



2. The learned Counsel for the Appellant submitted that the Prosecution's witness admitted during the cross-examination that the Appellant allegedly committed these offences after she reported the Police about the incident of assaults, which was the reason she did not mention these sexual allegations in her report to the Police. The learned Counsel then annexed a copy of the Charge filed in the Magistrate's Court regarding the said allegation of assault, stating that the said alleged assault took place after these two incidents of sexual assault occurred; hence, the evidence of the Prosecution's witness is not accurate.
3. In her written submission, the learned Counsel for the Respondent conceded the arguments of the Appellant's Counsel, stating that the issue was directly linked to the credibility of the evidence adduced by the Prosecution's witness.
4. However, the date of the said assault by the Appellant and the copy of the Charge were not tendered in evidence before the Magistrate's Court. The Appellant made no application to adduce those facts as new or additional evidence but only raised this issue in the written submissions.
5. Section 257 of the Criminal Procedure Act provides the procedure to obtain additional evidence when the High Court exercises its appellate jurisdiction. Section 257 states that:
  - i) *In dealing with an appeal from a Magistrates Court the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a Magistrates Court.*
  - ii) *When the additional evidence is taken by a Magistrates Court, such court shall certify the evidence to the High Court, which shall then proceed to determine the appeal.*
  - iii) *Evidence taken under this section shall be taken as if it were evidence taken at a trial before a Magistrates Court.*

6. Accordingly, the High Court is vested with discretionary power to adduce additional evidence when it exercises its appellate jurisdiction in appeal matters from the Magistrates' Court. Shameem J in **Cumutanavanua v State [2002] FJLawRp 26; [2002] FLR 181 (28 March 2002)** discussed the scope of this discretionary power of the High Court, explaining the factors that need to be taken into consideration when the Court contemplates exercising its discretion to adduce additional evidence. Shameem J held in **Cumutanavanua v State (supra)**:

*"Section 320(1) of the Criminal Procedure Code, provides that:*

*"In dealing with an appeal from a Magistrates Court, the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a magistrates court, ...*

*The Code does not provide guidance for the way in which this discretion should be exercised. In England, the issue, in respect of appeals to the Court of Appeal, is governed by s 23 of the Criminal Appeal Act 1968, which provides for additional evidence being accepted if it is "necessary or expedient in the interest of justice". The discretion prior to that enactment was conferred by the*

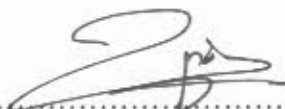
*Criminal Appeal Act 1966, and by a very wide provision (similar to our s 320) in section, it was held in R v Perry and Harvey (1909) 2 Cr App Rep 89 (per Walton J) that where the fact that the further evidence was not led in the lower court was because of the mistaken conduct of the case, and where justice required the adducing of further evidence, it would be admitted.*

*The principles which emerge from the earlier cases, are first whether the evidence is relevant to the appeal, second whether the evidence is*

*credible and admissible, and third whether there was a good reason for the failure to adduce the evidence in the lower court.*

7. Accordingly, the Court needs to consider whether the evidence is relevant to the appeal, whether the evidence is credible and admissible, and whether there were good reasons for the failure to adduce the evidence.
8. The evidence regarding the time of the alleged assault of the Prosecution's witness by the Appellant, whether it occurred before or after the two incidents of sexual assaults as charged, is materially important to determine the credibility of the evidence given by the Prosecution's witness. Hence, I find it necessary to adduce additional evidence under Section 257 of the Criminal Procedure Act.
9. I accordingly direct the Respondent to present the evidence regarding the time of the said alleged assault of the Prosecution's witness by the Appellant before the Resident Magistrate sitting in Labasa. I further direct the learned Resident Magistrate to record the evidence of the said incident and then certify the same to the High Court within one week pursuant to Section 257 (2) of the Criminal Procedure Act.



  
.....  
Hon. Mr. Justice R.D.R.T. Rajasinghe

**At Suva**

08<sup>th</sup> December 2022

**Solicitors**

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.