IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Criminal Appeal Nos. AAU 007 of 2014
(High Court Case No. HAC 79 of 2012)

BETWEEN : KEVIN NAINOCA PARKER

Appellant

AND : THE STATE

Respondent

Coram : Gamalath, JA
Prematilaka, JA
Nawana, JA

Counsel : Mr. J. Dinati for the Appellant
Ms. P. Madanavosa for the Respondent

Date of Hearing : 07 February 2020

Date of Ruling : 27 February 2020

JUDGMENT

Gamalath, JA

[1] In the High Court at Suva, the appellant was tried on an Indictment based on seven counts, out of which two counts were under Section 154(1) of the Penal Code, Cap 17 for having committed Indecent Assault and the five counts for having committed the offence of Rape on Esther Parker on different occasions between 1 January 2008 and 31 December 2011.

[2] After trial the appellant was convicted on all counts and on 15 March 2013 he was sentenced to 3 years on each of the indecent assault counts and 17 years imprisonment on each of the rape counts, all to run concurrently with a non-parole period of 16 years imprisonment.

[3] Against the conviction and the sentence the appellant filed an application for enlargement of time to appeal on 2 April 2014. This in effect means he was out of time by almost 11 months. However, the learned Single Judge having examined the reasons for the delay determined that the delay was not due to any lapse on the part of the appellant but as a result of a certain inadvertence on the part of the Corrections Department, which had supposedly misplaced the appellant's timely notice of appeal. In the circumstances the learned Single Judge allowed the application for the enlargement of time to prosecute the appeal as prayed for.

[4] The appellant relied on 7 grounds of appeal before the single judge. In support of them there had been written submissions made on 16 May 2017 and they are contained in the pages 5 to 9 of the court record. However, presently limiting the number of grounds of appeal to five, at the very outset of the hearing, the counsel for the appellant informed the Court that the appeal would be argued based only on the 5 grounds against the conviction as set out in the written submissions dated 16 May 2017. As such, our attention was drawn more specifically to page 7 of the record in which one finds the five grounds upon which the appellant places his reliance;

Grounds of Appeal:

(1) The learned Judge erred in law in failing to follow the mandatory requirement as set out in section 295 of the Criminal Procedure Decree 2009 with regard to the directions as to mode by which a vulnerable witness's evidence is to be given.

(2) The learned Judge erred in law in allowing the complainant's evidence to be given via skype thereby prejudicing the Appellant's right to a fair trial and in the process causing serious miscarriage of justice.

(3) The learned Judge erred in law in not prescribing the procedure of how the complainant's evidence to be given during cross examination when she was not properly answering some of the Appellant's questions and in particular on the issue of DNA and the questions relating to the father of her child.

(4) The learned Judge erred in law in expediting the trial following the request made by the State and thereby not giving the Appellant ample opportunity to prepare his defence thereof.

(5) The learned Judge erred in law in expediting the trial following the request made by the State in view of the fact that the appellant was unrepresented.

[5] The Facts:

As transpired in the trial, the appellant was the biological father of the complainant who was terminally ill with bone cancer at the time of her giving evidence at the trial. According to the prosecution witness, Elizabeth Parker, the complainant's mother and the appellant's wife, during the pendency of the trial the complainant was in severe pain and breathless at times, necessitating the administration of morphine regularly to quell the pain. The complainant's left leg had been amputated due to spreading of the cancer and she had been in and out of the hospital for a period of one year or so before the commencement of the trial. Further according to Elizabeth Parker her daughter had been pregnant for 20 weeks, a fact that came to light through the medical examinations carried out by the doctors, who treated the complainant for cancer.

[6] Dr. Kelerayani Namudu, who treated the complainant for cancer, giving evidence at the trial stated that in February 2012, while treating the complainant for cancer, she had discovered that the complainant had been pregnant for 20 weeks. On account of her advanced state of osteosarcoma, cancer in the bones, it was medically decided to terminate the pregnancy.

[7] Reverting to the evidence of Elizabeth Parker, it was in 2011 when she was informed of the state of her daughter's health with a growing cancer. On the issue of the filial relationship between the complainant and the appellant, it was her evidence that the appellant had been acting in an abusive manner and at times he used to hit the complainant with sticks or the belt. On being informed that the complainant was 20 weeks pregnant, Elizabeth inquired from the complainant about the pregnancy and learnt from the complainant that she was carrying the appellant's child. It was then only the matter was reported to the Police, through the intervention of the medical officer Dr. Kelerayani Namudu.

The evidence of Elizabeth Parker was not challenged by the appellant.

