IN THE HIGH COURT OF FIJI
AT LAUTOKA
REVISIONAL JURISDICTION

CRIMINAL CASE NO.: HAC 75 OF 2017
MAGISTRATES COURT CASE NO: CR. NO.: 1130 OF 2002

STATE

v

JITENDRA PRASAD

Counsel : Mr. I. Khan with Mr. Raratabu for Accused

: Mr. A. Singh for State

Date of Hearing : 21st July, 2017

Date of Judgment : 01st August, 2017

JUDGMENT

Background

1. The Accused was charged in the Magistrate's Court at Nadi with one count of Rape contrary to Sections 149 and 150 of the Penal Code, Cap 17.

2. The Information reads as follows:

Statement of Offence

RAPE : Contrary to Sections 149 and 150 of the Penal Code Cap. 17.

Particulars of Offence

JITENDRA PRASAD s/o Hari Prasad on the 19th day of October 2002 at Votualevu, Nadi in the Western Division, had carnal knowledge of **ABRESHNI LATA CHAND** d/o Amrit Chand, without her consent.

3. On 28th February, 2017, Accused was convicted of the said charge and the matter was then fixed for sentence on 9th March 2017.

4. On the day fixed for sentencing, police prosecutor made an application pursuant to Section 190 of the Criminal Procedure Act for a transfer of the case to High Court for sentence on the basis that the victim was a juvenile (14 years old) at the time of the offence and therefore a greater punishment should be imposed than what the Magistrate had power to impose.

5. In the meantime, Counsel for Accused Mr. Iqbal Khan filed an application before the Magistrate to suspend the sentence supposedly under Section 253 (1) & (2) of the Criminal Procedure Act. The learned Magistrate dismissed this application and advised the defence counsel to file a 'stay application' in the High Court. Having dismissed the 'stay application', learned Magistrate transferred the case to this Court under Section 190 of the Criminal Procedure Act for sentencing.

6. Being dissatisfied with the conviction, Accused filed a petition of appeal in this Court on the 8th of March 2017 against his conviction.

7. By Ruling dated 5th May, 2017, this Court dismissed the appeal. The Court took the view that, once a case has been transferred for sentencing to the High Court pursuant to Sections 190 (1) (b) of Criminal Procedure Act, it lacked jurisdiction to hear and determine the appeal as the appellate jurisdiction, in view of Sections 190 (3) and (4), was vested in the Court of Appeal.

8. Thereafter, both parties were given an opportunity to file sentencing submissions in the substantive matter. On 12th April 2017, State filed a sentencing submission. Instead of filing any submission in mitigation, Counsel for Accused filed a Notice of Motion seeking a suspension of sentence until determination of the Appeal, ostensibly under Sections 253 (1) and (2) of the Criminal Procedure Act. All appeal grounds that were incorporated in the dismissed appeal were also listed in this Notice of Motion.

9. By the Ruing dated 5th May, 2017, this Court dismissed the application and fixed the substantive matter for sentencing.

10. Considering Section 7(1) (a) of the Criminal Procedure Act and the tariff for juvenile Rape [10-16 years' imprisonment confirmed by the Supreme Court in ***Ananda Abhey Raj*** (Cri. App. No CAV0003 of 2014)], this Court did not act under Section 190 (5) of the Criminal Procedure Act to invest the Magistrate (who convicted the Accused) with sentencing power. (Although High Court, had 'unfitted discretion' under Section 4 (2) of the Criminal Procedure Act to remit any case to the magistracy for hearing, no such power is granted to remit a case for sentencing beyond magistrate's limit)

11. Having dismissed both the Appeal and the application for suspension of sentence, the Court adjourned the matter for sentencing.

12. Upon perusal of the record and evidence led before the learned Magistrate, it appeared to me that, without answering serious questions of law and fact raised by the Accused in his frustrated appeal, Court should not proceed to sentence the Accused. Accordingly, Court decided to exercise revisional jurisdiction of the High Court under Section 260 of the Criminal Procedure Act.

