Samoa

Ufiufi v Attorney General

[2009] WSCA 13

Court of Appeal
Baragwanath, Slicer and Fisher JJ
5, 9 October 2009

(1) Criminal law – Rape – Definition – Statute defining rape as act of male having sexual intercourse with female without her freely-given consent – Appellant convicted of rape – Appellant claiming honest belief in consent of victim – Whether prosecution required to prove absence of honest belief in consent – Common law position – Relevance – Crimes Ordinance 1961, ss 9, 47(1) – Constitution of Samoa, art 111.

(2) Criminal evidence – Corroboration – Child witness – Appellant convicted of rape and attempted rape on uncorroborated evidence of child victim – Judge failing to warn assessors of danger of convicting on such evidence – Whether common law requiring judge to give assessors such mandatory warning – Whether matter to be left to discretion of judge – Criminal Procedure Act 1972, s 3.

(3) Constitutional law – Fundamental rights – Right to fair trial – Appellant convicted of rape and attempted rape – Prosecution counsel in closing speech suggesting that appellant had lied to court – Judge failing to direct assessors to disregard such suggestions – Whether rendering trial unfair – Constitution of Samoa, art 9.

The appellant was convicted of the rape and attempted rape of his 14-year-old stepdaughter. He appealed against the convictions, submitting, inter alia, that there had been a miscarriage of justice because (i) the judge had failed to direct the assessors that, if the appellant believed that the complainant had consented to sexual intercourse and attempted sexual intercourse, he should be acquitted, (ii) the judge had failed to direct the assessors that it was dangerous to convict on the uncorroborated evidence of a child and (iii) the judge had failed to give a strong direction to the assessors to disregard the prosecutor's submission in closing that the appellant had lied to the court.

HELD: Appeal dismissed.

(1) Section 47(1) of the Crimes Ordinance 1961 provided that rape was the act of a male person having sexual intercourse with a woman or girl without her freely-given consent. In the ordinary case, therefore, there was no obligation on a judge to refer to absence of an honest belief in consent in his or her summing up to assessors. There was an important exception to that

general rule under s 9 of the Crimes Ordinance, which provided that, in the absence of legislation to the contrary, common law defences were available to an accused. Under the common law of England, to which art 111 of the Constitution of Samoa referred in case of doubt, the accused was entitled to be acquitted unless the prosecution established beyond reasonable doubt that he lacked honest belief in consent. However, in Samoa the definition of rape clearly excluded absence of honest belief as a primary element of the offence. Nevertheless, it was clear that once there was evidence in a case which made the possibility of honest belief in consent a live issue, the prosecution had to prove its absence beyond reasonable doubt and the judge had to sum up to that effect. In the instant case, there was no live issue over honest belief in consent. Either the complainant's version was accepted, in which case there could have been no room for honest belief, or the appellant's version accepted, in which case there would have been actual consent. Therefore the judge's summing up in that respect could not be criticised (see paras [14]–[23], below). *DPP v Morgan* [1975] 2 All ER 347 considered.

(2) A mandatory warning that it was dangerous to convict on the uncorroborated evidence of a child was no longer part of the common law of Samoa. It was a matter for the discretion of the trial judge to decide what warning, if any, was appropriate in the circumstances. In the instant case it was appropriate to apply the proviso to s 3 of the Criminal Procedure Act 1972, which directed that, where there was no special or inconsistent provision for any matter of criminal procedure, the law of New Zealand would apply (see paras [24]–[27], below). Dicta of Lord Hobhouse of Woodborough in *R v Gilbert* [2002] UKPC 17, [2002] 5 LRC 606 at [20] applied. *Police v AB* [2003] WSSC 24 and *Police v Silipa* [2008] WSSC 81 approved.

(3) The right of a criminal accused to a fair trial was absolute and was guaranteed not only by the common law but by art 9 of the Constitution. In the instant case there had been a head-on clash between the versions of the two sides. There was no room for mistake; one was not telling the truth. The necessary thrust of the prosecution case was that the appellant was telling a false story. There had been no material unfairness and the prosecution submission was accepted (see paras [28]–[33], [41]–[42], below). Dicta of Lord Bingham of Cornhill in *Randall v R* [2002] UKPC 19, [2002] 5 LRC 678 at [28] applied. *Robinson v R* (1991) 180 CLR 531 and *R v E* [2008] NZCA 404, [2008] 3 NZLR 145 distinguished.

Per curiam. It is the duty of counsel to assist the due administration of justice by advising the judge of any alleged error in summing up. Any such practice of saving a point for appeal is to be denounced as breach of counsel's first duty, which is to the court (see para [13], below).