Evidence of the complainant:

[8] The complainant testified *via* Skype and stated that her date of birth was 7 May 1996. Her evidence was that the appellant was a "violent and brutal person". He used to beat her regularly and on one particular occasion he had even tried to "choke her in the neck". She was merely 8 years when the father started to become sexually aggressive towards her. Then she was a student studying in class 3. That was in the year 2004. From 2004 to 2008, the appellant had been sexually abusing the complainant twice a week, on a regular basis. When she was in class 7 and was 12 years old, the appellant had had sexual intercourse with her for the first time. That was when the rest of the family members had been away attending a function. On that occasion, the appellant having entered her room gagged her with a pillow and raped her. From then onwards, whenever Elizabeth, the mother was away from home, the appellant had been indulging in sexual intercourse with the complainant, of which no complaint had been made due to the fear of being beaten by the appellant. Since

2007 the complainant had been experiencing pain in one of her legs and in 2011 she was diagnosed with bone cancer. Somewhere in January or February of 2012, the doctors informed her that she was pregnant. In the cross examination of the complainant, the appellant had made attempts to challenge the evidence of the complainant. However, as can be seen through her evidence it is clear that her evidence remained uncontroverted.

[9] In addition to the above evidence, prosecution case relied on the caution interview statement of the appellant, recorded by Acting Assistant Superintendent of Police, Shanti Lal. Further on 3 March 2012, whilst being formally charged by DC 1841 Sashi Kumar at Valelevu Police Station, the appellant had stated as follows:-

> *"I confess to my crimes and I am saying sorry to my wife and children and also to my mum and dad and all my in laws, my relatives and friends and my church members and that I accept my wrong doing.*

The appellant did not challenge the evidence of DC 1841 Shashi Kumar. That was despite the advice correctly given by the learned Trial Judge, who informed him of his right to impeach the credibility of the evidence of the Police Officer by cross examining him. In responding to the advice of the learned Trial Judge the appellant stated that "I do not want to challenge PW 6's evidence. (meaning DC 1841 Shashi Kumar's) PW6 was nice to me".

[10] At the end of the Prosecution case the appellant remained silent, and did not call any evidence on his behalf.

[11] This in brief is the factual background on the whole at the trial.

<u>In dealing with the Grounds of Appeal:</u>

[12] As can be understood, having regard to the grounds 4 and 5 referred to earlier, the essence of the appellant's complaint is that by acceding to the request of the prosecution the learned

trial Judge has expedited the hearing of the trial and on one hand it denied him of the opportunity to be fully and completely ready to face the trial , in particular with his intended defence and on the other hand since he was appearing in person, the decision to expedite the trial process has caused him prejudice.

[13] In so far as these grounds are concerned, as it evinces from the proceedings at the trial the sequence of events that led to the commencement of the trial had been as follows:-

(a) *That on 19 March 2012, on the very first day of the proceedings where the information and the disclosures to be filed, the court informed the appellant his right to counsel. In responding he had stated that since he lacks resources, he would be seeking the assistance of the Legal Aid Commission. The matter was then postponed till 10 April 2012.*

(b) *On 10 April 2012, since the information was not yet filed of record the case was postponed till 17 April, 2012.*

(c) *On 17 April 2012, after the filing and serving of the information and disclosures, the court ordered the prison authorities to escort the appellant to the Legal Aid Commission to formally apply for Legal Aid. The hearing was postponed till 23 April 2012.*

(d) *On 23 April 2012, the matter was further adjourned till 30 April 2012, and based on the court order, the appellant to be escorted back to the Legal Aid Commission to seek Legal Aid.*

(e) *On 30th April 2012, the case was adjourned once again till 18 May 2012.*

(f) *On 18 May 2012, the matter was once again adjourned till 28 June, 2020, awaiting the response of the Legal Aid Commission.*

(g) *On 28 June 2012, a counsel, one T. Muloilagi had appeared for the appellant and thus the trial fixed for two weeks from 8 July 2013 to 19 July 2013.*

(h) *On 28 June 2012, the court was informed of the complainant's deteriorating health related issue and the prosecution moved that the case be concluded within a week.*

The trial was then postponed till 8 July 2013.

