IN THE FIJI COURT OF APPEAL

SUVA, FIJI ISLANDS

APPELLATE JURISDICTION

[Criminal Appeal No. AAU 0059/07]
(HAC 003/05)

BETWEEN : **PRABHU LAL**

APPELLANT

AND : **THE STATE**

RESPONDENT

Before the Honourable Acting President : **Mr. JUSTICE JOHN E. BYRNE**

Counsel : **Ms J. Nair for the Appellant**

: **Ms N. V. Tikoisuva for the Respondent**

Dates of Hearings and Submissions : **5th June, 7th July 2008; 28th October 2009**

Date of Ruling : **10th February 2010.**

RULING ON APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

[1] On the 24th of May 2007 after a Trial which began in the High Court at Labasa on the 27th of May 2007, the appellant was convicted on ten counts of rape and two counts of indecent assault. The offences dated from February 2004 to November 2004.

[2] The appellant was unrepresented although he had attempted over a period to obtain legal assistance both from private lawyers and from the Legal Aid Commission. He was unable to pay the fees requested by private lawyers and he was refused legal aid both by the Commission and then on appeal by its Director.

[3] At the time of trial the appellant was 61 years old and a Fisherman by trade. He had never been to school and had spent sixteen years in prison serving a life term for murder. He was released in 1987 and the trial Judge disregarded this conviction for the purpose of sentence because it was a spent one.

[4] It was alleged by the prosecution that in each of the months, February, April, May, June, July, August, September and October 2004 he raped his daughter Savita Devi once and twice in November 2004 and that on the 31st of March and 13th of November 2004 he indecently assaulted Savita Devi.

[5] He now seeks leave to appeal against his conviction on the ground that he was prejudiced at his trial by not having a counsel to represent him. Linked with this ground is his allegation that the learned Trial Judge did not give the appellant sufficient time to engage a lawyer of his choice.

CHRONOLOGY

[6] On the 29th of November 2004 the appellant first appeared in the Labasa Magistrates' Court on the 12 charges. He asked to have his plea deferred so that he could seek

legal counsel. His bail application was denied and he was further remanded until the 13th of December 2004 when he was represented by a local solicitor, Mr Kohli who made a further application for bail which was also denied and he was further remanded until 24th December 2004.

[7] On that day the appellant appeared in the Court but his counsel was not present and the matter was adjourned for plea to be taken.

[8] On the 5th January 2005 he appeared in the Magistrates' Court with his solicitors Messrs Kohli and Sen and make another application for bail. This was again refused and he was remanded until the 11th of January 2005. He pleaded not guilty to all charges against him.

[9] On the 11th of January 2005 he was bailed and on the 25th of February 2005 his case was transferred to the High Court.

[10] On the 21st of March 2005 he first appeared in the High Court when Mr Kohli withdrew as counsel for him and the learned Judge advised the appellant to apply for Legal Aid. The prosecution sought time to file information and disclosures.

[11] On the 20th of September 2005 Mr Robinson appeared before Chief Justice Fatiaki for the appellant and the respondent asked for time to file information and disclosures.

[12] On the 26th of September 2005 an information was filed.

[13] On the 28th of November 2005 Mr Sen appeared before Chief Justice Fatiaki and sought leave to withdraw as counsel on instructions from Mr Robinson. The matter was adjourned without leave being granted for a bail hearing.

[14] On the 29th of November 2005 Chief Justice Fatiaki granted Mr Robinson leave to withdraw as Counsel and Ms Vaniqi of the Legal Aid Commission appeared as a duty Solicitor to inform the Court that the appellant's application was being processed by Legal Aid.

[15] The then Chief Justice refused to revoke his bail on the ground that the State had failed to prove that the appellant had interfered with witnesses.

[16] On the 7th of February 2006 Ms Vaniqi appeared and informed the Court that his legal aid application had been refused. The appellant wished to challenge the decision of the Director of Legal Aid and the matter was further adjourned until the 23rd of March 2006 when he appeared before Winter, J after which his file was transferred to Madam Justice Shameem and a hearing date set for trial from the 21st to the 29th of June 2007 after a pre-trial conference date had been set for the 1st of December 2006.

