A **1. LAISENIA TAKAYAWA**
2. OSEA BUA

v.

REGINAM

B (SUPREME COURT—Tuivaga, C.J. 16 April 1982)

Criminal Jurisdiction

Criminal Law—Corroboration—assisted by circumstance—accused acting in concert—each liable for acts of other—defence of consent not supportable—
C *method of raising misdirection as ground of appeal.*

R. Chandra for the 1st Appellant
E. Vula for the 2nd Appellant
S. Kepa (D.P.P.) with *J. Sabhrawal* for Respondent

D Appeal against convictions on 8 December, 1981 for (1st Appellant), Rape and Assault Occasioning Actual Bodily Harm, (2nd Appellant) Attempted Rape and Assault Occasioning Actual Bodily Harm.

They evidence upon which the convictions were based was set out by the learned Judge on appeal. The evidence of witnesses included that on the night of 30 May 1981 the complainant was in a state of intoxication at a dance at a night
E club. She was placed in a taxi, a witness and the 2nd appellant also got in. First appellant took the front seat. At approximately 1 a.m. to 2 a.m. the taxi was stopped at Nadonumai Settlement. First appellant pulled complainant out, punched her and with the 2nd appellant carried her to the porch of a church. First appellant punched and kicked her rendering her totally unconscious, then had intercourse with her—second appellant standing two yards away. Then he lifted her on his shoulder and took her to the other side of the community hall, the
F second appellant following him.

Police arrived at about 2.30 a.m. finding the girl naked, unconscious, bruised and bleeding. Complainant remained unconscious for two days. The appellant elected to remain mute during the trial. An alibi witness was called by the first appellant, but was totally disbelieved. Various grounds of appeal were
G argued some of which are referred to here.

In his reasons the Magistrate was said to have dealt inadequately with consent. This was mentioned once, the Magistrate holding the intercourse was without her consent.

Held: The learned Judge noted that no evidence or material was put forward
H to suggest the appellants did not know complainant was not a consenting party. He said:

> "Both appellants has shown remorseless feeling towards her plight which more than confirmed how callous and indifferent they were to her physical and moral well being . . . . . .

An appellate court will not lightly assume that a legally qualified Magistrate has misdirected himself in some matter of law or . . . . . followed some erroneous legal principle." A

Further, the learned appeal Judge considered that if the omission properly to direct himself amounted to misdirection, the case was once when the proviso to Criminal Procedure Code s.319(1) should be applied. B

A failure properly to direct on corroboration was raised as a ground of appeal. The learned appeal Judge noted that the Magistrate had directed himself in the accepted language and expressed himself as satisfied anyway with the accomplice's evidence. The Court said: C

"There was ample corroboration not only of the appellants' presence at the scene but also of their acts of brutal force upon the complainant."

As to some difference as to the order of assaults upon the complainant, the learned Judge remarked it did not matter as it was clear: D

" . . . . . both appellants were at all material times acting in concert in all that was going on and in law each of them be culpable for the act of the other."

On the same basis he considered that the second appellant should be convicted of rape along with the first appellant; he substituted a conviction therefor, i.e. contrary to Penal Code s. 143. E

The Judge, speaking generally said:
"Where misdirection is complained of, it must be stated whether (it) . . . . . is one of law of fact, and its nature must also be stated (see *R. V. Fielding* (1938) 26 Cr. App. R. 211) and also see *Archbold* (40 Ed.) paras, 874 and 918). Under paragraph 918 it is stated that where misdirection is alleged adequate particulars must be given in the notice of appeal." F

Appeal dismissed.

G

Judgment

TUIVAGA, C.J.

The appellants were convicted after trial in the Suva magistrate's Court on 8th December 1981 and sentenced as follows: H

1st Appellant

1st Count — Conviction for rape and sentenced to four and a half years' imprisonment with a recommendation for corporal punishment of five strokes.

A *2nd Count* — Conviction for assault occasioning actual bodily harm and sentenced to four years' imprisonment with a recommendation for corporal punishment of five strokes. (8½ years in all).

The sentences were to be consecutive in effect.

2nd Appellant

B *1st Count* — Conviction for attempted rape and sentenced to four years' imprisonment with a recommendation for corporal punishment of four strokes.

