MARK LAWRENCE MUTCH v STATE

Court of Appeal Criminal Appellate Jurisdiction
Casey, Kapi and Handley, JJ
17 November, 2000
AAU0060/99 (on appeal from HAC0008/98S)

Rape and indecent assault – appeal against conviction – cross appeal against sentence— rape sentencing discussed — Penal Code s154(1); Court of Appeal Act s23(1) and Court of Appeal (Amendment) Decree 1990 s21(2)(c)

The appellant was found guilty on 2 counts of rape and 4 counts of indecent assault and sentenced to 7 years on each count of rape and 4 years on each count of indecent assault. He appeals against conviction on all counts. The State appeals against sentence. The court assessed the High Court record thoroughly and made observations on the common law requirement for corroboration.

Held – effective and compelling corroboration of indecent assault charges by photographs and similar fact evidence by various complainants was too strong to ignore and made the likelihood that each complainant was telling the truth, thus a conviction was inevitable.

(2) The failure of trial judge to direct assessors correctly on corroboration rule in respect of the first rape count and the four indecent assault counts, failure to point out elements of the charges requiring corroboration, failure in referring to appropriate evidence, and advising assessors that in two counts there was no evidence capable of amounting to corroboration was serious enough to warrant convictions being set aside, but there was no substantial miscarriage of justice as counsel did not seek further direction from trial judge or object to summing up.

(3) Sentence of four years on each count of indecent assault not manifestly lenient; however, 7 years for rape was inadequate in light of the seriousness of aggravating features of offence against a 9 year old whom appellant befriended and who regarded him as a trusted adult, and increased to 10 yars as minimum appropriate in the circumstances.

Conviction on count 5 of rape set aside and new trial ordered. Conviction on first count of rape and 4 counts of indecent assault upheld. Sentence on 4 counts of indecent assault affirmed. Sentence on first count of rape increased to 10 years but to run concurrently with terms imposed in respect of counts of indecent assault.

Cases referred to in judgment
foll ***D.P.P. v Kilbourne*** [1973] AC 729
appl ***Maika Soqonaivi v State*** [1998] AAU 8/97 judgment of 13 November, 1998
foll ***Mohammed Kasim v State*** AAU 21/93
Cons ***D.P.P. v P*** [1991] 2 AC 447

Mehboob Raza for appellant
Rachel Olutimayin for the respondent

17 November, 2000. **JUDGMENT**

Casey, Kapi and Handley, JJ

The appellant was found guilty on two counts of rape and four counts of indecent assault and was sentenced in the High Court at Suva on 15 November 1999 to concurrent prison terms of 7 years on each of the rape counts and 4 years on each of the counts of indecent assault, making a total of 7 years overall. He appeals against his conviction on all counts and the State appeals against the sentences pursuant to leave granted under s2 I(2)(c) of the Court of Appeal Act (Amendment) Decree 1990. Originally there were two further counts of indecent assault but these were withdrawn after the complainant gave no evidence incriminating the accused.

Charges and evidence summary

The prosecution alleged that the offences were committed at the appellant's house against five young girls ranging in age from 9 to 15 at different times over a period from 1990 to 1997. The evidence from the complainants and other witnesses made it clear that he associated with numbers of young girls who were frequent visitors to his house where they played with computers and watched videos and engaged in other activities with him. In his police statement he said he used to teach them maths and English and whatever they needed. Some of them stayed overnight and slept there, and occasionally one might bring a young brother during the day, but he did not sleep there. The appellant had a sophisticated video camera and took photos of the girls which could be displayed on the computer where various features could be altered. Images of some of the girls were printed from it and produced in evidence; they showed complainants naked in a bath or having their hair shampooed with the appellant alongside in one. Several witnesses described how he would come into the bathroom naked while they were there, and the overall impression of the evidence of the general activities in the house, and of the appellant's indulgence in what may be colloquially described as "slap and tickle" with them, is of a relationship with an undercurrent of sexuality between him and these young girls.

In the first count he was charged with raping M (then aged 9) between 1 September and 31 December 1990, and in the second count with indecently assaulting her between 1 August and 31 December of that year. In her evidence she said she often slept at the house which had two bedrooms, one of which was where the appellant slept and she used the other which had two beds. She described being awakened by him coming into her bed (which he did frequently) where he engaged in sexual activity involving kissing and playing with her breasts and attempting to put his penis inside her, eventually having full intercourse on a Saturday night over her objections. When he left after about half an hour she went to the bathroom and cleaned herself and washed her blood-stained underpants, and went home the following morning. She said nothing about this to her parents and continued to visit and have sex with him until 1996 when she never heard from him again. Cross-examination brought out inconsistencies with what she had said in the Magistrates' Court and apparent confusion

over dates and at one stage an admission that her evidence against the accused had been "fabricated", but it became clear in re-examination she had not understood the meaning of that word put to her by counsel and she affirmed the truth of her previous evidence.