13. Parties were given a hearing under Sections 262 and 256 (1) (a) and (c) of the Criminal Procedure Act. Court invited submissions from both parties on questions of law and fact raised by the Accused in his frustrated appeal. Both parties filed written submissions accordingly.

Revisional Jurisdiction of the High Court

14. The State Counsel, having conceded that this Court had jurisdiction to exercise revisional powers on Section a 190 transfer, argues (at paragraph 7 of submission) that the the correct approach would be to address the appeal once the final sentence had been passed.

15. I am not inclined to accept this contention. This Court, which is vested with powers to examine the records of court below, should not be blind to serious questions of law and fact to be addressed and, if the Court find them to be meritorious, must exercise revisional jurisdiction to revise the proceedings of the court below and not sentence an accused on erroneous convictions.

16. In ***State v Prasad*** [2004] FJHC 217; HAM0034X.2004S (24 June 2004) State counsel submitted that the revisional jurisdiction of the court could not be used on a Section 222 (Section corresponding o Section 190 of the Criminal Procedure Act) transfer for sentence.

Madam Justice Shameem observed:

> *"However, this submission flies in the face of the provisions of section 325(1). Further, if he is right, the consequence would be that the High Court would be forced to sentence on erroneous convictions. I do not accept that this is the position. The logical meaning of section 325(1) is that the High Court may revise proceedings which have been brought to its attention in any way".*

17. Section 260 of the Criminal Procedure Act follows the spirit of the supervisory jurisdiction in civil and criminal proceedings given to the High Court by Section 6(3) of the Administration of Justice Decree 2009, which was formerly provided by Section 120(6) of the 1997 Constitution. ***State v Batiratu*** HAR 001/2012 (13 February, 2012).

18. Section 260 of the Criminal Procedure Act provides:

> *— (1) The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to —*
>
> *(a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and*
>
> *(b) the regularity of any proceedings of any Magistrates Court.*
>
> *(2) The High Court shall take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken.*

19. Section 262 states:

> (1) *In the case of any proceedings in a Magistrates Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may —*

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 256 and 257; and

(b) in the case of any order other than an order of acquittal, alter or reverse such order.

(2) No order under this section shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.

(3) The High Court shall not impose a greater punishment for the offence, which in the opinion of the High Court the accused has committed, than might have been imposed by the court which imposed the original sentence.

(4) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

20. Appellate power of the High Court is described in Section 256 as follows:

(1) At the hearing of an appeal, the High Court shall hear —

(a) the appellant or the appellant's lawyer; and

(b) the respondent or the respondent's lawyer (if the respondent appears); and

(c) the Director of Public Prosecutions or the Director's representative (if there is an appearance by or for the Director)

(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.

21. Accused filed his appeal against conviction on following grounds:

I. That the Learned Trial Magistrate erred in law in fact in not directing herself to the evidence of the complainant/witness who was a juvenile and as such proper directions ought to have been given regarding taking oath. The failure to do so caused a substantial miscarriage of justice.

II. That the Learned Trial Magistrate erred in law and in fact in not taking into consideration that apart from the evidence of the Complainant, there was no other independent evidence against the appellant to prove the case against appellant beyond all reasonable doubt.

III. That the Learned Trial Magistrate erred in law and in fact into adequately directing/misdirecting the previous inconsistent statements/evidence made by the Prosecution witnesses and as such there has been a substantial miscarriage of justice.

IV. That the Learned Trial Magistrate erred in law and in fact in not directing herself the possible defence on evidence presented in Court and as such by his failure there was a substantial miscarriage of justice.

V. That the Learned Trial Magistrate erred in law and in fact in stating *"The prosecution evidence clearly proved that they had a sexual intercourse on the date of 19th October 2002 and PW1's evidence and doctors evidence proved that was by force and her sister's evidence confirmed the same. The prosecution has proved their case beyond reasonable doubt....."*. The Learned Trial Magistrate in so stating seriously erred when taking into consideration the doctor's evidence and as such there has been a substantial miscarriage of justice.

