IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 60 of 1976

Between:

MOSESE ULUINAVITILEVU

Appellant

and

R E G I N A M

Respondent

E. Vula for the Appellant
R.E. Lindsay, Fa and Fatiaki for the respondent.

Date of Hearing : 18th March, 1977
Delivery of Judgment: 25th March, 1977

JUDGMENT

GOULD V.P.

This is an appeal from the Supreme Court of Fiji at Suva sitting in appellate jurisdiction from the Magistrate's Court in which the appellant had been convicted on two charges of procuring a male person to commit an act of gross indecency with him, contrary to section 170 of the Penal Code. The appellant was sentenced in the Magistrates Court to concurrent terms of eighteen months' imprisonment. No appeal lies to this Court in relation to the sentences and in his appeal against

conviction the appellant is restricted by section 22(1) of the Court of Appeal Ordinance (Cap.8) to grounds of appeal which involve questions of law only.

The complainants were two secondary school boys (referred to respectively as P and T); P was 15 years old at the date of giving evidence and T, 13 years. The appellant was the headmaster of the school at which they attended, and the offences were alleged to have occurred in April and May, 1976. It is unnecessary to go into details of the evidence. Masturbation was involved in each case, and the appellant procured the two boys to carry out acts upon his person to that end. The findings of fact of the learned Magistrate, which were accepted by the learned Chief Justice indicated a marked degree of similarity between the method or approach of the appellant in each case.

Before coming to the grounds of appeal it is necessary to say a word about the evidence led by the prosecution. The complainants P and T were both called and in addition to giving the detailed evidence of the actual commission of the offences they each testified that they had written a letter on the instructions or order of the appellant, after the inquiry had commenced, which in effect retracted their allegations against him. Another boy (hereinafter called P.W.3) a pupil at the same school, gave evidence that the appellant had called him to his quarters, and asked him, to perform acts

(which he did) which were similar to acts performed by P and T prior to the actual indecency. After P.W.3 had been asked to massage the appellant's bottom, and had done so, he seized an opportunity to run away. All of these witnesses gave their evidence on oath. The last witness we need mention was Mr. P.M. Hilton, who was a master at the school; he spoke with P, T, and P.W.3 and made a report to the police.

Counsel for the appellant relied upon the following grounds of appeal. A fourth ground was withdrawn.

"1. The learned trial Magistrate erred in law in treating the incident relating to the taking of statements from the complaint as corroboration of the offence itself.

2. The learned trial Magistrate erred in law in treating the evidence given by a third boy as corroboration and further erred in law in admitting such evidence.

3. The learned trial Magistrate erred in law in treating the evidence of each of the three boys as corroborating the evidence of each other."

Before we deal with these grounds we think that it will be of advantage to consider, insofar as they appear relevant the two comparatively recent House of Lords cases in which similar problems have been dealt with. They are Director of Public Prosecutions v. Kilbourne (1973) 1 All E.R. 440, and Boardman v. Director of Public Prosecutions (1976) 3 All E.R.887.

In the Kilbourne case there were two groups of offences charged, one with four boys and the other, a year later, with two boys. We quote now from the headnote at p.440-

> "The prosecution alleged that the accused encouraged the boys to come to his house by providing them with various inducements and having got them into his house he committed the acts charged in the indictment. The accused admitted that the boys had come to his house but claimed that his association with them had been entirely innocent. The judge directed the jury that, whereas the boys in each of the two groups knew each other well and could have collaborated in putting forward their stories, it was unlikely if not impossible, for the two groups to have collaborated in that way and accordingly they were entitled to take the evidence of the boys in one group as corroborating the evidence of the boys in the other group."

The Court of Appeal quashed a conviction on that direction but it was restored by the House of Lords; again from the headnote, at pp.440-1:-

> "The word 'corroboration' had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence. No distinction could, therefore, be drawn between evidence which could be used as corroboration and evidence which might help the jury to determine the truth of the matter. Since the evidence of one group of boys was admissible in relation to the charges concerning the other group as being relevant to matters in dispute and implicating the accused in the criminal conduct alleged, the evidence, if

believed, constituted corroboration. It was immaterial that evidence of boys of both groups was mutually corroborative, or that each boy was technically, an accomplice in relation to the offence committed against him."

"Per Lord Hailsham of St. Marylebone LC, Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale. There is no general rule that no persons who come within the definition of 'accomplice' may be mutually corroborative. The rule does not necessarily apply to all witnesses in the same case who may deserve to be categorised as 'accomplice.' In particular it does not necessarily apply to accomplices who give independent evidence of separate incidents as proving system and negativing accident, and where the circumstances are such as to exclude the danger of a jointly fabricated story."