The third count alleged indecent assault on A between 1 January 1994 and 31 December 1995. She gave evidence of first knowing the appellant in 1990 and later visiting his house with her cousin M and her sister. She slept there and even lived there for a period and said that when she was 12 he used to play with her breasts on many occasions and put his fingers down her pants. She was cross-examined at length about dates and occasions of her visits to the house, demonstrating some confusion. In response to further questioning she stated that the appellant put his fingers inside her vagina which she found painful. Mr. Raza made much of the fact that her hymen was found to be intact on subsequent medical examination, but the doctor called as a witness explained that penetration by a finger would not necessarily rupture it, so that this circumstance could not be regarded as a conclusive indication that the witness was lying. There were also inconsistencies with her previous police statement and evidence she gave in the Magistrates' Court.

In the fourth count there was a charge of indecent assault on V between 1 January and 31 May 1997, when she was 13. She first visited the house at the invitation of her friend MS (another complainant) and said that appellant showed her around and to her surprise carried her into his room and threw her on his waterbed. They watched television and played with the computer. He entertained them by enlarging the breasts on photos of herself and MS and changed her facial expression. She said he and another girl had taken photos of them in the bathtub and identified those printed from the computer and produced in evidence. She described how he put shampoo on their hair and alleged that he was fondling her left breast and touched her private parts briefly while feeling in the water for the soap. She slept at the house that night, but left next day and did not go back. As with the other witnesses cross-examination brought out discrepancies with the evidence she had given in the Magistrates' Court and with her statement to the police.

MS was the subject of the fifth count containing the second charge of rape, alleged to have occurred during 1996. She said she lived near appellant's house which she visited many times and remembered being shown pictures of naked girls on the computer. She went there once at night when she was 13 and said that after watching a movie with him and showering he carried her into his bedroom and put her on his bed where he had intercourse with her and he stopped after she told him to. She went home next morning and told no one what had happened. Apart from a visit for a birthday party she did not go back to the house again. She also described incidents in the bathroom and shower similar to those mentioned by the previous complainant, including the fact that he was fiddling around with another girl's breast while she was in the bathtub with her.

This complainant then referred to a letter she had written to the Director of Public Prosecutions on 26 September 1999 before the case started withdrawing the statement she had made to the police about the appellant in 1997, and stating that she was forced to give it and that she had nothing against him and did not want to testify. In explanation (still in examination-in-chief) she named the police officer who had made her say he had raped her, by threatening her with jail. She said in answer to further questioning that the part in the statement about the night she slept with the appellant was true. She was closely cross-examined about subsequent discussions with the police and the prosecutor and about the truth of her letter, and about problems with some dates she had given for the events she described. and discrepancies between her evidence and her police statement. She agreed that the touching of her friend's breast in the bath could have been accidental. She and a cousin had visited the appellant at prison while he was in custody following his arrest. He was later released on bail.

The sixth count was one of indecent assault of E on 17 May1997 when she was 14. She met the appellant on the street when looking for a job in 1997 with her friend. She said he winked at them and called them across to ask what they were looking for and, when he was told, offered her work at his factory where she was employed for two days. On the second afternoon he invited them to his house where they had lunch and afterwards took their photos on his computerised camera, and then he drove them home. They went back to the house on Saturday in his car at about 10.30 am. There were other girls present, including the next witness Leba, when they arrived and one of them showed them around the place including the appellant's bedroom upstairs. She was the last of the five to move out of that room and said he came in before she left, closed the door, grabbed her and started massaging her breasts and tried to put his finger into her vagina. She objected but he prevented her from leaving and she finally bit his hand and got away. She estimated this lasted about 5 minutes. He then drove her home and she saw no more of him. She was cross-examined about relatively minor differences between her evidence and her statement to the police, and about the contents of a medical report. She was unable to recall sexual intercourse with a boyfriend when the question was put to her.

Leba was called by the State to allow defence cross-examination in which she was asked about E's visit to the house. She was 12 at the time, and said four of them including E were playing cards in the computer room upstairs and none of them went into any other rooms and all came downstairs together. After that they took E home. She put the visit at 22 July. Another prosecution witness, Sainiana. aged 13 at the time, was E's friend who was also given work at appellant's factory and she said she went with her to his house on the second day they were on the job (Tuesday 29 April) when they were shown around then came downstairs and had tea and were entertained on the computer with photos he had taken of them. She said nothing about going into the bedroom, but she seems to be describing their first visit. On the other hand, E said the indecencies she described occurred on Saturday 17 May (after some uncertainty about the

month), nearly three weeks after that first visit. Another witness, Vani, who would then have been about 13, gave similar evidence about E's visit although she was thoroughly confused about the month. She described the group of girls being in appellant's .bedroom where another (R) was asleep on his bed and said they watched him manipulating photos on the computer there, and then she, E, and Leba all came down together while the appellant stayed with R.

