asked him to call at 9 am on the following day).

[22] The appellant denied having sex with the complainant as alleged but he said that they had had sex on previous occasions. He denied being involved in a fight with the complainant's husband although he admitted being in the complainant's home

on the morning after the visit to the town. Before the assessors he repeated his allegations of violence by the police.

Finding of Guilty

[23] Plainly both the assessors and later the Judge believed the complainant and disbelieved the appellant, hence the finding of guilty.

Appeal against Conviction

[24] We deal, first, with the appeal against conviction. The appellant's grounds of appeal, as distilled from his letter to the Court complain of the following errors in law and in fact:

- (a) In accepting the complainants' evidence when there were inconsistencies between her police statement and her evidence in Court.
- (b) In accepting the complainants' evidence when there was no sign of injury and lack of medical corroboration to indicate that sexual activity had occurred.
- (c) In not allowing the appellant time to seek representation, and in proceeding with the trial without the appellant having legal representation when he had no knowledge of the law.
- (d) In not giving the appellant the opportunity and facilities needed to prepare a defence.
- (e) In remanding the appellant for almost five months occasioning an unfair trial.

[25] We here, note that there was no complaint about the admission of the confessional statements.

[26] We shall now deal with each of these complaints in turn.

(a) Inconsistencies in the complainants Evidence

[27] The appellant does not identify the inconsistencies he refers to. In any event he did not during his cross-examination of the complainant seek to impeach her credit by reference to her police statement. Indeed there was no cross-examination as to her police statement. Prior to the trial there had been the usual pre-trial disclosure. We consider that the appellant cannot now, on appeal, refer to the complainant's police statement in an endeavour to undermine her credibility. Even if he could demonstrate inconsistencies she was not cross-examined on them.

[28] In our view, the assessors were properly directed by the Judge as to how they should deal with the facts. The complainant gave evidence which appeared to be credible. There was evidence of a recent complaint from the husband which was consistent with her account of the events of the night. The assessors and later the Judge were entitled to prefer her evidence to that of the appellant. As well there were the confessional statements of the appellant (now unchallenged) which were confirmatory of the complaint's evidence This ground therefore fails.

(b) Lack of Injury

[29] The appellant relied on the medical report of the doctor who examined the complainant. It will be recalled that report was admitted with the consent of the appellant as the examining doctor was no longer in Fiji. The examining doctor had recorded that there was no sign of injury on the complainant. The appellant contended that there was a lack of medical corroboration of any sexual activity, that

that fatally undermined credibility of the complainant and that the complainant's evidence ought not to have been accepted on that account.

[30] In this context it is to be remembered that the doctor who was called by the State to produce the report deposed that the absence of injury does not exclude rape as a woman could be frightened and in any event injury need not occur.

[31] Summing up the Judge directed the assessors:

"In the past Fiji has relied heavily on the need to corroborate the statement of a female victim that she was raped. It was said in the past that it was dangerous to convict on the female victim's evidence alone. That's because the law traditionally and for very old and unworthy reasons said that complaints of sexual assault by women may not always be reliable.

Thankfully that position has now changed as a result of a recent Court of Appeal decision in Fiji. So, just in case you think in this case you need to have Lavenia's statement that she was raped corroborated in any way I am telling you as a matter of law you don't.

As a matter of law it will only be on the rarest of occasions that a female victim's complaint of sexual violation will now require some form of corroboration.

So in short it is open for you to find this accused guilty on Lavenia's evidence alone. However, in this case her evidence is supported by her husband's testimony of recent complaint and Mr Chand's own confession of guilt. That may be significant for you."

[32] The reference to "a recent Court of Appeal decision", of course, was a reference to the judgment of this Court in *Seremaia Balelala v. The State* Criminal Appeal No.AAU0003 of 2004S. In that case this Court held the rule requiring corroboration of the complainant's evidence in sexual cases was counter productive and discriminatory. Thereafter it became discretionary for the trial Judge to give a warning or caution wherever there was some particular aspect of the evidence that gave rise to a question as to its reliability.

[33] Thus it was in the Judge's discretion as to whether he gave a warning or caution. Here, the Judge did not do so. In our view it has not been demonstrated that he was wrong. There was evidence from the complainant that the appellant held a glass louvre blade against her neck and forced her to have sexual intercourse. The appellant was shown a louvre glass recovered from the scene by the police and he agreed that it was the glass he had used to threaten the complainant. This is strong evidence from which, if accepted that it could be reasonably be inferred that the complainant was in a state of submission. The medical evidence disclosed that a complainant of rape might not show any sign of injury where she was frightened.

[34] We do not see any substance in this complaint and it therefore fails.

(c),(d) **Legal Representation and Preparation of Defence**

[35] It is convenient to deal with these two grounds together. They deal with the series of inter related complaints:

- (i) not allowing time to seek representation;
- (ii) proceeding with the trial without representation when the appellant had no knowledge of the law;
- (iii) being in custody and unable to seek counsel;
- (iv) being unrepresented due to financial constraints; and
- (v) not giving the appellant the opportunity and facilities necessary to prepare a defence.

[36] For us to consider these complaints it is necessary to look at the history of the case from when the appellant was first charged until trial.

