IN THE COURT OF APPEAL FIJI ISLANDS
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal NO. AAU0078 of 2007

IN THE MATTER of an appeal from the decision of the High Court in Criminal Appeal No. HAA 062 of 2007

BETWEEN:

PREM SIDHARTA KUMAR
Father's name Prem Sushil Kumar

Appellant

AND:

THE STATE

Respondent

Coram: Byrne, AP
Pathik, JA
Madigan, JA

Date of Hearing: 19 March 2010
Date of Judgment: 25 March 2010

Mr M Raza for Appellant
Mrs. J Cokanasiga for Respondent

JUDGMENT OF THE COURT

This is an appeal against an order for retrial made by a Judge of the High Court on the 27th July, 2007 on one charge of rape. The appellant was given leave by the single Judge to appeal to this Court on the 18th March 2009.

2. The appellant had been tried in the Suva Magistrates Court between the 26 November 2003 and 16th October 2006. Judgment was delivered on 2nd February, 2007 convicting this appellant.

3. The complainant was the first prosecution witness. She stated that she was a student boarding at the Kadavu Provincial School on the 13 November 2003. The accused was a teacher and lived with his wife on the school compound. At about 7pm on the 13th November, the accused ordered her to go to the dormitory because she was sick. When she got there the accused had the matron send her to his house to get medicine from his wife, who was the school nurse. The accused intercepted her and took her to another teacher's house. When they got there he asked her to kiss him, and on refusal he started touching her breasts. She pushed him away and ran off but the accused caught her and dragged her to another house where he raped her.

4. After the rape she returned to the dormitory when she says she told other girls what had happened. The inconsistent evidence from those girls was one of the principal factors in his appeal being allowed.

5. An appeal against conviction to the High Court was successful. The learned appellate Judge after allowing the appeal then went on to say this:

> *"Both counsel addressed the court on what may be done should the appeal against conviction is (sic) upheld. The court had carefully considered the submissions made. In the opinion of this Court the wider interest of justice will be best served if there is a retrial of the charge in this matter."* (para 40)

The interpretation and rationale for this paragraph eventually became pivotal in the hearing of this appeal against retrial.

6. The appellant certainly would not and does not argue that it is not within the discretionary powers of the Judge to order a retrial on the charge of rape. That power is found in s.319(i) of the then operative Criminal Procedure Code, Cap 21. What is in dispute are the principles which should be considered by the appellate Judge leading to the exercise of his discretion to so order.

7. In addressing this very issue the Privy Council in ***Au Pui-kuen v. Attorney General of Hong Kong*** [1980] AC 351, said:

> *"No judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it."*

Lord Diplock then went on to say in the Board's opinion:

> *"to exercise it judicially may involve the Court in considering and balancing a number of factors some of which may weigh in favour of a new trial and some may weigh against it. The interests of justice are not confined to the interests of the prosecutor and the accused in the particular case."* and later,

"the strength of the evidence adduced against the defendant in the previous trial is clearly one of the factors to be taken into consideration in determining whether or not to order a new trial".

8. This Court (differently constituted) relied upon this opinion of the Privy Council in ***Azamatula v. State*** AAU0060 of 2006S and further held that factors of strength of prosecution case and unreasonable delay are highly relevant when considering whether the interests of justice are best served by ordering a retrial.

The Appellant's Grounds

9. The appellant's appeal is founded on the following grounds:

i) that the strength of the prosecution case is so weak that it is very unlikely that a conviction would be obtained on a retrial.

ii) A retrial would seriously prejudice the appellant in that the alleged offence took place on 13th November 2003 and to have a trial now in 2010, or more likely 2011 would prejudice the appellant in that he cannot locate defence witnesses.

10. Subsumed in the first ground is the appellant's submission that the length of time taken to conduct this trial and arrive at a judgment some 18 month's after the complainant gave her evidence raises issues of genuine assessment as to credibility and reliability to the point that the judgment must be unacceptable.

The Respondent's Reply

11. The State submits that the case against the Appellant is strong, despite material inconsistencies in the evidence of the two witnesses first complained to.

12. Counsel for the State submits that there is no prejudice likely to be occasioned to the appellant on retrial, partly because the delay has been attributable to the appellant exercising his right to appeal the decision of the learned appellate Judge and in any event the delay is not unreasonable.

13. In her oral submissions before us, State counsel said that the Judge properly founded his decision on the interests of justice and there are no authorities which state he must then go on to list the factors he has taken into consideration.

Analysis

14. One of the first and greatest difficulties in determining whether the learned Judge acted "judiciously" or not is brought about by the fact that despite the wording of the Judge's decision (see para 3 supra) neither State nor Defence

Counsel were called upon to address the appellate Court on the question of retrial. Nor do the Judge's notes assist. The notes make no reference to submissions on this question.

15. The failure to hear Counsel for the defence on a serious issue as to retrial goes to the very heart of our adversary system of criminal procedure. To have called for submissions would lead to a better understanding of the factors that the learned Judge may have been taking into consideration.

16. Although the probability of a conviction in the second trial is not an overriding factor to be considered (***Au Pui-kuen***) – a weak prosecution case is but one factor to be taken into consideration. The evidence in the instant case is strong if the complainant is to be believed, but there are nevertheless serious material inconsistencies in the statements of other witnesses. These do become a "factor" to be considered.

17. We believe that the delay in delivering judgment in the Magistrates Court some 18 months after the complainant gave her evidence is a matter of concern however this is not relevant to the issue of retrial. It was of course highly relevant to the appeal against conviction.

18. Of the utmost relevance, and a factor that should have been considered by the appellate Judge is that the passage of time has deprived the appellant of the facility in calling his witnesses. He is divorced and acrimoniously estranged from his wife, his teacher colleague at the time has migrated to Australia and his whereabouts are unknown. The complainant will be 22 years old now, probably married with a family. For her to relive the ordeal now would be severely traumatic.

Conclusion

19. In the premises, we are persuaded that the learned Judge's discretion in ordering a retrial was not exercised judiciously. While State counsel is correct in that there is no authority which states a Judge is bound to provide reasons, it is nevertheless incumbent on the Judge to show that he has considered all relevant factors either by

i) hearing counsel on the matter, or
ii) referring to more than "in the interests of justice", a term which is wide as it is nebulous in the circumstances.

20. This, the learned Judge did not do but we are of the view that had he considered the inconsistent evidence in the prosecution case, and had he considered the prejudice caused to the appellant by ordering him to be retried, and had he considered the ordeal to be suffered by the complainant; then he may have decided that those factors overrode the public interest in having a serious crime tried again.

21. The fundamental problem is that we just do not know what he considered, and consequently cannot safely say that his discretion was properly exercised.

ORDER

This Court allows the appeal and orders that the order for retrial by the High Court Judge be set aside.

John E. Byrne, AP

Devendra Pathik, JA

Paul Madigan, JA

Solicitors:

Mehboob Raza and Associates, Suva for the Plaintiff
Office of the DPP, Suva for the Respondent