[*Editors' note*: Section 47 of the Crimes Ordinance 1961, so far as material, is set out at para [14], below.

Article 9 of the Constitution of Samoa, so far as material, provides: '(1) ... every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law ...'

Article 111 of the Constitution of Samoa, so far as material, provides: '(1) In this Constitution, unless it is otherwise provided or the context otherwise requires ... "Law" means any law for the time being in force in Western

Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, bylaw or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Western Samoa, and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction ...']

Cases referred to in judgment

DPP v Morgan [1975] 2 All ER 347, [1976] AC 182, UK HL
Lee Chun-Chuen v R [1963] 1 All ER 73, [1963] AC 220, HK PC
Police v AB [2003] WSSC 24, Samoa SC
Police v Silipa [2008] WSSC 81, Samoa SC
R v E [2008] NZCA 404, [2008] 3 NZLR 145, NZ CA
R v Gilbert [2002] UKPC 17, [2002] 5 LRC 606, [2002] 2 AC 531, Grenada PC
R v Howse [2005] UKPC 30, [2006] 1 NZLR 433, NZ PC
R v Kerr [1976] 1 NZLR 335, NZ CA
R v McI [1998] 1 NZLR 696, NZ CA
R v Owen [2007] NZSC 102, [2008] 2 NZLR 37, NZ SC
R v Tavete [1988] 1 NZLR 428, NZ CA
Randall v R [2002] UKPC 19, [2002] 5 LRC 678, (2002) 60 WIR 103, [2002] 1 WLR 2237, Cayman Is PC
Robinson v R (1991) 180 CLR 531, Aus HC

Legislation referred to in judgment

Constitution of Samoa, arts 9, 111
Crimes Ordinance 1961, ss 9, 47
Criminal Procedure Act 1972, ss 3, 164N

Appeal

The appellant, Muaiava Ufiufi, appealed against his conviction of rape and attempted rape. The facts are set out in the judgment of the court.

S Leung Wai for the appellant.
P Chang and *K Koria* for the respondent.

9 October 2009. The following judgment of the court was delivered.

BARAGWANATH, SLICER and FISHERJJ.

THE APPEAL

[1] The appellant was convicted of the rape and attempted rape of his 14-year-old stepdaughter. He appeals against conviction on the grounds:

(1) The verdicts of the assessors should be set aside under s 164N of the Criminal Procedure Act 1972 on the ground that they are unreasonable or cannot be supported having regard to the evidence;

(2) There was a miscarriage of justice in that:

(i) the learned Chief Justice failed in summing up to direct the assessors that if the appellant believed the complainant had consented to the sexual intercourse and attempted sexual intercourse he should be acquitted;

(ii) the Chief Justice failed to direct the jury that it is dangerous to convict on the uncorroborated evidence of a child;

(3) The Chief Justice did not give a strong direction to the assessors to disregard the submission of the prosecutor in closing that the appellant was lying;

(4) The Chief Justice did not discharge the jury or direct the assessors in summing up following the evidence of the complainant that she had become pregnant and given birth as a result of the sexual connection with the appellant.

(5) In combination these factors made the trial unfair.

GROUND 1: VERDICT UNREASONABLE

[2] The issue is whether the verdicts are unreasonable because, having regard to all the evidence, the jury could not reasonably have been satisfied beyond reasonable doubt that the appellant was guilty: *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

The evidence

[3] The appellant admitted that he had sexual connection with the complainant on two occasions. He said it occurred at the family house and was with the complainant's consent.

[4] The complainant's evidence was that in July 2007 there were two episodes. The first was when she went inland with the appellant: he took off her clothes and he pressed his penis against her private part; tried to insert his penis into her but could not succeed. She said she was not happy with what he did; this was the first time she had something like that done to her; and that she tried to move away but he held her. He told her not to tell her mother or he would chop off her head with a bush knife. When they returned to the house she told her mother.

[5] She said that the second episode was also inland, at a plantation. She had been told by her mother to go there with the appellant. She weeded the grass while the appellant tidied the bananas. He threw a stone at her which struck the back of her head, causing her to faint. He then struck her with the handle of his cane knife, pulled down her pants and pulled up her shirt. He inserted his penis into her private part and shook his buttocks. She was unhappy with what he was doing and wanted to move away from him but he held her hands. She said she would tell her mother and he told her not to or he would expose her intestines with his bush knife. Because she was scared of what he had said she did not tell her mother.