- [37] The appellant first appeared in the Magistrate's Court on 26 July 2004 when he indicated that he wished to seek legal advice. He was in custody from then until 24 January 2005. The appellant was committed to the High Court for trial on 10 September 2004. He sought legal aid. On 20 September 2004 he unsuccessfully sought bail so that he could prepare his case and obtain a lawyer. On 20 October 2004 he again applied for bail. By then he had applied for legal aid. He had been told that he could get aid if he pleaded guilty. This advice was not accepted and he indicated that he intended to deny the charge although he still sought the assistance of a legal aid lawyer. Bail was again refused.
- [38] By 16 November 2004 disclosure had been completed and the appellant's request for legal aid had been unsuccessful. A trial date was set for 17 January 2005. The appellant then indicated that he would be able to get financial assistance from a brother in the United States to pay for counsel. There were number of remands on account of this indication. Ultimately the Court was told on 12 January 2005, that the money had not materialized. By then the trial date of 17 January 2005 had been vacated.
- [39] On 24 January 2005 the appellant was granted bail. On 11 March 2005, with the trial now scheduled for 11 April 2005, the appellant informed the Court that he would be instructing a lawyer. This was again confirmed on 15 March 2005. Then on 11 April 2005, the new trial date, the appellant failed to answer to his bail. A bench warrant was issued and this remained outstanding until 1 March 2006 when he appeared after he had been arrested on the bench warrant. Just over a month later on 3 April 2006 the appellant informed the court that he elected to appear on his own behalf. A new trial date was given for 1 August 2006, the case to follow another specified case. In fact the trial commenced on 7 August 2006.
- [40] It is clear from this chronology that he was given every opportunity by the Court to seek legal aid, to seek funds for counsel and to seek counsel. It does not escape our attention that the appellant had nearly eleven months during the time he absconded from his bail during which he could have engaged counsel.

[41] And as to his lack knowledge of the law to conduct his defence and the absence of representation at the trial we are unable to accept these complaints. Ahead of trial he made a number of bail applications and at the trial he cross-examined State witnesses, he challenged the admissibility of his caution and charge statements and he addressed the Court in closing. We therefore infer from the record that he did have a good understanding of the trial process. In any event, at the trial he elected to represent himself. He did not seek an adjournment in order to brief counsel. For these reasons we conclude that there is no substance in these various complaints and these grounds are accordingly rejected.

(e) **The Five Months Remand Complaint**

[42] The appellant separately complains that he was remanded in custody for five months after he was recaptured and that in itself occasioned an unfair trial. We see no substance in this complaint. We have already dealt with the issue of representation and the opportunity to obtain counsel. This grounds therefore fails.

Conclusions on Appeal against Conviction

[43] All the grounds of appeal against conviction have failed. We consider that, on the evidence, the appellant was properly convicted. There was ample evidence (including the appellant's now unchallenged confessions) to establish beyond reasonable doubt that the appellant was guilty of rape as charged. The appeal against conviction is accordingly dismissed.

Appeal against Sentence

[44] The appellant complains that the sentence of 10 years imprisonment was manifestly excessive in all the circumstances.

[45] At the time of sentencing, the appellant was aged 41 years. He had had a limited education to class 5 at primary school. He was a joiner by trade and self employed doing some private jobs. He was said to have a good work history. He had previous convictions going back to 1985 including assaults occasioning actual bodily harm, larceny and in 2003, a conviction and imprisonment for wrongful confinement for which he was sentenced to 3 months imprisonment and a concurrent sentence of 3 months imprisonment for attempted rape. That was his only previous conviction from an offence of a sexual nature. The present offending was by far the most serious to date.

[46] The Judge reminded himself of the appropriate tariff for this kind of offending. He referred to the decision of this Court in Mohammed Kasim v. The State Appeal 14 of 1993 where this Court observed:

“We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of 7 years. It must be recognized by the courts that the crime of rape has become altogether too frequent... the sentences imposed by the courts for that crime must ... reflect an understandable public outrage.”

[47] The Judge took a starting point of 8 years. He then identified the following aggravating factors:

- (a) the abuse of trust by the appellant by tricking the complainant into believing that he, the appellant, could obtain employment for her when no such employment was available and this had been the means of luring her into his company.
- (b) threats of violence by physically closing her mouth, pulling her hair and putting the glass louvre blade to her neck.

[48] As well, the Judge took into account the appellants' previous convictions, including the conviction for attempted rape, to which we have referred. Ultimately he concluded that a sentence of 10 years was the proper sentence in all the circumstances of the case.

[49] In our opinion such a sentence was appropriate for the circumstances of this crime. A particularly serious feature of the case was the way that the appellant gained the confidence of the complainant by the deliberate deceit of the offer of a non-existent job. He then reduced her to a state of submission with acts of violence and the use of the glass louvre blade as a weapon. As well, there was the previous conviction for an attempted rape.

[50] The Judge, however, fell into one error. The appellant had been in custody on remand for a total period of just over 11 months. The Judge did not take this time into account. The appellant was entitled to a credit. We, therefore, propose to correct this error by reducing the sentence by one year.

[51] The appeal against sentence is allowed and a sentence of 9 years is substituted.

Result

[52] (1) The appeal against conviction is dismissed.

(2) The appeal against sentence is allowed.

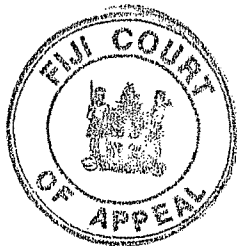
(3) The sentence of 10 years is set aside and in lieu thereof a sentence of 9 years is substituted.

JA Ellis

Ellis, JA

JA Penlington

Penlington, JA



B. McPherson

McPherson, JA

Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions, Suva for the Respondent

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