VI. That the Learned Trial Magistrate erred in law and in fact in not directing herself adequately and/or taking into consideration that the rape complainant was lodged almost four (4) weeks after the alleged incident and this would have raised serious doubts as to the credibility of the complainant. The failure to consider the four (4) weeks delay caused a substantial miscarriage of justice.

VII. That the Learned Trial Magistrate erred in law when she stated that Section 129 of the Criminal Procedure Decree states that there is no need for corroboration for sexual related offences when in fact in not taking into consideration that the Appellant was charged under the Penal Code when the Common Law on corroboration of sexual offence was applicable as was stated in ***Mark Mutch vs State*** (2000) 1 FLR 275 AAU0060/99 at 7 that: "the corroboration rule is still the law in Fiji Islands....." The failure to do so caused a substantial miscarriage of justice.

VIII. That the Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant when she stated that *"Defence failed to create reasonable doubt in a prosecution case"* and thus a substantial miscarriage of justice had occurred.

IX. That the Learned Trial Magistrate erred in law and in fact in not directing herself to the possible defence on evidence and as such by her failure there was a substantial miscarriage of justice.

X. That the Learned Trial Magistrate erred in law and in fact when she stated that *"But in this case victim's evidence was corroborated by PW2's her sister's evidence....."*. When in fact a recent complaint cannot in law

amount to corroboration and as such there was a substantial miscarriage of justice.

22. Prosecution had called three witnesses, the complainant (PW.1), her sister (PW.2) and the doctor (PW.3) who had examined the complainant after the alleged rape incident.

23. The learned trial Magistrate accepted following evidence at trial.

Incident occurred on 19th October, 2002. Complainant (PW.1) was 14 years old at the time of the incident. She along with her sister (PW.2) and one Murti went (PW4) to Accused's house in Votualevu around 7 p.m. because Accused had promised that PW.2 would get a job. Accused invited complainant to his bed room. She went straight to his room. Accused told her to sit down. Then he pushed her down and put his penis into her vagina. She was really scared that he will hit her with something. She then persuaded Accused to open the door and came to her sister.

24. When complainant came out, she told her sister (PW.2) that Accused had raped her. After 2-3 weeks, she complained to her mother who in turn told her father. The matter was eventually reported to police on 14th November, 2002, almost four weeks after the incident by the principal of her school who learnt about the incident when the complainant was being teased by her school mates calling her "fair deal" (name of the company Accused worked for). Complainant was then medically examined by a doctor on 14th November 2002.

25. According to complainant's sister (PW.2)'s evidence, complainant went to Accused's bedroom voluntarily while she was with Maruti in the sitting room. Complainant spent 15-20 minutes with Accused in his room and came out crying and complained that Accused raped her. She asked Accused what he did. Accused said that he only touched her sister and nothing else. She saw blood in her sister's pants. Then Accused admitted raping her sister and apologized. She did not report the incident to anybody. She wanted to tell police, but she was afraid as it was the first time they had experienced such an incident.

26. PW.3 (Doctor) examined the victim approximately three weeks after the incident and prepared the medical report on 15th November, 2002. Doctor found complainant not to be a virgin. He observed a 2 cm long laceration at her perineum, at 7' o clock position, and noticed some white discharge but it did not produce odour.

27. The caution interview of the Accused in which he admitted having consensual sexual intercourse with the complainant was tendered in evidence without objection. At the end of the prosecution case, Accused elected to remain silent.

Analysis

28. The Accused in his first ground of appeal argues that the learned trial Magistrate erred in law and in fact in not directing herself to the evidence of the complainant/witness who was a juvenile and as such proper directions ought to have been given regarding taking of oath.

29. The Complainant was 16 years old when she gave evidence. It appears from the record that she had given sworn evidence.

30. Section 10(1) of the Juveniles Act, which provides (so far as is material):

> *"Where in any proceedings against any person for any offence ... any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth; ..."*
>
> *Provided that where evidence is admitted by virtue of this section on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated."*

31. This section requires a trial Magistrate to conduct a competency test and to determine before the child witness gave evidence whether she could give sworn evidence. There is no indication in this case that the learned trial Magistrate conducted such a test.