[6] Cross-examined, she said she had been to the office of Faataua o le Ola where a woman told her to be confident if she came before the court. She agreed that the woman had told her what to tell the judge. She accepted that she had not told the police that the appellant had threatened her, that she fainted and that he told her not to tell her mother what happened. She agreed with defence counsel's suggestion 'your evidence you're now giving are what

people talked to you about giving your evidence'. She agreed that the reason it took a while for her to answer was because she needed time to think of the answer. She rejected counsel's suggestion that the appellant did not threaten her or say he was going to cut her stomach until her guts came out. But she agreed that Faataua o le Ola had told her to say that. Asked 'Am I correct in saying the only thing [the appellant] said was "what if [your mother] discovers the things we did but he never said to you do not tell [her] the things that were done" ', she agreed. She denied she had asked the appellant 'what do you and your mother [sic] do at night?'. Asked 'Is it correct if I put to you the two days you gave evidence about these things happened at home?' she answered 'Yes'. But asked a few questions later she denied that her testimony was incorrect when she said the two episodes happened in the bush. Asked by the Chief Justice why she did not tell the police she had told her mother, she said her mother had told her not to tell. She was then asked about her evidence that the appellant had taken off her clothes. Counsel asked 'Is it correct to say that [the appellant] took off his clothes and you took off yours?' She replied 'Yes'. Counsel asked 'To put it another way you took off your clothes not Muaiava'?' She said 'No'. The cross-examination concluded with a treble question: 'Is it correct if I say that the Faataualeola people asked you to come and testify, is it correct that Muaiava did not force you, but you had sexual intercourse with Muaiava, is that correct?' She answered 'Yes'.

[7] Re-examined, the complainant said that the appellant took off her clothes; that he threatened her by saying not to tell her mother what had happened; that she was forced; and that the answers were her own.

Discussion

[8] What they should make of the evidence was a matter for the assessors. Whether they attributed the inconsistencies in the complainant's evidence to failure to understand what was being put or to falsehood actuated by others was par excellence their role to decide with the assistance of counsel's submissions and the summing up with its directions as to onus and standard of proof. The final treble question should not have been asked; there is no reason to assume that the complainant was answering the last part rather than the first. The first ground fails.

GROUND 2: THERE WAS A MISCARRIAGE OF JUSTICE

(i) The learned Chief Justice failed in summing up to direct the assessors that if the appellant believed the complainant had consented to the sexual intercourse and attempted sexual intercourse he should be acquitted

[9] Section 47 of the Crimes Ordinance 1961 states:

> 'Rape—(1) Rape is the act of a male person having sexual intercourse with a woman or girl ... Without her consent freely given ...'

[10] The Chief Justice directed the assessors:

> 'The charge of rape consists of two ingredients which the prosecution must prove beyond reasonable doubt. (a) The first ingredient is that the accused must have had sexual intercourse with the complainant. (b) The

second ingredient is that sexual intercourse must have occurred without the consent of the complainant. Consent in this context must be freely and voluntarily given. Submission by a woman out of fear or a sense of helplessness is not consent.'

[11] As to attempted rape, the Chief Justice directed:

'(a) The first ingredient is an intention on the part of the accused to have sexual intercourse with the complainant without her consent ...

(b) The second ingredient is the carrying out of an act by the accused for the purpose of achieving that intention ...'

[12] Mr Leung Wai submitted that the Chief Justice had erred in failing to direct the assessors that if the appellant had believed the victim had consented to sexual intercourse and attempted intercourse he should be acquitted.

[13] Asked why, if he considered an essential element had been omitted, he did not inform the Chief Justice at the end of the summing up of the supposed oversight counsel responded that he felt to do so would be discourteous to such a senior member of the judiciary and that there is a practice of saving such a point for the Court of Appeal. We state clearly that it is the duty of counsel to assist the due administration of justice by advising the judge of any alleged error in summing up. Any such practice of saving a point for appeal is to be denounced as breach of counsel's first duty, which is to the court.

[14] In Samoa rape is exhaustively defined in s 47(1) of the Crimes Ordinance 1961 as follows:

'*Rape*—Rape is the act of a male person having sexual intercourse with a woman or girl:

(a) Without her consent freely and voluntarily given; or

(b) With consent extorted by fear or bodily harm or by threats; or

(c) With consent extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of or grievous bodily injury to a third person; or

(d) With consent obtained by personating her husband; or

(e) With consent obtained by a false and fraudulent representation as to the nature and quality of the act.'

[15] It will be noted that in Samoa absence of an honest belief in consent does not constitute one of the primary elements of rape. In the ordinary case, therefore, there is no obligation on a judge to refer to it in his or her summing up to assessors.