The prosecution then called four witnesses who were young girls at the relevant times to give evidence of similar facts in relation to the charges of indecent assault. They were all friendly with the appellant and visited his house. Some spoke about conduct in the bath and showers similar to that described by the complainants above and of physical contact which could be seen as bordering on the sexually suggestive, even to the stage of sleeping with him on his waterbed.

Evidence was given by doctors who had examined the complainants and they were closely cross-examined about inconsistencies between the information in their reports and what the girls said in their evidence, and the latter were also questioned at length about these matters.

At the close of the prosecution evidence the Judge rightly rejected a submission of no case to answer. The appellant called no evidence and made a brief unsworn statement denying the allegations against him, and referred to his police statement to the same effect. That statement was produced as an exhibit and given to the assessors.

Grounds of Appeal

A number of the grounds advanced were without substance for reasons which were fully canvassed with Mr. Raza in the course of his submissions, and we did not call on Mrs. Olutimayin to respond to them. There is accordingly 'no need to discuss them in this judgment and we can turn directly to the matter of real concern, namely His Lordship's directions on corroboration and similar fact evidence.

The common-law requirement for corroboration of the complainant's evidence in sexual cases is a frequent source of confusion and was criticised by this Court in **Maika Soqonaivi v The State** {CA 8/97; 13 November 1998). It has been abolished by statute in New Zealand. However it is still the law in Fiji Islands, and assessors must be directed (and Judges bear in mind) that even if they believe the complainant, it is dangerous to convict on his or her evidence unless it is corroborated or supported in some material particular by independent testimony implicating the accused in the commission of the offence. It is for the Judge to determine whether there is any evidence capable of being corroboration, and for the assessors to decide whether to accept it, and if so, whether it amounts to corroboration. They should also be told that they can convict bearing in mind this warning, if they are convinced of the truth of the complainant's testimony.

All this is relatively straightforward and can be put to them in simple language, but the Judge embarked on a lengthy discussion of this and the associated topic of similar fact evidence, with quotations from decided cases and texts. a course which is unlikely to be helpful to laypersons.

We think he got the message across through all this material of the danger of convicting on uncorroborated evidence, and of the general theory of similar fact evidence and its role as corroboration in appropriate circumstances. However, he omitted an important part of such a direction in failing to point out those elements of the charges requiring corroboration, and in failing to refer to appropriate evidence; nor did he tell the assessors that in respect of the two rape counts there was no evidence capable of amounting to corroboration. Counsel agreed with us that there could be no dispute over the identity of the appellant as the offender if the offences occurred, nor could there be any issue of consent in dealing with children of the ages involved in them, so that the only elements requiring corroboration were the acts of intercourse in the two rape charges, and the physical contact in the other four. No relevant objection was taken to the summing up by either Counsel, and in particular His Lordship was not asked to direct the assessors that there was no corroboration of the evidence of the complainants in the two counts of rape.

We think these omissions in the directions and the general confusion likely to have been left in the assessors' minds from its discursive nature are serious enough to warrant setting aside the convictions, unless the proviso in s23(1) of the Court of Appeal Act should be applied if we consider that no substantial miscarriage of justice has occurred. This first requires attention to the adequacy of His Lordship's direction on the facts, also criticised in the grounds of appeal. The hearing took 16 days during the period from 13 October to 4 November 1999, on which day counsel made extensive closing submissions. There was then a delay of 7 days before His Lordship's summing up, which seems with respect an unusually long time to take for preparation, even granted the extensive evidence which had to be covered and the intervention of a Monday holiday. The assessors had the benefit of full coverage by counsel of most of the material aspects of the case before that lengthy adjournment, and although His Lordship's summary of the complainants' testimony with its inconsistencies and areas of dispute was brief, we think it was enough to enable the assessors to recall the salient features insufficient detail to make proper assessments of its credibility. They were unanimous in their verdicts of guilty, with which His Lordship agreed.

The effective corroboration of the indecent assault charges was to be found in the photographs and the similar fact evidence. That such evidence in appropriate circumstances can constitute corroboration in cases such as these was confirmed by the House of Lords in **D.P.P. v. Kilbourne** [1973] AC 729 and we quote from the opinion of Lord Reid at p409:

> "Where several children, between whom there can have been no collaboration in concocting a story, all tell similar stories, it appears to

me that the conclusion that each is telling the truth is likely to be inescapable and the corroboration is very strong..... Once there are enough children to show a system, there is no ground for refusing to recognise the obvious that they can corroborate each other."