[17] On the 7th of July 2006, the appellant failed to appear before Madame Justice Shameem but did so on the 10th of July 2006. He informed Shameem, J that he wished to be represented by a lawyer. The State agreed that he had a right to Counsel. The appellant said that he needed time to raise money to pay for a private lawyer. On that date he also informed the Court that he would raise the defence of Alibi as he had been out fishing on the dates alleged in the information. The matter was adjourned

till the 12th of September 2006 before Gates, J (as he then was) who adjourned it to be called before Shameem, J.

[18] On the 20th of November 2006 the matter was called before Jitoko, J to determine his ability to pay for his legal representation. The appellant had collected some money but needed more time to collect up to $2,500.00. The matter was set for hearing in June 2007.

[19] On the 19th of January 2007 Shameem, J fixed the date for the hearing to commence on the 21st of May 2007 and the appellant was given time until the 21st of May 2007 to find counsel and collect money. She adjourned the matter until the 20th of February 2007 before Winter, J.

[20] On the 21st of May 2007 he appeared before Shameem, J and explained that he was out at sea fishing and therefore did not have time to arrange for a lawyer. He mentioned that he had spoken to a Mr Shah a Solicitor and he had requested all his disclosures. He was given until the 22nd of May 2007 to arrange for a lawyer to represent him.

[21] On the 22nd of May 2007 the prosecution was ready to start its case. The appellant informed Shameem, J that he had spoken to Mr Shah but he wanted all his disclosures. The prosecution said that they had already served him with full disclosures and asked the Court to proceed with the hearing. The Judge then directed the hearing to proceed, the appellant pleaded not guilty and the prosecution opened its case.

[22] The Prosecution called the complainant as its first witness and she was cross-examined and re-examined that day. The second prosecution witness was a doctor and she was not cross-examined. The matter was adjourned.

[23] On the 23rd of May 2007 the prosecution called its third witness, the wife of the appellant who was declared hostile by the Judge. The prosecution then closed its case and the appellant gave sworn evidence. He called two witnesses who basically said: they knew nothing about the case.

[24] The appellant then asked for a two to three weeks adjournment to have his Alibi witnesses in Court but his request was refused by the Court. Closing submissions were made and the matter was adjourned to the 24th of May 2007 for summing up.

[25] On the 24th of May 2007 the Judge concluded her summing up and no re-directions were made.

[26] The Assessors came back with opinions of guilty and the learned Judge concurred with their opinions and convicted the appellant as charged.

[27] From this chronology it is clear that the appellant was given more than reasonable time to engage a lawyer so that I have no hesitation in rejecting the allegations by the appellant that he had not been given sufficient time to engage a lawyer of his choice. The appellant had been given almost ten months to find himself a counsel and I consider it would have been unreasonable to give him any further time for this purpose.

THE PROBLEM OF THE UNREPRESENTED ACCUSED

[28] This is well known in Fiji, mainly because of economic grounds and the fact that although there is a Legal Aid system its resources are limited as are its professional staff.

[29] All Judges know how difficult it is to maintain a fair trial where the accused is unrepresented, particularly on a serious charge such as murder. The problem is to endeavour at all times to keep an adequate balance between the rights of the accused to a fair trial and those of the prosecution representing the public to ensure that the Judge does not favour either side. Undoubtedly it is daunting for most persons to be on trial and to have to make a statement or give evidence. As Murphy, J said in his dissenting judgment in McInnis v. The Queen (1979) 143 C.L.R. 575 at p585, "it must be overwhelming to attempt to cross-examine, address a Jury and use other forensic skills".

[30] Without legal representation there must always be a risk that a fair trial does not occur. In McInnis v. The Queen (Supra) Mason, J said at pp 582 – 583:

> *"If the Crown case is overwhelming then the absence of counsel cannot be said to have deprived the accused of a prospect of acquittal.....But if the Crown case is less than overwhelming I have some difficulty in perceiving how in general the conduct of the case by an accused who is without legal qualification and experience can demonstrate that even with the benefit of counsel, he had no prospect of an acquittal. How is it to be said, for example, that cross-examination of Crown witnesses by counsel would not have been more effective?"*

[31] In the instant case, the prosecution case was very strong so that it might be said that the absence of counsel did not deprive the appellant of a prospect of acquittal.

