IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Labasa Criminal Appeal No.8 of 1980

SHAH ALAM
s/o Mahabub Alam — Appellant

v.

REGINAM — Respondent

Mr. S.M. Koya for the Appellant
Mr. R.E. Lindsay for the Respondent

J U D G M E N T

The appellant was convicted by the Magistrate's Court Labasa of indecent assault contrary to section 148(1) of the Penal Code and sentenced to 12 months' imprisonment. He was acquitted on an alternative count charging him with attempted rape.

At the hearing of the appeal, learned counsel for the respondent abandoned his cross-appeal against the acquittal on the alternative count and against the inadequacy of sentence for indecent assault.

The appellant appeals against his conviction.

According to the prosecution evidence, the appellant, a school teacher, had, on the day in question gone to the complainant's house at about 10 a.m. He had known her parents for years and was on visiting terms with them. The complainant's mother wanted methylated spirits for medical use and the appellant informed her that there was some at his

house and that the complainant could go and get it from his wife. He knew his wife was not at home.

When the complainant, a girl of thirteen, reached the appellant's house, the appellant had already arrived back on his motor-cycle. He took her inside the house and tried to have sexual intercourse with her by force. During the struggle, her underpants and half-slip were torn. He was, however, unable to penetrate. Medical examination showed that the complainant's vagina showed signs of having been "fiddled" with but she was still a virgin. The complainant had run to her own house crying and complained to her mother. At the trial, the mother described her distressed condition and the complainant's torn garments were produced as exhibits.

In addition, the prosecution produced a record of interview between the police and the appellant, signed by the appellant, in which he had admitted that he had tried to have sexual intercourse with the complainant but had let her go when she became frightened and started to scream.

A trial within a trial was held to test the admissibility of the record of this interview and the learned Magistrate ruled it admissible.

During the trial proper the appellant said that he had gone to the complainant's place before 9 a.m. and from there had gone to Jag Deo's and then to Chandrika's place. He had remained at Chandrika's place until 4 p.m. returning to his house at 4.30 p.m. He called Chandrika as a witness who supported his evidence.

When he had first been seen at his house the same day, the appellant had said that he had been to the complainant's house at 10 a.m. and returned to

his own house at 11 a.m. He had not mentioned Chandrika's name.

The appellant has put forward several grounds which really fall into three main categories. Firstly, that the learned Magistrate failed properly to deal with the evidence at the trial within a trial in coming to the conclusion that the appellant's confession was voluntary. Secondly, that the learned Magistrate's treatment of the evidence, generally, was at fault as he "accepted" the prosecution evidence before even coming to the appellant's testimony. Lastly, that the learned Magistrate erred in holding that there was evidence amounting to corroboration of the complainant's testimony.

On the issue of admissibility of the appellant's confession learned counsel drew the Court's attention to the case of D.P.P. v. Ping Lin (1975 3 All E.R. 175). That decision does not help the appellant. No objection was raised to anything said by the appellant to the police at his house. There, he had appeared embarrassed because of the presence of his wife and had said to Cpl. Amrat Lal that he "would tell the whole story later" whereupon the Corporal had stopped further questioning. At the police station when the allegation of indecent assault was put to him under caution, the appellant's very first answer, according to the record, was

> " I admit the allegation. Mahendra Kuar came to my house to get spirit; my wife was away and asked her to have sexual intercourse. When I pulled her panty and she got frightened, so left her."

There is little similarity between the evidence in this case and that in Ping Lin. Even where there is a marked similarity, their Lordships in Ping Lin said -

" On appeal against a judge's decision to admit a confession as having been made voluntarily, the court should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases, but should only do so if satisfied that the judge had made a completely wrong assessment of the evidence or had failed to apply the correct principle." (p.176).

In the present case, there was ample evidence which, if accepted, would have pointed to the voluntary nature of the appellant's confession and no reason has been shown why the learned Magistrate should be held to have been wrong in accepting that evidence.

As to the learned Magistrate's general treatment of evidence, learned counsel for the appellant complains that, by the time the Magistrate came to consider the appellant's evidence, he had already "accepted" the evidence given by the prosecution witnesses and he could not, therefore, have given to the appellant's evidence an adequately dispassionate consideration. The basis for this complaint is the use of the words "I accept" by the learned Magistrate as he dealt with the evidence of each prosecution witness. I do not think this Court will be justified in drawing the inference that counsel wishes it to draw. Different magistrates set out their judgments on paper differently. There is no single rigid way of doing it. Most magistrates first state what various witnesses have said, leaving the issue of acceptability to the very end. Learned Magistrate in this case dealt with the evidence of each witness in the order in which he or she had been called to the witness box. This would automatically place the accused and his witness at the very end of the list. The Magistrate, instead of hearing the

issue of acceptability to the end of the judgment, stated what he thought of each witness as he dealt with his evidence. From this it does not follow that he had failed to give adequate consideration to the whole of the evidence in coming to his final finding of fact. The ground, therefore, must fail.

As for the ground relating to corroboration, learned Magistrate accepted the evidence of the complainant's mother and the doctor who had examined the complainant soon afterwards. This evidence did not come from the complainant herself. In addition, there was the appellant's own statement. It is not necessary to deal with all this evidence in detail. Suffice it to say that the evidence accepted by the Magistrate contained sufficient corroboration of the complainant's evidence both as to assault and as to the element of indecency.

The appeal is dismissed.

( G. Mishra )
JUDGE

Suva,
12th June, 1981