(j) *After many other adjournments, on 15 February 2013 the Appellant had informed the court that since he couldn't afford to retain a lawyer and since the Legal Aid Commission had turned down his application for legal aid, he would thenceforth be appearing in person. He had further informed that the confession said to have been made by him will also be challenged for its admissibility.*

(k) *On 7 March 2013, the appellant informed the court that he was ready to go to trial. Since the complainant's health was falling rapidly, the prosecution urged that the trial be commenced on 8 March 2020 and the court, with the consent of the appellant, allowed the application.*

(l) *On 8 March 2013, the appellant was ready for trial.*

(m) *Thus, on 11 March 2013, the trial commenced.*

[14] As can be gathered from the material above, there was almost a period of one year between the first calling date of the matter in the High Court and the commencement of the trial. As the information had been served on the appellant on the 17 April 2012, the appellant was fully equipped with the necessary material, including the disclosures of the proposed evidence, well in advance of the commencement of the trial. The commencement of the trial had been with the consent of the appellant, who had opted to appear in person.

[15] As reflected through the proceedings, the evidence of the complainant had been challenged by the appellant extensively and during the cross-examination efforts had been made to make out that the complainant had an intimacy with one David, who was her cousin. It was probable that this was meant to be an insinuation to make it look like that the appellant was not responsible for the pregnancy. The complainant denied this suggestion.

[16] However, what is clear from the above narration of facts is that the issue of non-availability of counsel to represent the appellant at the trial could not be justifiably attributed to the justice system and in the context of the factual basis referred to above, I am unable to

conclude that there was prejudice caused to the appellant due to the want of legal counselling.

[17] In the light of the facts as stated above, the grounds of appeal 4 and 5 are untenable. Further, it evinces clearly that every endeavour had been made by the learned Trial Judge to assist the appellant to secure the assistance of the Legal Aid Commission, and the time period of almost over one year that operated from the initial stages of the proceedings on 19 March 2012 to the actual commencement of the trial on 11 March 2013 would have given ample time and opportunity for the appellant to be ready to face the trial against him.

[18] In relation to grounds 4 and 5, in a broader sense what is relevant to ask is whether the non-availability of legal assistance had denied the appellant his right to a fair trial. Expounding the attributes of the concept of Fair Trial, the distinguished Jurist and the Lord Chief Justice (ex) of England and Wales the late Lord Tom Bingham has the following to state in his seminal text *"The Rule of Law"; Chapter 9 - A Fair Trial; Criminal trials p.97*:

> *"The defendant must be clearly and intelligibly told exactly what crime he is said to have committed. He must have enough time and the facilities he needs to prepare his defence. He must be permitted to defend himself or to be represented by a lawyer of his choice; if he cannot afford legal representation, it must be provided free when the interests of justice require it. He must have the opportunity to examine or have examined witnesses against him and to obtain the attendance and evidence of witnesses on his behalf in the same way as evidence is given against him. He must have the help of an interpreter if the case is conducted in a language he cannot understand. He is entitled to disclosure of material which is helpful to him because it weakens the prosecution case or strengthens his."*

[19] The principles enunciated in the above have universal application. In so far as the issue of availability of legal assistance is concerned, I find similar resonance in the judgment of **Josua Raitamata v The State;** [2008] FJSC 32; CAV 0002.2007(25 February 2008) in which it had been decided that;

> *"There was a complaint that the High Court failed to consider that the Magistrates Court allowed the trial to proceed in the absence of legal representation for the petitioner. This did not, however, form part of the grounds of appeal before the High Court. Section 28(1) (d) of the Constitution provides that every person charged with an offence has the right:*
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> > ***...to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid;"***
>
> *The record discloses that on 5 February 2001 both the petitioner and his co-accused asked for legal aid counsel to assist in the hearing. However, on 20 October 2003 the magistrate's notes indicate that the petitioner did not want any legal representation while his co-accused wanted legal aid assistance. The record stated:*
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> > ***"This Court has given enough time for Tomasi to arrange a lawyer. This was revealed to me on 9/7/2003. He has to quickly get his application done and I shall hear this matter in the next call date."***
>
> *Another note, on 22 November 2003, records that Accused No 1, Mr. Raitamata, did not need legal aid. He complained of delay in commencing the trial at an appearance on 1 March 2003. He was recorded as saying:*
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> ***"It's been 4 years now. Ask Court to exercise our right under constitution."***

The magistrate's note indicated that he was the cause of the delay and had "jumped bail since December 2001-October 2003".

There is nothing in the record to indicate that Mr. Raitamata was denied an opportunity to exercise such rights as the Constitution provides in relation to legal representation. Those rights are plainly not absolute. (My Emphasis)"

[20] Thus, in my view, the answer relating to the issue of the lack of legal representation should be clear. According to the Supreme Court's decision, there is no absolute right for legal representation and as it is trite law, each case should be determined on its own merits. During the hearing of the appeal, the State informed this court that the complainant died within two to three months after testifying at the trial. The Appellant did not dispute to that submission. As I have pointed out with having reference to the proceedings at the trial the appellant had enough time to prepare with for his defence. In the circumstances there had been no prejudice caused to him at the trial on account of the issue of legal representation. Accordingly, I hold that the grounds 4 and 5 are untenable.