32. Section 10 (1) was in force in 2002 when the complainant gave evidence. Although this Section was declared unconstitutional by Gounder J in ***State v AV*** (Criminal Case No: HAC 192/2008, 2 February 2009). The Supreme Court, in ***Kumar v State*** [2016] FJSC 44; CAV0024.2016 (27 October 2016), having analysed the ***AV*** decision has taken a different view. The Supreme Court at paragraph 38 observed:

> *"....I am in respectful disagreement with Goundar JA's judgment in the Court of Appeal that the "competence inquiry" which the judge is required by section 10(1) to conduct before a child can give evidence, and the requirement at common law for a warning of the danger of convicting a defendant on the*

uncorroborated evidence of a child, are inconsistent with the Constitution and therefore invalid..."

33. What impact the trial judge's failure to conduct a "competence inquiry? The Supreme Court in ***Kumar*** (supra) observed at paragraph 32:

> *"The same applies to the existing requirement for a judge to conduct a "competence inquiry" before the child gives evidence to ascertain whether, to use the language of section 10(1), the child "is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth". I can see how in some cases it may well be apparent to the judge that the child simply lacks the maturity to give evidence, but I suspect that in many cases that assessment may be difficult to make initially, and that it will only be in the course of the child giving evidence that their ability to understand the questions asked of them, their ability to give answers which can be understood, and their appreciation of the need to tell the truth will be apparent. That, no doubt, was what lay behind the legislation in England which caused the Court of Appeal in England in Hampshire to conclude that the law in England no longer required a judge to conduct a preliminary investigation into the child's competence as a witness. If the judge concludes that the child is not competent to be a witness, the judge should exclude the evidence or direct that it be disregarded. In my opinion, the more appropriate course is to follow what has been the practice in England for almost 30 years, and to leave it to the judge to decide whether to conduct a "competence inquiry" before the child gives evidence, and for the requirement in section 10(1) of the Juveniles Act that the judge must do so to be abolished, although again I can only give effect to that view if that requirement is inconsistent with the Constitution".*

34. At paragraph 38 the Court observed:

> *"It is good practice for a judge to tell the child that he or she must tell the truth. I have not considered whether that rule of practice could be said to have been elevated to a rule of law, but even if it has, I do not think that the trial judge's omission to say that affects the safety of Kumar's conviction. Such a contention was not advanced by Mr. Yunus, and in any event it would be inconsistent with what the Court of Appeal held in Sachend Chand v The State [2016] FJCA 20, albeit in reliance on what was said in AV and by the Court of Appeal in the present case"*

35. At paragraphs 42 and 43, the Supreme Court held:

"For the reasons I have given, the trial judge should have determined before the girl gave evidence whether she could give sworn evidence. If he had decided that she could not, he should then have determined whether she could give unsworn evidence. Does his failure to do those things mean that Kumar's conviction has to be quashed?

As Goundar J noted in both his judgment in AV at [19] and in his judgment in the Court of Appeal in the present case at [22], there have been many cases in which the failure of the judge to inquire into the competency of the child to give evidence, whether sworn or unsworn, has resulted in the conviction being quashed. With some diffidence, I question this line of authority – at any rate in its application to this case. I do not believe that the assessors were less likely to accept the girl's evidence if it had been unsworn than if it had been sworn. ***And if it had been apparent to the trial judge in the course of the girl's evidence that she did not satisfy the conditions for giving even unsworn evidence, he would have directed the assessors to disregard her evidence. The fact that he did not do that means that he must have thought that she was intelligent enough to understand that she had to tell the truth. In the circumstances, despite the trial judge not having done what section 10(1) required him to do, no substantial miscarriage of justice occurred".*** *(emphasis added)*

36. The complainant was 16 years old when she gave evidence. The words 'tender years' are not defined in the Juveniles Act and therefore, it is up to the trial judge to decide whether the child witness should be treated as of 'tender years'. In my opinion, a girl of 16 cannot be described as a child of 'tender years' within the meaning of the Juveniles Act. The Accused was tried by a magistrate (not sitting with assessors) who is learned in law and her decision to allow the complainant to be sworn shows that she (magistrate) was satisfied that child witness understood the nature of the oath. Therefore, in the circumstances, despite the trial Magistrate not having done what section 10(1) required her to do (conducting a competency test) no substantial miscarriage of justice occurred. This ground of appeal should fail.

