IN THE SUPREME COURT OF FIJI

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Appellate Jurisdiction

Criminal Appeal No. 73 of 1982

Between:

TEVITA CAKACAKA — Appellant

and

REGINAM — Respondent

Mr. V. Maharaj for the Appellant
Mr. K. Bulewa for the Respondent

JUDGMENT

Appellant (1st Accused) was on 24th September, 1982 convicted after trial with one Emosi Uluilakeba (2nd Accused) before the Magistrate's Court at Moala, Lau of rape contrary to section 150 of the Penal Code and was sentenced to two years' imprisonment.

The particulars of offence alleged that Tevita Cakacaka (Appellant) and Emosi Uluilakeba between 14th and 15th August 1981 at Naroi, Moala, Lau had carnal knowledge of Fane Tikoimoala without her consent.

Appellant is appealing against conviction on several grounds of which main reliance is placed on the following grounds:

(i) That the learned trial Magistrate erred in law and in fact convicting in the absence of any adequate evidence of corroboration.

(ii) That the learned trial Magistrate erred in law and in fact convicting in the absence of adequate evidence of complaint having been made at a time proximate to that of the alleged offence.

(iii) That the learned trial Magistrate erred in

law and in fact in convicting when there was evidence that there was ample opportunity for complaint to have been made immediately during and after the alleged offence and there was no evidence that such complaint was made.

The appellant and his co-accused were not represented by counsel at the trial.

The facts which the learned Magistrate accepted are conveniently set out in the following passage from the judgment -

"On the night of the 14th August, 1981 complainant P.W.1 had attended a dance at the PWD Depot at Naroi where she met her boy friend one SAILOSI. She had then gone with SAILOSI at about 11 p.m. to the beach close by and returned in about an hour to the dance hall. On her way back she met a person named SIRELI and had delayed to talk to him, SAILOSI had in the meantime entered the dance hall. When P.W.1 was on her way back to the dance hall the 2nd accused whom she knew quite well who had been walking on the road with his 18 year old brother named VILI, had suddenly grabbed her from behind as she had passed him by holding both wrists in one hand and stopping her scream by closing her mouth with the other. The 2nd accused had then pulled her backward a distance of about 15 yards into the bush and had forcible sexual intercourse with her without her consent having put her on the ground after the 2nd accused had finished the 1st accused who was also knownto the P.W.1 had arrived there, and had sexual intercourse with P.W.1 without her consent. After the 1st accused had finished the 2nd accused had got on top of her body as she lay fallen and had sexual intercourse with her for the second time without her consent. According to P.W.1 while these four acts of intercourse were being committed the 2nd accused's brother VILI who had been close by and watching the proceedings until he was chased away by the accused to the road close by. After both accused had finished P.W.1 who had been crying had gone in the company to her parents house and slept that night. She had not complained to her parents as to what had occurred because she was frightened of them. About 13 days later on 28.8.81 P.W.1 had complained about this incident to her aunt one RACHELI BIU who had informed her parents who had in turn informed the police. P.W.1 admitted having had sexual intercourse earlier but never with the accused."

In evaluating the case as a whole the learned Magistrate made these pointed observations:

> "I have carefully considered the evidence led in this case and realise that there are several weaknesses in the prosecution evidence viz. (a) the fact that the evidence of P.W.1 stands uncorroborated (b) the belatedness of the complaint made by P.W.1 (c) the absence of any evidence of injuries either on P.W.1 or on either of the two accused suggesting consent as suggested by both accused in cross-examination."

Having thus pointed to the evidentiary weaknesses in the prosecution case the learned Magistrate went on and directed himself that although the evidence of complainant (P.W.1) was not corroborated and that it was dangerous to act on her evidence alone he was nevertheless satisfied beyond reasonable doubt of the truth of her evidence and felt he could act upon it.

As I had indicated during argument on the appeal I found the fact that P.W.1 raised no general alarm about the sexual attack upon her on the night in question or next morning as quite inexplicable. Nothing was heard of the incident until two weeks later when P.W.1 decided to complain about the matter. Her conduct in this regard was clearly inconsistent with her allegation that she was forced to have sexual intercourse. For all we know she may well have a purpose of her own to serve by her belated complaint. In any case her odd behaviour was such as to cast considerable doubt upon her credibility. In my view the lack of corroboration of her evidence underscores the basic weakness of the prosecution case which the warning the learned Magistrate gave himself concerning uncorroborated evidence does little to change.

Towards the end of his judgment the learned Magistrate remarked:

> "The fact that when the accused when given the opportunity to either give evidence or make unsworn statements both chose to remain mute confirms my finding that both accused are guilty of the charge of rape."

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This statement was I think a little unfortunate as it tended to suggest that the accused bore some burden of proof. It is clearly inappropriate for a court to draw any presumption from the fact that the accused chose to remain silent. In any event at the trial the accused did not have the benefit of legal representation.

For the reasons given this Court is not satisfied that the conviction of appellant was reasonable or satisfactory.

The appeal is allowed and the conviction quashed.

Chief Justice

Suva,
22nd April, 1983.