Grounds of Appeal, (1), (2) and (3)

[21] Ground (1)

THE Learned Judge erred in law in failing to follow the mandatory requirement as set out in section 295 of the Criminal Procedure Decree 2009 with regards to the directions as to the mode by which a vulnerable witness's evidence is to be given;

Directions as to mode by which a vulnerable witness's evidence is to be given

"295. — (1) Before the commencement of any trial, a prosecutor may apply to a judge or magistrate for directions as to the procedures by which the evidence of a vulnerable complainant or witness is to be given at the trial.

(2) The judge or magistrate shall hear and determine an application made under sub-section (1) in chambers, and shall give each party an opportunity to be heard in respect of the application.

(3) The judge or magistrate may call for and receive any reports from any persons whom the judge or magistrate considers to be qualified to advise on the effect on the complainant or the vulnerable witness of giving evidence in person in the ordinary way or in any particular mode provided for in section 296.

(4) In considering what directions (if any) to give under section 296 the judge or magistrate shall have regard to the need to minimise stress on the complainant or the vulnerable witness, while at the same time ensuring a fair trial for the accused.

(5) A judge or magistrate may hear and consider an application by either party made during the course of any trial for an order prescribing the procedures by which the evidence of a vulnerable complainant or witness is to be given in the trial."

These are salutary provisions inbuilt into the law solely for the purpose of providing a protective environment for the witnesses who come under the category of vulnerable witnesses. As it transpired at the trial relating to this appeal, the complainant comes well within the category of a vulnerable witness whose interest should have been properly secured within the parameters of the provisions of the law. In the light of the vulnerability of the complainant of this case, I see no basis for objecting to the procedure adopted during the trial in obtaining her evidence via Skype.

[22] Moreover, adverting to the proceedings as reflected on page 119 of the Court Record it is clearly discernible that the court had complied with the procedure laid down in the said section 295of the Criminal Procedure Act 2009, and for the purpose of clarity I shall relate it in here.

*"**Prosecution***

- *We are making an application pursuant to section 295 and 296 of the criminal Procedure Decree 2009 to:*

(i) take the complainant's evidence through Skype.

- *We rely on the case of **State** v **A.K. Singh** HAM 005 of 2012. Lautoka which allowed the evidence of the complainant to be taken through Skype/video link (see paragraph 7).*

- *Apply for a police officer [female] and court officer [female] to be present at the scene, where the complainant is at. We also apply for complainant's grandmother to be her support person, at the scene, but she will not be giving evidence or coaching the complainant witness*

- *We also apply for a close court and complainant's and accused's name to be suppressed. I rely on Section 9 and 12 of Juveniles Act.*

Accused

- *I have no objection to the complainant's evidence taken by Skype/video link.[My emphasis*

- *I have no objections to the female police officer and female court clerk to be at the place, where complainant will be giving her evidence.*

- *I have no objection to a close court, when complaint is giving evidence and I have no objection to name suppression for complainant and accused.*

- *I have no objection to the grandmother been the support person for complainant's, during the hearing, but she will coach the witness.)*

Court:

1) Prosecutions above application are granted.

2) Adjourned 11.03.2013 – hearing starting at 11.30am

3) Remand in custody

4) Above orders to be formally drawn up".

[23] In so far as the 2nd ground is concerned, it is interrelated to ground 2. It is a commonly used procedure in this jurisdiction to obtain evidence via Skype and it has now become an entrenched practice, often used with no legal impediments. The appellant had not explained how the procedure adopted had caused him any prejudice and moreover he had acceded to the application made by the prosecution to obtain evidence of the complainant via Skype. In the circumstances, I find this ground of appeal is with no merit and further he is estopped from taking objection at the procedure followed at this late stage.

[24] Ground 3 is vague and unsubstantiated. The issue of DNA testing referred to therein have no relevance to what had transpired at the trial. I am therefore unable to find any merit in this ground as well.

[25] Accordingly, grounds 1, 2 and 3 are also unsubstantiated. The appeal is dismissed.

Prematilaka, JA

[24] I have read in draft the judgment of Gamalath, JA and I agree with the reasons, conclusions and the orders therein.

Nawana, JA

[25] I agree with the reasons, conclusions and the orders proposed by Gamalath, JA.

The Orders of the Court:

1. Appeal dismissed.
2. Conviction affirmed.

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice P. Nawana
JUSTICE OF APPEAL