37. I do not intend to deal with all other grounds of appeal raised by the Accused in his dismissed appeal. Instead, I group salient grounds and consider them together.

38. The Accused contended that the learned trial Magistrate erred in law and in fact in not taking into consideration that, apart from the evidence of the complainant, there was no other independent evidence against the Accused to prove the case against him beyond all reasonable doubt. In other words,

Accused says that he was convicted on uncorroborated evidence of a child witness.

39. The requirement for corroboration in cases of a sexual nature was abolished by section 129 of the Criminal Procedure Decree 2009, which provided:

> *"Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration."*

40. The complainant was a child witness and she gave evidence under oath. Therefore, the requirement for corroboration under the Juveniles Act does not arise. The Accused was tried by a magistrate learned in law. Therefore, the requirement to give a warning of the danger of convicting a defendant on uncorroborated evidence of a child does not arise. Even in a trial where judge sitting with assessors, this warning is required to be given only where the judge thinks that a warning of this kind is desirable.

> *"the requirement at common law for a warning of the danger of convicting a defendant on the uncorroborated evidence of a child, are inconsistent with the Constitution and therefore invalid. However, whether the requirement for a warning of this kind should remain part of the common law is another matter. For the reasons given in [33] above, I believe that Fiji should follow the path taken in England many years ago, and treat that requirement as no longer representing part of our common law. Accordingly, the fact that the trial judge did not give the assessors that warning does not undermine Kumar's conviction. Having said that, there may be some cases in which the trial judge thinks that a warning of this kind is desirable. That may have something to do with the nature of the child's evidence, or the way it was given, or it may have something to do with the assessors themselves. The trial judge is in the best position to assess that. So although there should no longer be any requirement on trial judges to give a warning of this kind, they may do so if they think that it is appropriate in a particular case".*

41. Therefore, evidence of the complainant alone is sufficient to find the Accused guilty **if her evidence is credible** and **believable.**

42. By raising ground (vii) the Accused argued that the learned trial Magistrate erred in law when she stated that Section 129 of the Criminal Procedure Decree states that there is no need for corroboration for sexual related offences when in fact in not taking into consideration that the Accused was charged under the Penal Code when the Common Law on corroboration of

sexual offence was applicable as was stated in ***Mark Mutch vs State*** (2000) 1 FLR 275 AAU0060/99 at 7 that: *"the corroboration rule is still the law in Fiji Islands....."*

43. At the time when the Accused was charged and the trial commenced (2002), the common law requirement of corroboration was still the law in Fiji. Even though this trial commenced before the Criminal Procedure Act (Act) came into being, no judgment had been entered or sentence passed by the time the Act came in to effect. Therefore, Section 129 of the Act which abolished corroboration requirement was applicable to this case in view transitional provision of the Act [Section 301 (1)], as no judgment had been made and no sentence imposed by the time of transition.

Section 301 (1) *says:*

"A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree may apply the provisions of this Decree if no judgment has been made in the case and no sentence has been imposed on the offender prior to the commencement of this Decree.

44. For the above reasons, I find that there was no need in this case to corroborate complainant's evidence by an independent source. Therefore, Accused's contention that he was convicted on uncorroborated evidence of a child witness does not hold water.

45. However, the court should have been satisfied that the complainant was a credible witness. The learned Magistrate accepted the version of the prosecution and rejected that of the defence. It appears that her decision to act upon prosecution's version of events is not supported by credible evidence. Therefore, it was dangerous to convict the Accused solely on complainant's evidence.

46. PW 1's evidence is completely unreliable. Although corroboration is not required to believe a rape victim, in light of unreliable evidence of the complainant in this case, the trial learned Magistrate ought to have looked at other evidence led in trial to ensure that complainant's evidence was satisfactorily supported.

