IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 73 of 1982

BETWEEN: PARDESHI s/o Gurlu — Appellant

A N D : R E G I N A M — Respondent

Mr. G. P. Shankar — Counsel for the Appellant
Mr. S. C. Maharaj — Counsel for the Respondent

J U D G M E N T

The appellant was charged with the offence of rape contrary to section 149 of the Penal Code or in the alternative the offence of defilement of a girl under 13 years of age contrary to Section 155(1) of the Penal Code. When the appellant was first before the court he was put to his election and elected to be tried by the Magistrate's Court. He pleaded not guilty to the offences. After various adjournments, on 19th May, 1982 the magistrate decided that, in spite of the appellant's election, the case ought to be tried by the Supreme Court. Consequently the case came on for P.I. on 30th June, 1982. Before the hearing began counsel for the appellant argued for the appellant to be tried by the magistrate's court, but his argument was rejected. Then during the middle of the evidence of the complainant counsel for the appellant again applied for the P.I. to be converted into a trial proper. To this application the magistrate agreed and set aside his previous ruling. Nobody thought to ask the appellant what his choice was and the case proceeded. After hearing all the evidence including that of the appellant the magistrate found him guilty on the alternative count of defilement and sentenced him to three years' imprisonment. The appellant now appeals against his conviction and sentence.

An additional ground of appeal filed just before the hearing of the appeal claims that since the magistrate did not obtain the consent of the appellant before proceeding to summary trial the trial was a nullity. Section 4(1) of the Criminal Procedure Code provides that an

offence such as the ones we are concerned with here shall not be tried by a magistrate unless the consent of the accused to such trial has first been obtained. In this case the consent of the appellant had been obtained, but defence counsel argued that that consent ceased to have any effect once the magistrate decided the case should be tried by the Supreme Court, and that when he changed his mind the magistrate should have put the appellant to his election again. I think a prudent magistrate would have done so, and it may have been unfortunate that all present at the trial overlooked this aspect. But does this render the trial a nullity? If the appellant had not been put to his election at all, the trial would have been a nullity. The accused person himself should be told his rights and asked to elect. However in this case the appellant had been asked to elect and had elected summary trial. There is nothing to show that he ever retracted that election, in fact from what happened subsequently it is quite clear that he never retracted it and that he wished to be tried by the magistrate. There is no reason to find that, because the magistrate, in spite of defence objections, decided that there should be a P.I. that the appellant's election lapsed or ceased to be valid, and I have not been referred to any authority which would lead me to the opinion that that is so.

The additional ground of appeal therefore fails and I reject the argument that the trial was a nullity.

With regard to the other grounds of appeal, ground 1(a) is that the magistrate failed adequately and properly to evaluate the evidence of the prosecution witnesses, particularly as to the major contradictions and inconsistencies. Counsels' submissions deal with a number of contradictions and inconsistencies including conflicts with previous statements to the police. But, it cannot be said that the magistrate did not fully and properly evaluate them. He properly directed himself as to law on the point, he said that he had carefully noted the various discrepancies. In his view they were minor and not more than one might expect in the circumstances. In his view they were not material to the extent of appreciably reducing the weight of their evidence.

He also said he had heard and seen the witnesses in court, and tested their demeanour against all the evidence. He was satisfied that the complainant and her mother were essentially honest witnesses. He has adequately dealt with the evidence of Gopal Swamy. This ground of appeal must fail.

On ground 1(b), that the magistrate filed to direct himself properly as to the onus of proof, I point first of all to the passage in the judgment where he says "I have given full and careful consideration to the evidence of the accused on oath bearing in mind that the onus of establishing the guilt of the accused beyond all responsible doubt rests upon the prosecution. No onus lies upon the defence." With an experienced magistrate it must be presumed that he always bears in mind the basic principle of where the onus of proof lies. The passage I have quoted makes it quite clear that he did bear the onus of proof in mind. Also with regard to the evidence of the complainant, who was a young girl of about 12 years or under he was well aware of the need to corroborate her evidence. He did not in as many words say that in a rape or defilement case it was dangerous to convict on the evidence of the complainant without corroboration, but he did say that in arriving at a decision in the instant case, i.e. he had warned himself that it would be dangerous to convict the accused on the evidence of the young girl unless her evidence was corroborated. He also warned himself that it was unsafe to base a conviction on a confession if there was no corroborative evidence.

So far as ground 1(c) relating to the medical evidence is concerned the magistrate did deal with it but found that it was confusing and of no assistance to either party so that he placed no reliance on it. I don't think that can be quite right, because there was evidence that the hymen was ruptured, which as Dr. Musunamasi said could have been caused by the forced introduction of an object, such as in intercourse. The difficulty arose perhaps because the girl was not examined by Dr. Musunamasi till almost a month after the alleged incident. Three days later she was sent to Lautoka Hospital for examination under anaesthetic because of vaginal bleeding. At the hospital she was examined and although old scarring was found on the hymen the only finding was that the bleeding at that time was caused by normal menstruation. No doctor gave evidence in court in respect of this report, no questions were asked about the old scarring on the hymen, or whether this could be consistent with intercourse or attempted intercourse. So it could not be said that the hospital report conflicted with Dr. Musunamasi' evidence, and in fact Dr. Musunamasi said in the witness box that the report in no way gave him grounds to change his view that the injury to the hymen was consistent with intercourse. So this ground of appeal also fails.

But it may be relevant that there was a finding of normal menstruation, because for some time after the alleged intercourse the girl attributed bleeding from her vagina as being menstruation, and so it might have been. Whether it was also caused by rupture of the hymen has not actually been proved beyond a reasonable doubt.

Ground 1(d) that the magistrate did not direct himself that on the totality of the evidence there was serious doubt, in view of the previous grounds of appeal, cannot be sustained.

Grounds 2 and 3 relate to the charge and caution statement taken from the appellant. The appellant was taken to the police station in custody on 19th January, 1982 and interviewed, the interview being recorded in the form of questions and answers. The interview concluded at 12.30, and at 1.10 p.m. the appellant was charged and cautioned, whereupon he is alleged to have made a short statement to the effect that what he had said in his interview was true and he had done wrong.

The admissibility of the statements was challenged and a trial within a trial was held. It was claimed by the appellant that the statements were not voluntary, that they were fabrications and that force had been used. The appellant gave evidence of assaults on him, and said he did not understand since he spoke Telegu and not Hindi (the language used by the police). Also that he was forced to put his thumbprint on the statements - even though he was quite capable of signing his name in English.

For some reason the magistrate refused to admit the interview record but admitted the charge and caution statement. He made no finding on the question of assault or the thumbprints, merely remarking that they were incidental observations. What that means I don't know because these matters were in fact very relevant to the whole question of admissibility. He rejected the interview record on other grounds which may not have applied to the charge and caution statement, but it was vital that he consider the question of assault, and whether the appellant had properly signed the statement before deciding to admit it. It follows that the charge and caution statement was not properly admitted.

It is clear that the magistrate relied very heavily on the charge and caution statement to provide corroboration for the evidence of the complainant, which as he had pointed out really required corroboration. In fact the judgment does not indicate any other piece of corroborative evidence, though it says the complainant's evidence was amply corroborated.

Without the charge and caution statement there was clearly not enough evidence - if any at all - to corroborate the girl's evidence, and it therefore follows that the Crown had not proved its case beyond a reasonable doubt. The conviction and sentence are therefore set aside and the appeal succeeds.

G. O. L. Dyke
Judge

Lautoka,
9th December, 1982