KALIOVA RAGE

v.

THE STATE

[HIGH COURT, 1996 (Fatiaki J) 23 September]

Appellate Jurisdiction

Crime: evidence and proof- rape- necessity for corroboration- availability of proviso. Criminal Procedure Code (Cap. 21) Section 319 (1).

Crime: practice and procedure- Magistrates' Courts- contents of judgment- Criminal Procedure Code Cap. 21) Section 155.

The Appellant was convicted of rape in the Magistrates' Court. The High Court allowed the appeal and ordered a retrial. The Court once again reminded Magistrates that their judgments in criminal matters must fully comply with the requirements of Section 155 of the CPC. Citing authority the High Court also declined to apply the proviso to Section 319 (1) of the CPC.

Cases cited:

Chandar Pal v. R. (1974) 20 F.L.R.1
Dennis Reid v. The Queen [1986] A.C. 343
Hobstaff (1992) 14 Cr. App. R.(S) 605
Jan Barkat Ali v. R. (1972) 18 F.L.R. 129
Mano Datt Sharma v. R. (1966) 15 F.L.R. 136
Nirmal v. R (1969) 15 F.L.R.
Peceli Vosararawa v. R. (1970) 16 F.L.R. 202
R. v. Birchall and Others (1986) 82 Cr. App. R. 208
R.v. O'Reilly (1967) 51 Cr. App. R. 345
R. v. Peter O's (1993) 14 Cr. App. R. (S) 633
R. v. Trigg (1963) 47 Cr. App. R. 94
Woolmington v DPP [1935] A.C. 462

Appeal against conviction in the Magistrates' Court.

Appellant in Person
Ms. R. Olutimayin for the State

Fatiaki J:

On the 19th of September, 1996 this Court quashed the appellant's conviction and ordered his retrial. On that occasion the Court said it would provide detailed reasons later which I now do.

On the 21st of November, 1994 the appellant was charged in the Suva Magistrates' Court with an offence of Rape. He had been earlier bailed to appear in Court on

that day but he failed to appear and a bench warrant was duly issued for his arrest.

A The warrant was subsequently executed after 17 months and on the 22nd of April 1996 the appellant appeared in the Suva Magistrates' Court and pleaded not guilty to the charge.

On 29th April 1996 the prosecution called 3 witnesses (including the complainant) to prove its case, and the appellant gave evidence on oath. Thereafter the trial B magistrate took a short break to consider his ruling, and upon resumption, he delivered a short 3-page handwritten ruling convicting the appellant. After a further short break to consider the sentence, the trial magistrate imposed a sentence of 5 years imprisonment and 5 strokes of corporal punishment but this time, in a 7 page handwritten sentence!

C On 27th May 1996 the appellant lodged an appeal against his conviction. The appeal raises various matters including the absence of corroboration in the case.

I set out below (in full) the trial magistrate's ruling against which this appeal is brought :

"

RULING

D I have considered all facts and evidence very carefully.

I find PW1 to be an honest and reliable witness.

She was never evasive in her testimony and in her answers to questions from the accused. I find her to be a credible witness.

E I believe PW2 as well. She appeared honest witness.

On the other hand, I found the evidence of accused as well as his answers to questions, both from prosecution and court, to be far fetched and at times evasive.

F I observed the accused when he was giving evidence. I did not find him to be an honest witness.

The defence of accused was that he did not rape but she consented. However, in reply to a question from the court, whether she consented, he said : "Thought she did".

G This clearly shows that there was no absolute certainty that she did consent.

Furthermore, he admitted in cross-examination that he could not control his urge to have sex. On facts I find that she never consented to sex. I also find it hard to believe the accused's evidence that the complainant took off her pants and put her legs up while he was going to her in the back seat.

> It is the prosecution duty to prove its case beyond reasonable doubt - (Woolmington v DPP [1935] A.C. 462.)
>
> In my view, the prosecution has done that.
> I find the accused guilty as charged."

A

I confess that on first seeing the trial magistrate's ruling I was somewhat taken aback not only by its undue brevity given that this was a contested trial after a not guilty plea, but also, in its almost complete failure to comply with the mandatory requirement of Section 155(1) of the Criminal Procedure Code (that) :

B

> "Every judgment shall ... contain the point or points for determination, the decision thereon and the reasons for the decision ..."

C

As was said by Thompson J. in quashing the conviction in Mano Datt Sharma v. R. (1966) 15 F.L.R. 136 at p.138:

> "The Magistrates' Courts are called upon to deal with large numbers of cases and to do so expeditiously. This undoubtedly militates against the writing of lengthy judgments. Nevertheless there is a degree of brevity beyond which a judgment ceases to comply with Section 154(1) [now Section 155(1)] and ceases to show that the Magistrate has applied his mind properly to the defence raised."

D

Furthermore it need hardly be said that the trial magistrate's ruling also fails to follow the clear guidelines provided in the judgment of Grant Ag. C.J. in Chandar Pal v. R. (1974) 20 F.L.R.1 when his lordship said at p.4 :

E

> "As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts or rejects, and should proceed to make his findings of fact, apply the appropriate law to those facts, and give his reasoned decision: bearing in mind throughout the provisions of Section 154(1) of the Criminal Procedure Code.

F

> If these considerations are kept in view, not only will it make the task of an appellate court easier, it might well lead to fewer decisions being upset."

G

In his ruling in this case the trial magistrate appears to have decided the case solely on his determination of the credibility of the complainant as against that of the appellant without any reference to or analysis of the evidence in the case.