In the later case of **D.P.P. v. P** [1991] 2 AC 447 the House of Lords discussed the nature of the relationship between the different acts put forward as similar fact evidence capable of supporting a complainant, and in the opinion of Lord Mackay of Clashfern at p 462 (whim whom the other members agreed), if there is a sufficiently strong connection between the circumstances spoken of by the complainants for their testimony mutually to support each other, then the evidence of one may be admitted to support another.

We are satisfied that the evidence of indecent assault by the various complainants in this case, coupled with the descriptions from them and other witnesses about the activities in the bathroom and showers, makes the likelihood that each complainant was telling the truth so strong that it would be an affront to commonsense to ignore that evidence. This conclusion is reinforced by consideration of the general background nature of the appellant's relationship with so many young girls over the period. As noted above, His Lordship did not put the matter in this way to the assessors, confining his directions to general principles. If he had, the result for the appellant would have been quite damning, and we are accordingly satisfied that his conviction on the indecent assault charges was inevitable.

The only reservation might have been over E, whose account of being waylaid in the bedroom after the others had left conflicted with their evidence that they all came down the stairs together. The assessors obviously believed her description of what the appellant did to her, and we are satisfied that the others could well have been mistaken in their recollection after the lapse of such a time between that event in 1997 and the trial date. They would have had no particular reason to remember such a common-place action as descending the stairs on that occasion. We do not think the assessors could have regarded their evidence as sufficient raise any reasonable doubt about her testimony.

So far as the rape charges are concerned, there was no corroboration and the assessors were not told this by the Judge, although the point was made to them by Mr. Raza in his closing address. But this would not be sufficient. If they had been properly directed they could have found the appellant guilty, bearing in mind the warning about the dangers of doing so without corroboration, if they were convinced of the truth of the complainants' testimony. The evidence of M in the first count has been summarised above. The assessors clearly believed her. She gave a circumstantial account of the Appellant's conduct with her and of his attempts to have intercourse, leading to penetration on the Saturday night, and then described washing herself and her bloodstained panties afterwards. This account has the real ring of truth about it and we are satisfied that even with a proper direction on corroboration, there must inevitably have been a verdict of guilty. However, we cannot say the same of the other rape conviction in count 5

involving MS, having regard to the matters casting doubt upon her credibility referred to in the summary above.

In the light of these conclusions we are satisfied that in spite of the deficiencies in the summing up, there has been no substantial miscarriage of justice in the appellant's convictions on the first count of rape and on the four indecent assault counts, and that the proviso in s 23(1) should be applied. A relevant factor in applying the proviso in this case is that experienced defence counsel did not seek further directions from the trial Judge on corroboration and the evidence which was capable of being corroborated. He must have taken the view that further directions in these matters were not likely to improve his prospects of an acquittal. Accordingly the appeal in respect of those counts is dismissed. But the appeal in respect of the second charge of rape (count 5) is allowed, and a new trial is ordered.

Sentence Appeal

The State appeals against the leniency of the sentences. The maximum for indecent assault under s154 (1) of the Penal Code is five years, and we are not persuaded that concurrent sentences of four years on each of the counts were manifestly lenient as claimed in the grounds of appeal. The real issue is the adequacy of the 7 years imposed concurrently on the two counts of rape, which must now be considered in the light of the successful appeal against the second. His Lordship was at pains to emphasise the aggravating features of the offending, in which the appellant emerged as a devious paedophile winning the confidence of young girls and preying on them sexually until they attained maturity. There were no mitigating features.

This Court has recommended that the starting point for rape should be 7 years where there are no aggravating or mitigating circumstances to be adjusted up or down to take .them into account: see **Mohammed Kasim v The State** (Criminal Appeal 21 of 19935) and **Maika Soqonaivi v The State**. His Lordship referred to these guidelines in his sentencing remarks and it is difficult to understand his failure to go beyond the starting point of 7 years to take into account the seriousness of the aggravating features of this offence against a nine-year old girl whom the appellant had befriended and who regarded him as a trusted adult. A prison term of ten years must be regarded as the minimum appropriate in the circumstances and the appeal is allowed to the extent of increasing that sentence accordingly.

Result

1. The appeal against conviction is allowed in respect of count 5 alleging unlawful carnal knowledge and that conviction is set aside and a new trial ordered.

2. The State's appeal against sentence is allowed to the extent of increasing the prison term of 7 years imposed in respect of

count 1 alleging unlawful carnal knowledge to 10 years to remain concurrent with the terms imposed in respect of the counts of indecent assault.

Appeal by appellant on second count of rape conviction allowed.
Appeal by State on sentence for rape allowed.

Marie Chan