[16] To that general rule there is an important exception found in s 9 of the Crimes Ordinance coupled with the common law. Section 9 provides:

'All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Ordinance or under any other enactment, except so far as they are altered by or are inconsistent with this Ordinance or any other enactment.'

[17] The effect of s 9 is that in the absence of legislation to the contrary, common law defences are made available to an accused. For present purposes the English common law approach to honest belief in consent can be regarded as just such a defence.

[18] Under the common law of England, to which art 111 of the Constitution of Samoa refers in case of doubt, the accused is entitled to be acquitted unless the prosecution establishes beyond reasonable doubt that he lacked honest belief in consent (the mens rea (guilty mind) element: *DPP v Morgan* [1975] 2 All ER 347).

[19] In *Morgan* the House of Lords did not apply the principle employed in cases of self-defence and provocation that it is the obligation of a judge to leave a defence to the assessors (or a jury) only if there is a sufficient credible narrative to justify that course: see *R v Kerr* [1976] 1 NZLR 335, *R v Tavete* [1988] 1 NZLR 428 and *Lee Chun-Chuen v R* [1963] 1 All ER 73. The dismissal of the appeal against conviction was because it was clear that the jury rejected the accused's allegation of consent, a version radically opposed to that of the complainant, and would have convicted even if they had been directed as to the element of lack of honest belief, and the provision equivalent to s 164N(4) of the Criminal Procedure Act 1972 was applied (dismissal of appeal even though point decided in favour of appellant if no substantial miscarriage of justice has actually occurred). The test is whether a reasonable jury properly directed would inevitably have convicted: *R v McI* [1998] 1 NZLR 696 at 712 and *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [34].

[20] In England it was possible and appropriate to introduce absence of honest belief as a third element of rape because the expression 'rape' was not defined in that jurisdiction. In Samoa it has been so defined and the definition clearly excludes absence of honest belief as a primary element. Nevertheless it is clear that once there is evidence in a case which makes the possibility of honest belief in consent a live issue, the prosecution must prove its absence beyond reasonable doubt and the judge must sum up to that effect.

[21] In the present case the appellant asserted that at the house the complainant had opened her legs and tempted him to engage sexually with her following which consensual intercourse took place. On his account the only reasonable inference was that the complainant had in fact consented. The complainant asserted that there had been violence associated with attempted rape and rape in the bush. On her account there was not only no consent but there no possible room for his belief in consent.

[22] In those circumstances we do not think that there was any live issue over honest belief in consent. Either the complainant's version was accepted, in which case there could have been no room for honest belief, or the appellant's version accepted (or at least considered worthy of raising a reasonable doubt), in which case there would have been actual consent.

[23] We can therefore see no criticism of the summing up in this respect. The first submission under ground 2 fails.

GROUND 2: THERE WAS A MISCARRIAGE OF JUSTICE

(ii) The Chief Justice failed to direct the jury that it is dangerous to convict on the uncorroborated evidence of a child

[24] The Chief Justice followed an earlier decision of his own that in today's conditions it is demeaning of women to retain the former law requiring corroboration of a sexual allegation. Mr Leung Wai submitted that such substantial change could be made only by Parliament, as has occurred in New Zealand. Ms Chang cited *R v Gilbert* [2002] UKPC 17, [2002] 5 LRC 606 in which the Privy Council described the rule as one of practice as to how a judge should sum up in a sexual case. It stated (at [20]):

> 'The rule is always liable to be reassessed in the light of further experience or research and reformulated in order better to perform that function. If, as their Lordships consider in agreement with the Law Commission and the Court of Appeal in England, the rule has become counter-productive and confusing it is the duty of their Lordships so to hold.'

It held instead that it is a matter for the discretion of the trial judge to decide what warning, if any, is appropriate in the circumstances.

[25] We accept the attorney's submission that this is a proper case for the application of the proviso to s 3 of the Criminal Procedure Act 1972, which directs that where there is no special or inconsistent provision for any matter of criminal procedure the law of New Zealand shall apply.

[26] We endorse the decision of the Chief Justice in *Police v AB* [2003] WSSC 24, followed in *Police v Silipa* [2008] WSSC 81, that a mandatory corroboration warning is no longer part of the common law of Samoa.

[27] The second submission in ground 2 fails.

GROUND 3: THE CHIEF JUSTICE DID NOT GIVE A STRONG DIRECTION TO THE ASSESSORS TO DISREGARD THE SUBMISSION OF THE PROSECUTOR IN CLOSING THAT THE APPELLANT WAS LYING

[28] The prosecutor in closing said:

> 'The prosecution's respectful submission is, the reason [the appellant's] explanation was so vague was because it was false ... I submit that the evidence of the accused is a fabrication and that he has lied to this court.'