2nd Count — Conviction for assault accasioning actual bodily harm and sentenced to three and a half years' imprisonment with a recommendation for corporal punishment of four strokes. (7½ years in all).

C The sentences were to be consecutive in effect.

Both appellants have appealed against conviction on several grounds and to these I will refer in a moment.

The evidence upon which conviction of the appellants was based may be briefly set out.

D On Saturday night 30th May, 1981 the complainant one Lavenia Cerelala was at the Bali Hai Night Club. Complainant had been drinking somewhat heavily and towards midnight was virtually incapable of taking care of herself and was from then on mostly insensible to what went on around her. For that reason her evidence in Court which was largely hearsay was not relied on by the trial Court. Anarieta Makoi (P.W. 4) said that she was at the Bali Hai Night Club with one Iliesa Waqa (P.W. 5). When the the dance closed P.W. 4 helped to escort complainant down from E the hall and put her in a waiting taxi outside in the back seat. P.W. 5 got inside too on one side of complainant and the second appellant whom she personally knew got on the other side. First appellant sat in the front seat with the driver. P.W. 4 herself travelled later in a taxi driven by Eparama Turaga (P.W. 3) in the same direction towards Delainavesi. On arrival at the Nadonumai Settlement P.W. 4 heard someone speak to P.W. 3 to call the police. P.W. 5 confirmed that he was in the taxi with F complainant and the two appellants. Throughout the journey complainant was asleep at the back seat. The taxi stopped at Nadonumai Settlement by a house near the church building. First appellant paid for the taxi and then pulled complainant out and as he did so punched her presumably to wake her up. First and second appellants and P.W. 5 carried complainant to a spot near the church and from there the two appellants each holding one of her hands carried her to the porch of the church. At the porch first appellant punched and kicked her rendering her totally G unconscious. When that happened second appellant spoke to first appellant to be careful or she might die. First appellant then had sexual intercourse with her. Second appellant was standing about two yards away from them. After first appellant finished he lifted the complainant and carried her on his shoulders and walked along one side of the church with second appellant following him on the other side to the community hall beyond. The other eye witness of events at the H church was Mere Rokotuibau (P.W. 2) a young girl of Nadonumai Settlement who was staying in a house only a few yards from the church. P.W. 2 described how at about 1 and 2 a.m. she had gone outside the house to pass water when she heard a car approaching and stopped on the road leading to the church. She heard a woman shout. She saw three youths whom she later identified as P.W. 5 and the two

appellants on the road with a girl. Her evidence corresponded to a large extent with that of P.W. 5 on the broad events that took place that night during which complainant was raped and brutally assaulted. Only in certain matters of detail do they differ. The police arrived at the scene about 2.30 a.m. and found the girl lying naked and unconscious on the floor of the community hall. She had bruises on her face and forehead from which blood was streaming. Her legs were spread open and she was also bleeding in her vagina. She was still unconscious when taken to the CWM Hospital and remained in that state for two days afterwards. Several spermatozoa were found inside her vagina.

Both appellants elected to remain mute although first appellant called one witness as to an alleged alibi but this was totally disbelieved by the learned Magistrate.

In the first ground of appeal argued by counsel for second appellant it was said that the learned Magistrate erred in law in failing to adequately or properly direct himself on the issue of consent. It was submitted that only once the learned Magistrate mentioned the question of consent and this was at page 61 of the record where reviewing the evidence he said:

> "Accordingly in view of the violence that had already taken place, I hold that Accused 1 commited rape on P.W. 1 (complainant) by having sexual intercourse with her without her consent."

and proceeded to find him guilty of rape.