47. The Complainant admitted that she did not complain to her parents after the incident. She gave the statement to police on 14th November 2002, almost four weeks after the incident. She said that she was scared. The learned trial Magistrate was satisfied that it was a reasonable explanation. However, the explanation complainant had given cannot be considered reasonable in the circumstances of this case. According to complainant's evidence, she had

complained to her elder sister (PW.2) soon after the incident. Even PW.2 did not relay this incident to her parents. The incident eventually came to light when principal of complainant's school received a complaint that complainant was being teased by school mates calling her 'fair deal' (the name of Accused's company). This evidence was also confirmed by PW.2. It was the school principal that had reported the matter to police.

48. It appears form the record that, complainant under cross-examination was smiling through the cross-examination. She said that it was her hobby. The learned Magistrate who heard the case had to warn her to respect the court.

49. The learned Magistrate who convicted the Accused stated at paragraph 17 of her Judgment -*"present appearance cannot damage the credibility of the witness only by smiling and looking happy after two years from the incident"*. The learned Magistrate's view may sound quite rational. However, she formed this view only looking at the transcripts of complainant's evidence. She did not have an opportunity to observe the demeanour of the complainant. Although demenour as a test may be misleading or may not give an accurate picture as to the credibility of a witness, it plays an important role in a rape case. Therefore, the defence was prejudiced when the learned Magistrate formed this view on credibility without observing demeanour of the complainant.

50. The complainant admitted that after the rape incident she wrote a love letter to the Accused whereby she stated that *"I really love you"* and *"you came as stranger you became a great lover"*. These parts of the letter were put to the complainant and was admitted. She stated that she wrote the letter to Accused by mistake. She further said that *"because people were teasing me 'fair deal' that is what I don't like"*.

51. This letter was not tendered in evidence. The learned trial Magistrate took the view that because it was not tendered as an exhibit, its contents cannot be considered. However, the complainant in her evidence admitted writing this letter to the Accused after the incident and the relevant portion of the contents that were read to her in evidence. Therefore, contents admitted by the complainant should have been considered by the learned Magistrate.

52. It is highly unlikely for a rape victim to write a love letter of this tenor to a rapist stating *"I really love you"* and *"you came as stranger you became a great lover"*. Therefore, learned trial Magistrate fell into error when she failed to consider the admitted contents of the letter and her post event conduct.

53. The learned trial Magistrate found that complainant's evidence was corroborated by her sister (PW.2.) and treated PW.2 as an independent and

credible witness. With regard to PW.2's evidence, the learned Magistrate stated at paragraph 21 of her Judgment:

> *"This part of evidence was not challenged by the Defence. She also explained why she did not complain it to her parent because this was her first experience and she was also scared to complain. By applying the above principles and laws into the present case,* ***victim's evidence was corroborated by her sister's evidence*** *and cannot find any reason to discredit her evidence"*

54. In fact a recent complaint cannot in law amount to corroboration and as such there was a substantial miscarriage of justice. Previous consistent statements, if believed, can only be used for a limited purpose, that is to test the consistency and credibility of the complainant's evidence. See: ***Ananda Abhey Raj*** (Cri. App. No CAV0003 of 2014)]

55. In the seminal English case of ***R v Lillyman*** [1896] 2 QB 167 Hawkins J, giving the judgment of the court (the other members being Lord Russell of Killowen CJ, Pollock B, Cave and Willis JJ) said at 170:

> *'It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It is clearly not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness- box, and as being inconsistent with her consent to that of which she complains.'*

56. Furthermore, the learned trial Magistrate considered recent complaint evidence as being evidence negating complainant's consent when she said:

> *"The prosecution evidence clearly proved that they had a sexual intercourse on the date of 19th October 2002 and PW1's evidence and doctors evidence proved that was by force and her sister's evidence confirmed the same. The prosecution has proved their case beyond reasonable doubt….."*.