In Nirmal v. R (1969) 15 F.L.R. the Court of Appeal in allowing the appeal in that case:

A

> "Held : 1. The assessment of the credibility of witnesses by their demeanour alone is wrong if it can be avoided; All the evidence should be weighed before deciding what to accept and what to reject."

B

I accept at once that "... a magistrate is not obliged to give reasons for his acceptance or rejection of the evidence of any particular witness ..." where it is based upon his assessment of the witness's general credibility per Grant J. (as he then was) in Jan Barkat Ali v. R. (1972) 18 F.L.R. 129 at 130G, but even in such a case, it is still incumbent on the trial magistrate in my view, to refer clearly in his judgment, to the evidence which he accepts as establishing the ingredients of the offence.

C

Quite plainly in this case the trial magistrate has made no reference to any of the evidence led in the trial nor made any findings of fact sufficient to establish the ingredients of the offence with which the appellant was charged and which offence is nowhere identified in his ruling as it should have been. (see : Section 155(2) of the C.P.C.)

D

The trial magistrate in his ruling also mentioned in particular, the appellant's answer to the Court's question as to whether the complainant consented to intercourse and where the appellant is recorded to have said : "Thought she did". This answer the trial magistrate states : "... shows that there was no absolute certainty that she did consent." With all due regard to the trial magistrate his observation comes periously close to a reversal of the burden of proof in a criminal trial, and in any event, misrepresents the standard of proof.

E

Furthermore even if one accepted that the form of the trial magistrate's ruling sufficiently complied with the requirements of Section 155 and that the magistrate was entitled to prefer the complainant's evidence to that of the appellant, nevertheless, the trial magistrate completely failed to "... expressly warn (himself) and seriously consider the very real danger of convicting (the appellant) on (the complainant's) uncorroborated testimony". (per Hammett C.J. in Peceli Vosararawa v. R. (1970) 16 F.L.R. 202 at 204; and per Salmon L.J. in R.v. O'Reilly (1967) 51 Cr. App. R. 345 at 348/349.) Undoubtedly this was a serious omission on the trial magistrate's part and amounted in my view, to an incurable non-direction.

F

G

Learned State Counsel whilst conceding that the trial magistrate did not warn himself of the danger of convicting in this case in the absence of corroboration, nevertheless, submits that no substantial miscarriage of justice occurred in this case, and counsel asks, that the proviso to Section 319(1) of the Criminal Procedure Code Cap. 21 be applied.

In R. v. Trigg (1963) 47 Cr. App. R. 94 the Court of Criminal Appeal (Eng.) in

rejecting a similar submission in a rape case where no direction had been given on corroboration and where the only issue in the case was the identity of the assailant, said at p.101 : A

> "In principle this court feels that cases where no warning as to corroboration is given where it should have been should, broadly speaking, not be made the subject of the proviso to Section 4." (cf : Section 319(1) proviso)

Earlier, on the same page the Court said : B

> "A jury that receives a warning in regard to corroboration must in the nature of things approach the complainant's evidence with a sense of caution. It follows from the warning, and indeed is the object of the warning, ..."

C

More recently in R. v. Birchall and Others (1986) 82 Cr. App. R. 208 a rape case where there had also been no direction on corroboration and where there was a clear issue as to consent, the Court of Appeal in applying Trigg's case, and in rejecting a submission that the proviso be applied said, at p.211:

> "There was the clear issue between the Crown on the one hand and the defence on the other hand and we think it would be wholly wrong in the circumstances to apply the proviso." D

Similarly in the present case there was a clear issue as to consent arising from the sworn testimony of the complainant on the one hand, and the sworn testimony of the appellant on the other, and it was therefore vital that the trial magistrate should have warned himself about the necessity to look for corroboration of the complainant's evidence as to the absence of any consent on her part to the sexual intercourse that occurred, and in the circumstances this Court too, considers that it would be wholly wrong to apply the proviso. E

Then learned State Counsel urges the Court to order a retrial in this case.

In Dennis Reid v. The Queen [1986] A.C. 343 the Privy Council in discussing the exercise of a court's power to order a retrial said at p.350 : (as summarised in the headnote) : F

> "Factors which may deserve consideration are the seriousness and prevalence of the offence: the probable duration and expense of a new trial: the ordeal to be undergone for a second time by the defendant (and the complainant) and the lapse of time since the commission of the offence and its effect on the quality of the evidence. The strength of the prosecution's case at the original trial ... and lastly that it is not in the interests of justice that the prosecution should be given an opportunity to cure the deficiencies in its case against the defendant by a new trial." G

Bearing the above factors in mind and the appellant's own request that he be given an opportunity of having a fair trial before another magistrate, this Court ordered that the appellant be retried and he was accordingly conditionally bailed to appear before the Magistrates' Court, Suva on 30th September 1996.

Finally, I would draw to the attention of the trial magistrate, the recent judgment of the Court of Appeal (Eng.) in R. v. Peter O's (1993) 14 Cr. App. R. (S) 633 in which the Court in reducing the sentence in that case for a conviction of Indecent Assault:

> "Held : in imposing sentence, the sentencer said that the offences had resulted in serious damage to the girls, who might be marked for the rest of their lives. There was apparently no specific evidence before the Court to justify the sentencer's comments. The Court had emphasised in Hobstaff (1992) 14 Cr. App. R.(S) 605 that that kind of assumption should not be made unless the necessary evidence had been laid before the Court."

(Appeal allowed; conviction quashed; retrial ordered.)