ATTORNEY - GENERAL

v.

CHANDRIKA PRASAD AND ANOTHER

[SUPREME COURT, 1966 (Mills-Owens C.J.) 7th October]

Appellate Jurisdiction

Criminal law—evidence—charge involving violence not of sexual nature—complaint by victim—whether or not fact of complaint being made is admissible, identification of accused as part of terms of complaint is not—Penal Code (Cap. 8) ss.250(1), 271.

Whether or not, in a case in which personal violence not of a sexual nature is alleged, there may be circumstances in which evidence is admissible of the fact that a complaint was made by the victim, evidence that in the course of the complaint the victim identified the accused persons as the assailants is not admissible.

Appeal by Crown against refusal of Magistrate to convict of offence under section 250(1) of the Penal Code.

B. A. Palmer and *T. U. Tuivaga* for the appellant.

H. A. L. Marquardt-Gray for the respondents.

MILLS-OWENS C.J. : [7th October, 1966]—

This is an appeal by the Attorney-General. The Respondents were convicted of assault occasioning bodily harm, on a charge framed under section 250(1) of the Penal Code of unlawful wounding with intent to maim. For some reason the Magistrate, although accepting that the Respondents had deliberately attacked the victim and seriously wounded him with a cane knife (or knives), stated that he considered it "more correct to be convicted of assault occasioning actual bodily harm, under section 271".

The Crown appeals on the ground that the Magistrate erred in law in failing to convict the Respondents of the offence charged, and also against the sentence of four months' imprisonment imposed on each Respondent, on the ground of manifest leniency.

Although there is no cross appeal against conviction or application for leave to appeal out of time, and although the Crown is no doubt technically correct in urging that there was no basis for the refusal to convict of the major offence charged, I feel bound to take other considerations into account. The first of these considerations is that owing to delay occasioned in preparation of the record, by reason (*inter alia*) of difficulty in deciphering the manuscript notes, the Respondents have long since served the sentences imposed and been set at liberty.

Secondly, there is strong reason to suggest, on the face of the judgment, that an appeal against conviction would have been successful. The only substantial evidence against the Respondents is that of the victim. Other evidence did little more than show that the Respondents were in the area where the attack took place, at the time thereof; which the Respondents did not deny. In his judgment the magistrate said :—

> "Victim made complaints to two people at least immediately after the incident, and told the interviewing police the same night the names of his assailants. The facts of the complaints were admitted but not details, see (page(s) 203-205 of *Cross on Evidence.*"

This reference deals mainly with complaints in sexual cases. At p. 205, however, Dr. Cross says :—

> "On the other hand, it may be said that the procedure should not be limited to criminal prosecutions for sexual offences, because it ought at least to apply in all cases in which violence is alleged. There is some authority for this view, but the preponderance of authority restricts the admissibility of complaints to prosecutions for a sexual offence."

Earlier in the same work, undoubtedly a work of authority, at pp. 202-3, he says :—

> "There is no established rule that evidence of the fact that a complaint was made is admissible in all cases of personal violence, although, as a matter of practice, a party or prosecutor may no doubt be asked whether he made a complaint in order to link his evidence up with that which is about to be given by another witness such as a doctor consulted by him. This might be allowed in any proceedings. In O'H. v. O'H., for instance, counsel for a husband petitioner in a nullity case was permitted to ask his client whether he consulted a doctor about his marital difficulties. Moreover, evidence of a complaint may no doubt be given by the complainant on re-examination, if the cross-examination has suggested that his or her story is a recent concoction."

It is evident that the passage from the judgment of the learned Magistrate set out above is open to the criticism that he regarded as admissible not only the fact of the complaint but also its terms in so far as the victim purported to identify the Respondents as his assailants; that in effect he allowed the victim to corroborate himself. It is for this reason that, as it appears to me, an appeal against conviction would have had considerable chance of success. In these circumstances I dismiss the appeal against conviction of the minor offence.

As to the sentence imposed, Crown Counsel drew attention to the prevalence of grave assaults in the Labasa area, and I am bound to observe that a sentence of four months' imprisonment for an apparently premeditated attack with a weapon or weapons such as a cane knife, in the course of which serious wounds were inflicted, is unrealistic and entirely inadequate.

Appeal dismissed.