57. In ***Kilby v R*** [1973] 1 ALR 283 (High Court of Australia) Barwick CJ (in whose judgment McTiernan, Steven and Mason JJ concurred) said at 287 lines 27-46:

> *'[E]vidence of a complaint at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the woman claiming to have been raped: that is to say, it is admitted as matter*

going to her credit (see R v Lillyman [1896] 2 QB 167, per Hawkins J at 170; [1895-9] All ER Rep 586; Sparks v R [1964] AC 964, at 979; [1964] 1 All ER 727). Because the account with which the complaint is said to show consistency is an account of intercourse without consent, it has often been said that the evidence of the complaint is evidence negating consent. In my opinion, this manner of expressing the function of the evidence of proximate complaint is not correct: though, as it shows consistency in her account of rape, the fact of the complaint buttresses her evidence of no consent or, as it was said in R v Lillyman, supra, is inconsistent with consent. At times also it is said with technical inaccuracy that the evidence of such a complaint is corroborative of the woman's evidence of the rape. It is quite clearly not so corroborative (see R v Christie [1914] AC 545; Eade v R (1924) 34 CLR 154; 30 ALR 257), though it is so spoken of in American literature (see Wigmore on Evidence, 3ed, vol IV, p 219, para 1134 and p 227, para 1137; vol VI, p 173, para 1761).'

58. The learned Chief Justice then embarked on a careful analysis of ***Lillyman*** *(supra)* and several English textbooks, in the course of which His Lordship said the following (289 lines 35-49; 290 lines 12-29; and 292 lines 1- 8):

> *"In my opinion, nothing in this judgment [ie Lillyman] lends any support to the proposition that evidence of the making of the complaint is evidence of any fact other than the fact of the making of the complaint itself and of the terms in which it is claimed to have been made. When Hawkins J in the first of the two passages which I have quoted from Lillyman's Case [that at 170 quoted in para [13] above] spoke of the evidence of a complaint as being inconsistent with consent he was not, in my opinion, intending to place its admissibility upon a second and different ground from that of its tendency to show consistency in the conduct of the prosecutrix. He was merely indicating the extent of its effect on the credit of the prosecutrix. In my opinion, the error which has been made by text writers and in subsequent decisions is in treating this remark of Hawkins J as if it did set up a second and independent ground of admissibility. In my respectful opinion, it did not".*

59. On the other hand, the witness called by the prosecution to prove the recent complaint (PW.2) is not credible. PW.2 told court in her evidence that her sister, after spending 15-20 minutes with the Accused, ran out of Accused's' room and complained that she was raped by the Accused. She also said that she saw blood in her pants and questioned the Accused about the complaint. PW.2 admitted that the complainant went to the Accused's room voluntarily. She further stated that the complainant and the Accused were sitting on the

bed. She further admitted that she left the Accused and her sister without disturbing them.

60. PW.2 had gone to the Accused's house with the complainant in the company of Murti and Accused around 7.30 p.m. She admitted under cross examination that she never relayed the rape incident to anybody until she made a statement to police three weeks after the incident. Her explanation was that it was her 'first experience'. PW.2 said in court that, when she questioned the Accused about the complaint, he (Accused) admitted raping her sister and apologised. She admitted that she had failed to mention this important fact to police.

61. PW.2 is the sister of the complainant. She is naturally an interested witness particularly in the circumstances of this case. The version of the defence as was transpired in cross examination was that PW.2 was also engaged with Murti while complainant was with Accused in his bed room. Murti was not called by the prosecution although he was listed as a witness. In this context, learned Magistrate's reliance on PW.2' s evidence even to test the consistency of complainant's evidence is questionable.

62. The learned Magistrate also relied on doctor's evidence to conclude that the sexual intercourse was not consensual. Doctor observed a 2 cm long laceration at her perineum, at 7' o clock position, and noticed some white discharge that did not produce odour. Doctor had examined the complainant almost four weeks after the incident. However, his finding suggested a recent sexual intercourse and raised some doubt as to the relevancy of his evidence to this case. The doctor, although an expert in medicine, his evidence should not have been acted upon blindly. It is inappropriate to rely on doctor's evidence given the time lapse between the incident and the medical examination.

63. In his caution interview, the Accused stated that it was a consensual sexual intercourse and that the complainant came voluntarily to the Accused's bed and they had sexual intercourse. In the charge statement, the Accused further stated that whatever happened on the day in question it was done by consent of the complainant.