The learned Magistrate then proceeded to give his reasons for finding second appellant guilty of attempted rape as opposed to the original charge of rape. As I have already noted neither appellant gave evidence either on oath or by way of an unsworn statement. In those circumstances it was perhaps not surprising even assuming that the learned Magistrate had reminded to direct himself specifically on the issue of consent on the lines adumbrated in *D.P.P. v. Morgan* (1975)) 2 All E.R. 347) that is to say, as to whether the appellants knew the complainant was not a consenting party to the act of sexual intercourse or if they did not know whether or not they were indifferent to the question as to her consent. At the trial no evidence or material was put forward to suggest in any way whatsoever that both appellants did not know the complainant was not a consenting party to the sexual and physical attack to which she was subjected. Indeed the evidence was very strong to the contrary. Both appellants had shown remorseless feeling towards her plight which more than confirmed how callous and indifferent they were to her physical and moral well-being during the night in question. In these circumstances the question of a specific direction on the issue of consent clearly does not arise. Indeed it has never been suggested that the learned Magistrate misdirected himself in any way on the matter and if such had been alleged the onus would have been on the appellants to establish such misdirection. An appellate court will not lightly assume that a legally qualified Magistrate has misdirected himself on some matter of law or has followed some erroneous legal principle (see *Anthony Steven v. R.* (1971) 17 F.L.R. 48). Such a proposition appears to flow from the fact that such a Magistrate sitting alone without jury or assessors is presumed to know the legal principles involved in the case before him and that in general it is unnecessary for a Magistrate to indulge in nice legal expositions if the nature of the evidence adduced and argument made in the case does not warrant such treatment. However, if I am wrong in approaching the problem in this way and that the omission on the part of the learned Magistrate to direct himself specifically on the question of mens rea in rape on the lines stated

A in *Morgan's case* which was approved by the Fiji Court of Appeal in *Ilaitia Koroiciri and Anor. v. R.* (Cr. app. No. 43 of 1979) constituted a misdirection on a matter of law. I am satisfied that this is a case in which the proviso (a) to section 319(1) of the Criminal Procedure Code should be applied because it is quite clear that a properly directed tribunal on the issue of mens rea would no doubt have found for the prosecution. This ground of appeal also fails.

B In the next ground of appeal it was submitted that the learned Magistrate failed to direct himself properly on the question of corroboration in relation to accomplice evidence nor did he refer to any independent evidence that could have corroborated the accomplice evidence. That was a reference to the witness P.W. 5. P.W. 5 was treated quite properly by the learned Magistrate as an accomplice and in consequence directed himself in terms that it was dangerous to convict on the uncorroborated evidence of an accomplice and went on to accept P.W.5's evidence, no doubt C on the basis that he was completely satisfied with his trustworthiness as a witness. However, the learned Magistrate did find corroboration in this case in the evidence of P.W. 2 and in that finding he was quite justified on the evidence. The learned Magistrate was clearly fully appreciative of the danger of acting on the uncorroborated evidence of the danger of acting on the uncorroborated evidence of P.W. 5 but in fact the danger was negligible. This ground fails.

D The next ground of appeal which was formulated as to include both appellants states that the learned Magistrate erred in law and in fact in convicting the appellants on the second count of assault when there was contradictory evidence on this between the prosecution witnesses P.W. 2 and P.W. 5. It is correct to say that there was discrepancy in the evidence between P.W. 2 and P.W. 5 as to which of the appellants in fact punched complainant soon after she was pulled out of the car on E arrival at Nadonumai Settlement. Of the two witnesses testifying on the matter P.W. 5's version I would have thought was obviously more reliable because when the incident occurred he was much better placed than P.W. 2 to see which of the two actually assaulted complainant. It is not disputed that P.W. 5 was standing very close to both appellants. Whereas the same incident was observed by P.W. 2 from a little distance away during night time. The learned Magistrate did not say which of the two versions he accepted but clearly he would have been quite entitled to hold that P.W. 5's F account was to be preferred to that of P.W. 2. However, technically, it really does not matter as to which of them was the actually assailant as it is clear from the entire episode that night that both appellants were at all material times acting in concert in all that was going on and in law each of them would be culpable for the act of the other. It is clear on the evidence that the assault was perpetrated on complainant as a prelude, so to speak, to the main objective on which both appellants were bent, namely to the sexual advantage of a helpless and defenceless young girl. That initial G attack was only part of a pattern of violent conduct which persisted for most of the time they were there and before the police were called. The injuries sustained by complainant were correctly described by the trial Court as most appalling. There was no doubt on the evidence that the Court was perfectly justified pursuant to the provisions of section 21(1)(b) and (c) of the Penal Code in convicting both appellants of assault occasioning actual bodily harm. On the same ground of joint H enterprise I should have thought that second appellant who was convicted of attempted rape would have been more appropriately convicted of the substantive offence of rape along with first appellant. I will therefore set aside the conviction for attempted rape entered against second appellant and substitute one of rape contrary to section 143 of the Penal Code and with which he was originally charged.