[32] I have read the record of the proceedings in the High Court and generally speaking have formed the opinion that the learned Judge helped the appellant as much as possible in presenting his defence. For example, before the appellant began his cross-examination of the complainant the Judge explained the purpose of cross-examination and stated at page 122 of the record that he should put his case to its witness where there was any dispute of fact between himself and the State. She then summarized the evidence of the complainant for the appellant.

[33] At page 123 the appellant said: "I never did these things and I have nothing to ask further". The Judge then said: "Ask her about motives?" meaning did she have any motive for inventing her story. The appellant accepted this invitation and asked the witness, "You are making this up, because I reported her to the police". The Complainant denied this.

[34] The second witness called for the prosecution was Dr. Jayanti Regi, a specialist Gynaecologist at Labasa Hospital. She did not examine the complainant but gave her opinion on a medical report written by the doctor who did examine the complainant but who at the time of the trial had resigned and gone to Australia.

[35] There are at least four relevant paragraphs in the report which I set out now:

1. *The name of the patient is Savita Devi f/n Parbhu Lal. She was examined on 26th November 2004. She was 15. She told the doctor that her father had been raping her from February 2004 to 17th November 2004. She wanted to report it to the police but she was afraid of her father who threatened her with a knife.*

2. *The doctor found her to be fearful. Her health condition was satisfactory. The cervical orifice had an old laceration, at 10'oclock. This was on the external part of the uterus. It was an old laceration which had healed.*

3. *The diagnosis is not noted. In my opinion the conclusions we might draw are that there was an old trauma in that place. But nothing is mentioned about whether the hymen is intact. We can only conclude that there was old trauma to the cervix.*

4. *In this case she found no injuries because the rape was reported months later, and it was repeatedly done. She was too scared to struggle allegedly. She must have agreed under threat.*

[36] The Judge read the report and explained the nature of the evidence to the appellant who declined to cross-examine the witness. The judge then asked at page 127: "Do you dispute the injury?". The appellant replied: "No, I know nothing about it".

[37] I consider it possible that had the appellant been represented he might well have asked the doctor whether a man who had diabetes would be capable of having an erection and, depending on the answer to that question, other questions might have followed the answers to which might have given some credence to the appellant's claim that he was incapable of having an erection.

[38] The learned Judge referred to this in her summing up to the assessors when she said in page 11 of the record:

> "Of course the medical report did not say who had caused the trauma to Savita's cervix, and in that sense it does not prove the case against the Accused specifically. It does however show that there is an old injury to her cervical entry which is consistent with old trauma."

[39] Had the appellant been represented I think it quite possible that in his closing address to the Court he would have commented on this report and suggested that it was only speculation for the State to suggest that this old trauma could be linked to the appellant.

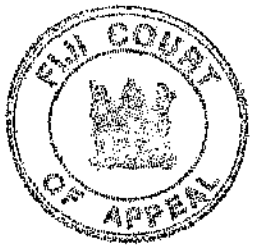
[40] Furthermore in my judgment it would not have been improper for the learned judge to have put the question about the appellant's diabetes as proof of his inability to have an erection to the witness. Again one is left to speculate as to what answer the doctor would have given. Of course I appreciate that at page 15 of the record in concluding her charge to the assessors the Judge mentioned the fact that the appellant was a diabetic who could not achieve an erection and at the very end of her summing up she said as to the guilt of the appellant: "If you have any reasonable doubt about it, you must find him not guilty".

[41] There is another matter which calls for comment, namely the lack of any medical evidence as to whether any man who has diabetes will normally be able to achieve an erection. Had there been such evidence then the assessors, if not the trial Judge, might have been left in some doubt as to whether the appellant was guilty. If he had been legally represented then I would have thought any prudent lawyer would have at least endeavoured to obtain medical evidence on this question. This was not done.

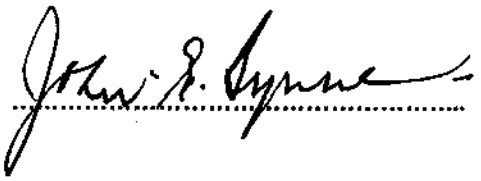
CONCLUSION

[42] In my opinion the appellant is entitled to have the judgment of the Full Court on this proposed ground of appeal.

I therefore grant the Appellant leave to appeal and the matter will now take its normal course.



Dated at Suva this 10th day of February 2010.



JOHN E. BYRNE

ACTING PRESIDENT, FIJI COURT OF APPEAL