[29] It was submitted for the appellant that the Chief Justice should have given a strong direction to the assessors, but none was given. *R v E* [2008] NZCA 404, [2008] 3 NZLR 145 at [96] and *Robinson v R* (1991) 180 CLR 531 at [6] were cited in support of the submission that there was a miscarriage of justice.

[30] Counsel for the attorney of course accepted that the right of a criminal accused to a fair trial is absolute. It is guaranteed not only by the common law (see *Randall v R* [2002] UKPC 19, [2002] 5 LRC 678 at [28]) but by art 9 of the Constitution of Samoa. But they submitted that there was no material unfairness.

[31] We accept the prosecution submission. Here there was a head-on clash between the versions of the two sides. There was no room for mistake; one

was not telling the truth. How the challenge to one's opponent's case should be expressed will depend on the circumstances. A judge will be astute to intervene if the dignity of the proceedings is put at risk by intemperate language. It would be unwise to embark upon such a course before any Samoan judge and improbable that such conduct would be attempted in the court of the Chief Justice. The argument was not pitched at such a level. It was rather that use of the word 'lie' of itself imperilled the fairness of the trial.

[32] We do not encourage the use of that word, which can substitute insult for analysis. But the necessary thrust of the prosecution case was that the appellant was telling a false story. We do not accept that, in its context, the words used would distract the assessors from their proper task. Nor do *R v E* and *Robinson v R* assist the appellant. Each concerned a prosecution submission to the effect that *as the man on trial* the accused had a special motive to lie, thus attacking his right to make a defence. That did not occur in this case.

[33] Ground 3 fails.

GROUND 4: THE CHIEF JUSTICE DID NOT DISCHARGE THE JURY OR DIRECT THE ASSESSORS IN SUMMING UP FOLLOWING THE EVIDENCE OF THE COMPLAINANT THAT SHE HAD BECOME PREGNANT AND GIVEN BIRTH AS A RESULT OF THE SEXUAL CONNECTION WITH THE APPELLANT

[34] The Chief Justice ruled pre-trial that the complainant should not disclose in evidence that she had become pregnant and given birth as a result of the appellant's offending. But the fact emerged in the following context:

> 'Prosecutor: Can you tell us why you are no longer living at [your former village]?
>
> Complainant: The thing between me and [the appellant].
>
> Prosecutor: What happened to you?
>
> Complainant: I became pregnant with ...
>
> Defence counsel: I object sir, my learned friends have already told the witness ... that they shouldn't have been mentioned ... but damage has already been done
>
> His Honour: Alright carry on counsel.'

[35] The answer to the prosecutor's question was in fact responsive to it. It is not suggested that either prosecutor or witness acted mischievously; there was a misunderstanding of a less than optimal non-leading question.

[36] Mr Leung Wai submitted that the pregnancy and birth were not relevant and, in any event, their prejudicial effect outweighed any probative value. He further submitted that the Chief Justice should have discharged the assessors or alternatively have given them a firm direction to disregard the evidence, but did not do so.

[37] Of their nature criminal trials engage powerful emotions. The court tries to minimise the risk that such emotions may overwhelm the assessors or jurors. It will exclude certain kinds of evidence that might be prejudicial where that can be done without undue damage to the prosecution case; if such evidence is admitted or comes in by error it may abort the trial or give

directions concerning it. It may also consider that justice can properly be done by simply allowing the trial to proceed without comments on the evidence, which would draw attention to it.

[38] A useful barometer in such a situation is how counsel reacts at the time. It did not occur to Mr Leung Wai to apply for a new trial and the Chief Justice's reaction was unsurprising. So too was his decision to leave the point alone in summing up. The assessors would well know that an unwanted pregnancy is a potential unhappy consequence of the sex which the appellant admitted. Revelation that it had happened would naturally trouble the assessors. But so do the kind of photographs that usually accompany a homicide. Yet we rely upon assessors, like jurors, to be true to their oath. We do not regard the evidence as sufficient to enliven the kind of reaction that entails miscarriage.

[39] The fourth ground fails.

GROUND 5: IN COMBINATION THESE FACTORS MADE THE TRIAL UNFAIR

[40] We have considered the points discussed above in combination as well as individually.

[41] We are satisfied that the appellant has had a fair trial and that the fifth ground also fails.

RESULT

[42] It follows that the appeal must be and is dismissed.