64. The learned Magistrate had not considered these documents and has not given any reason as to why she rejected the version of the Accused.

65. I find, for the reasons recorded, that prosecution failed to prove the case beyond reasonable doubt. The learned trial Magistrate had arrived at a wrong conclusion when she acted upon prosecution's version.

Prejudice caused to the Accused

66. The Complainant was 14 years old at the time of the incident. Accused, in his caution statement, admitted that he had had consensual sexual intercourse with complainant. Therefore, there is *prima facie* evidence against the Accused on the offence of Defilement.

67. In ***Ali v State*** [2008] FJCA 30; AAU0014.2008 (11 July 2008) it was observed that whilst the High Court, on appeal, is possessed of the jurisdiction to convict an appellant for Defilement, the power should only be exercised if it seemed just.

68. The Accused was led to believe by the prosecution that he only had a rape charge to defend and was not given an opportunity to raise the statutory defence for Defilement. Therefore, Accused should not at this stage be convicted for Defilement without him first being notified of the charge and the available statutory defence.

69. The alleged offence occurred in 2002. The trial commenced on 03rd July, 2003 before then RM David Balram. The complainant and her sister gave evidence before RM S. M. Shah. In between, RM Qica presided over this matter. According to court record, RM Qica had ordered this matter for trial *de novo* (page 41 of the copy record). However, Mr Iqbal Khan appearing for the Accused had agreed to proceed with the evidence taken before the previous Magistrate. The trial was concluded before learned trial Magistrate Ms. Dias in February, 2017. Only the evidence of doctor was recorded before her.

70. The State Counsel argues that learned trial Magistrate has quite rightly exercised her powers under Section 139 of the Criminal Procedure Act in hearing the matter and pronouncing the judgment and by doing so, no prejudice has been caused to the Accused. I agree that the adoption of proceedings and entering judgment had taken place according to law. However, I do not agree that the Accused had not been prejudiced.

71. Section 139 (1) of the Criminal Procedure Act states:

> *139. — (1) Subject to sub-sections (1) and (2), whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeeded (whether by virtue of an order of transfer under the provisions of this Decree or otherwise), by another magistrate, the second magistrate may act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by*

second magistrate, or the second magistrate may re-summon the witnesses and recommence the proceeding or trial.

(2) In any such trial the accused person may, when the second magistrate commences the proceedings, demand that the witnesses or any of them be re-summoned and reheard and shall be informed of such right by the second magistrate when he or she commences the proceedings.

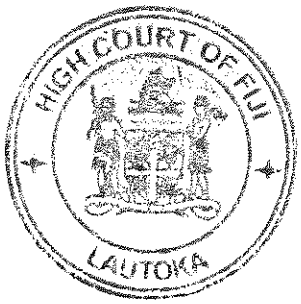
(3) The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was had, if it is of opinion that the accused has been materially prejudiced, and may order a new trial.

72. Approximately 15 years have elapsed between the beginning and conclusion of the trial. The learned trial Magistrate who convicted the Accused had heard only the evidence of the doctor. She did not have the opportunity to observe the demeanor of the complainant which in my view would have been an important factor in the circumstances of this case. Due to delayed prosecution, prosecution witness Murti was not available and prosecution closed the case without calling an important witness.

73. I am strongly of the view that, for the reasons recorded in this judgment, the Accused was materially prejudiced not only by the delay (conviction recorded approximately 15 years after the alleged offence) but also by conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was had.

Conclusion

74. Therefore, I do not proceed to sentence the Accused. Acting in terms of Section 256 (2) (a) of the Criminal Procedure Act, I set aside the conviction recorded by the learned Magistrate at Nadi. I do not order a new trial on the original charge of rape. It will be for the Director of Public Prosecutions, in his discretion, to determine whether, in all the circumstances, he will proceed on Defilement charge.



Aruna Aluthge
Judge

At Lautoka
1st August, 2017

Solicitors: Office of the Director of Public Prosecution for the State
Messrs Iqbal Kahn and Associates for the Accused