This ground of appeal also fails. A

The next ground of appeal complains of the rejection by the learned magistrate of the alibi evidence given by D.W.1 on behalf of first appellant. The question of credibility of a witness is essentially one for the trial Court. His rejection of the alibi evidence was one that was reasonably open to him having regard to the weight of other evidence in the case, I can find no merit in this ground of appeal.

Three additional grounds of appeal were filed which were as follows: B

"1. The learned trial Magistrate misdirected himself on the issue of the burden of proof and hence there was grave miscarriage of justice.

2. The learned trial Magistrate misdirected himself on the issue of identification and hence there was a grave miscarriage of justice.

3. The learned trial Magistrate misdirected himself on what constitutes an attempt and hence there was a grave miscarriage of justice." C

The above grounds like the ones already discussed are most unsatisfactory as grounds of appeal. This is because they have not been clearly or accurately formulated. As formulated it is hard to say at once what in fact is being complained about in relation to each of these grounds. I have no doubt that the Director of Public Prosecutions who is the statutory respondent to these criminal appeals must have felt the same quandary. It should not be necessary for the Court or the Director D to only come to know about the point in any ground of appeal when the matter is argued on appeal. The issue to be raised on appeal ought to be clearly set out in the petition of appeal.

Where misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and its nature must also be stated (see *R. v. Fielding* (1938) 26 Cr. App. R. 211) and also see *Archbold (40th Ed.) paras. 874 and 918).* Under paragraph 918 it is stated E that where misdirection is alleged, adequate particulars must be given in the notice of appeal.

However, be that as it may, in the first additional ground of appeal as aforesaid, counsel submitted in argument that the learned Magistrate in his judgment had in effect shifted the burden of proof to second appellant when he said (p. 63):

"Accused 2 has not seen fit to explain what he meant by this passage and I just F cannot accept that there is any truth in the suggestion that he was only pretending."

That judicial comment was made when the learned Magistrate was evaluating second appellant's interview statement and clearly in the context of his whole judgment the passage could not be construed in the sense that the learned Magistrate had thereby held that the onus of proof was on the appellant and not on the prosecu- G tion. At the same time I do not think that the same passage could by implication be regarded as amounting to adverse comment on the failure of appellant to give evidence. I find no substance in this ground of appeal.

In the second additional ground of appeal counsel raised the question of absence of adequate directions on the issue of identification. Counsel cited the case of *R. v. Turnbull* (1976) 3 All E.R. 549 in support of his complaint. The nature of an H appropriate direction on the issue of identification or any other contested legal issue for that matter must necessarily depend on the evidence and circumstances of each case. Here once the learned Magistrate accepted the evidence of P.W. 2. P.W. 4 and

A P.W.5 all of whom knew second appellant well. There was no necessity for him to enter into elaborate self-directions on the technical aspects of identification evidence as if he were sitting with a jury or assessors. Identification evidence in this case was most cogent as against both appellants. This ground of appeal also fails.

The third additional ground of appeal complains that the conviction of second appellant for attempted rape was misconceived as there was insufficient evidence to
B support such a conviction. I have already dealt with this matter in this judgment. There can be little doubt that there was ample evidence which would have entitled the learned Magistrate to find appellant also guilty of rape as an aider and abettor pursuant to the provisions of section 21(1)(b) and (c) of the Penal Code.

In the result the respective appeals of the first and second appellants against conviction would be dismissed.

C As regards the appeal against sentence the learned Magistrate as earlier noted had ordered the sentences on both counts to be served consecutively. In the circumstances of this case it was clearly inappropriate for him to do so. The two offences concerned were part of the same criminal transaction involving both appellants. In such a case the proper practice would be to let the sentences arising from such conduct to run together.

D The sentences passed in the Court below are set aside and in lieu thereof the following are substituted:

1st Appellant

1st Count — on conviction for rape 7 years' imprisonment.
2nd Count — on conviction for assault occasioning actual bodily harm 3 years' imprisonment.

E Both sentences are to be served concurrently.

2nd Appellant

1st Count — on conviction for rape 6 years' imprisonment.
2nd Count — on conviction for assault occasioning actual bodily harm 3 years' imprisonment.

F Both sentences are to be served concurrently.

Appeals dismissed. Sentences varied.