Boardman's case, like the present, involved a headmaster and pupils, somewhat older than P and T. In the headnote is the following, at p.887:

"There was no suggestion that S and H had collaborated together to concoct a similar story. Each boy gave evidence that the appellant had visited the boy's dormitory in the early hours of the morning and invited the boy to go with him to his sitting room and that the appellant had asked each boy to take the active part, while the appellant took the passive part, in acts of buggery. In his summing-up the judge pointed out to the jury that the kind of criminal behaviour alleged against the appellant in the two counts was in each case of a particular, unusual kind; that it was not merely a straightforward case of a schoolmaster indecently assaulting a pupil but that there was an 'unusual feature' in that a grown man

had attempted to get an adolescent boy to take the male part while he himself played the passive part in acts of buggery. On that basis the judge directed the jury that it was open to them to find in H's evidence on count 2 corroboration/S's evidence /of on count 1 and vice versa. The appellant was convicted on both counts."

The Court of Appeal upheld those convictions, and again we quote from the headnote:

"(i) In exceptional cases evidence that the accused had been guilty of other offences was admissible if it showed that those offences shared with the offence which was the subject of the charge common features of such an unusual nature and striking similarity that it would be an affront to common sence to assert that the similarity was explicable on the basis of coincidence. In such cases the judge had a discretion to admit the evidence if he was satisfied (a) that its probative force in relation to an issue in the trial outweighed its prejudicial effect and (b) that there was no possibility of collaboration between the witnesses."

"(ii) The general prinicple relating to the admissibility of 'similar fact' evidence was applicable to all offences. Homosexual offences were not to be treated as forming some separate category distinct from other offences and calling for the application of special rules. In particular the fact that there was evidence that a person accused of a homosexual offence was a man whose homosexual activities took a particular form was not by itself sufficient automatically to render that evidence admissible."

"(iii) It was doubtful whether the fact that a grown man had attempted to get an adolescent boy to play the active part, while he played the passive part, in acts of buggery was a sufficiently unusually feature to justify the admission of H's evidence in relation to count 1 and S's evidence in relation to count 2, but since there were other similarities in the two stories, in particular the appellant's nocturnal visits to the dormitories, it could not be said that the similar fact evidence was inadmissible or that the judge had exercised his discretion wrongly in admitting it. Accordingly the appeal would be dismissed."

Grounds 2 and 3 of the appeal raise two problems the answer to which in our opinion is to be found in the authorities just quoted. The first is whether the evidence of the similar incidents involving other persons was properly regarded as corroborative. Plainly, such evidence may properly be so regarded if a condition to which we will refer below, is fulfilled. The second is whether the witnesses P,T and P.W.3, being perhaps technically in the position of accomplices in the offences committed against them, and being youths could corroborate each other. For the purpose of the argument we put aside the plain evidence that P.W.3 at least could not have been an accomplice as he was not involved in any offence. The answer to this querry is again in the affirmative, if the circumstances warrant it.

The condition above referred to is that the evidence tendered be of circumstances of "striking similarity" to those alleged in the actual charge.

This phrase which is used repeatedly throughout the cases comes from R. v. Sims (1946) 1 All E.R. 697 - see the speech of Lord Morris in Boardman's case at p.893(g). In the present case the learned Magistrate specifically directed himself on this topic by reference to Boardman's case, and in the Supreme Court the learned Chief Justice used the phrase, "its most striking feature." The finding that there was sufficient similarity was with particular reference to the evidence of P.W.3, but it is quite clear from the text of the judgment that the Magistrate found equal similarity in the cases of P and T. The law on the subject was clearly present to the mind both of the Magistrate and of the Chief Justice; this appeal being confined to questions of law only, it would be for us to interfere only if we considered that no reasonable court could have come to the conclusion that the evidence was admissible for the purpose of corroboration. To the extent to which the admissibility of the evidence was a matter of discretion, as was said by Lord Salmon in Boardman's case, at p.913(j), " it is only in a very clear case that an appellate tribunal would interfere with the exercise of his discretion." We have no doubt that the evidence was rightly admitted.

In relation to the answer to the second problem above referred to, we have used the phrase "if the circumstances warrant it," and this relates to a restriction indicated in both the headnotes we have quoted. It can be taken from each of them that, in order that the evidence be admissible

as mutually corroborative, there must have been no danger of collaboration between those who put forward the evidence. The Kilbourne headnote reads, "the circumstances are such as to exclude the danger of a mutually fabricated story." In Boardman, "that there was no possibility of collaboration between the witnesses." It was put to us on the appeal as a matter of law that the courts below were not justified in accepting the evidence in question unless they were satisfied beyond any doubt whatever that collaboration could not have taken place. With three pupils in the same school collaboration was by no means impossible. The argument no doubt had as its basis the situation in Kilbourne's case in which the incidents concerning the two groups of boys were a year apart, where the learned Judge said "it was unlikely, if not impossible" that there could have been collaboration between members of the two groups. In the present case, the learned Magistrate had considered the question and had found - "I am satisfied that there is no evidence of collaboration between P, T and P.W.3 or between them and others." This, in counsel's submission was not enough.

To any extent that this submission suggests that Kilbourne and Boardman laid down a new evidential standard of "beyond possibility" in relation to this particular aspect of evidence, we are unable to accept it. That subject, as such, was not considered in either case, and it is certain that the headnotes quoted above are not intended to

be read in that light. In the official series, in which the cases are reported at (1973) A.C. 729, and (1975) A.C. 421, the headnotes make no allusion to the topic at all.

Some passages from the speeches on the Kilbourne case may be helpful - we use again the All England series. At p.444(d) Lord Hailscham said:-

> "On the other hand, the trial judge directed the jury that they must not use the evidence of any of the boys of either group to reinforce the evidence of any boy of the same group as that to which the witness belonged. He evidently had in mind that the boys of each group were respectively well known to one another and wished thereby to exclude the possibility that they might have put up within each group, but not between groups, a concocted tale."

He also quoted a passage (p.445) from R. v. Campbell (1956) 2 All E.R. 272, 276 where it was said:-

> "At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story."

Again, at p.454(e), Lord Hailsham said:-

> "In particular it does not necessarily apply to accomplices of Lord Simonds LC's third class, where they give independent evidence of separate incidents, and where the circumstances are such as to exclude the danger of a jointly fabricated story."

There is a reference by Lord Reid, at p.456 (b):-

> "Where several children, between whom there can have been no collabroation 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."

In Boardman's case Lord Wilberforce (p.897)(j)) was indicating a course of prudence when he said:

> "This is well illustrated by Kilbourne's case where the judge excluded "intra group' evidence because of the possibility as it appeared to him, of collaboration between boys who knew each other well. This is my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out."

Commenting on the case before him the same learned Lord said (p.898 (e)):-

> "The judge dealt properly and fairly with the possibility of a conspiracy between the boys."

The argument being what it is, we think the comment is justified that dealing with the possibility does not mean the same thing as finding that a conspiracy was impossible.

Lord Hailsham also referred to the summing-up under consideration, at p.901(f):-

> "No complaint was made of the terms in which the judge gave the warning and no complaint was made of the passage in his direction which considered, and then excluded, the possibility of a concocted story ..."

Lord Cross, at p.910(e) said:-

> "In such circumstances the first question which arises is obviously whether his accusers may not have put their heads together to concoct false evidence and if there is any real chance of this having occurred the similar fact evidence must be excluded. In Kilbourne it was only allowed to be given by boys of a different group from the boy an alleged offence against whom was being considered."

As we have said, we do not consider that in either of these cases, was the degree of proof, or disproof, in relation to the likelihood of a conspiracy, directly present to their Lordships' minds, There are references to the "possibility" of collaboration, but they are passing references, and it must be for the Judge to determine what evidence in a particular case leads him to the conclusion that the possibility can safely be disregarded. It is not a matter of a thing being physically impossible. It is an important issue and it is well settled that the importance of an issue plays a direct part in determining the standard of proof required. This is a matter for the Judge, who knows also that he has a discretion to aid him in circumstances of doubt. We think that the matter is best expressed in the last passage we have cited where Lord Cross used the words "if there is any real chance of this having occurred."

The learned Magistrate considered the matter of a possible conspiracy fully in his judgment. The matter really came to the light of day through the activities of the master, Mr. Hilton, which militates

strongly against any conspiracy between the boys. The learned Magistrate could have expressed himself in more affirmative terms than he used in saying:-
"I am satisfied that there is no evidence of collaboration between P, T and P.W.3 or between them and others", but we agree with the learned Chief Justice in construing this as meaning that the Magistrate was "satisfied that there had been no collaboration between P, T and P.W.3." If there was any technical insufficiency about the way in which the Magistrate expressed it we would have no hesitation, on our reading of the case as a whole, in applying the proviso. No miscarriage of justice was involved.

What we have said covers Grounds 2 and 3 of the Notice of Appeal which therefore fail. Ground 1 cannot succeed either. Mr. Vula for the appellant argued that the fact that the appellant had obtained the signing of letters of withdrawal of their allegations was just as consistent with a desire to exculpate himself from false charges as from just charges. In this, once it is accepted that the appellant's conduct at the relevant time was capable of amounting to corroboration no matter of law remains for the consideration of this court. The question of the weight to be given to the complainants' evidence on the matter, in the light of the explanation put forward by the appellant and of the whole circumstances of the case is a matter entirely for decision in the courts below.

In the result the appeal fails and is dismissed.

(Sgd.) T.J. Gould
Vice President

(Sgd.) C.C. Marsack
Judge of Appeal

(Sgd.) T. Henry
Judge of Appeal