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IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 34 OF 1982

Between:

1. APIMELEKI MADRAITABUA
2. TANIELA TUKAI

APPELLANTS

- and -

R E G I N A M

RESPONDENT

Iqbal Khan for the appellants.
V.J. Sabharwal for the respondent.

Date of Judgment: 2nd November, 1982.
Delivery of Judgment: 19th November 1982

JUDGMENT OF THE COURT

Spring, J.A.

Both appellants were convicted by the Supreme Court of Fiji at Lautoka on the 25th May, 1982, of the crime of rape contrary to section 149 of the Penal Code, (Cap 17); each was sentenced to 6 years imprisonment. The appellants were jointly charged with one Vereti Buregole. The trial took place before a judge and three assessors. In respect of the appellants the assessors returned the unanimous opinion that both were guilty of the crime charged; in the case of Vereti

Bureqele, the assessors returned the unanimous opinion of not guilty. The learned trial judge accepted and concurred in these opinions and cor. icted the appellants and discharged Vereti Bureqele.

The facts as presented by the prosecution are as follows.

On Saturday night 14th November, 1981, Niumai Lowata attended a dance at the F.S.C. Union Club Lautoko at which both appellants were present. The dance ended at 1 a.m. First appellant, Apimeleki Madraitabua, approached the complainant outside the dance hall, took her hand and pulled her across the road in the direction of a canefield; Lowata claimed he used physical force and punched her; at this time first appellant called to some of his companions who joined him and began punching complainant; they assisted in forcing her on to the ground in a canefield which was approximately 132 yards from Drasa road. First appellant removed her clothing, her panties and forcibly had intercourse with her. At this time there were approxima' ly six other male persons present. Lowata stated that she did not consent to first appellant having intercourse with her; she stated that one Qurai stuffed clothing in her mouth to prevent her calling out. As a result of the punching she lapsed into unconsciousness; she recovered about 5 a.m. and found she was alone; she dressed and left the canefield and proceeded to the home of Emili Koroi where she was staying; in the dark she did not find her panties. Lowata claimed that Taniela the second appellant tried to have sex with her, but as she lost consciousness she could not say definitely whether he succeeded or not.

On the morning of 15th November, 1981, she told Emili Koroi, with whom she lived, of her experience; as a result the police took her to the hospital where she was examined. The medical examination revealed that she had tenderness over the abdomen, the left porital region of the scalp; a cut on the left earlobe and multiple tiny superficial cuts over both thighs and tenderness on the left shoulder with tiny abrasion over mid clavicular regio.. The doctor said these injuries could have been caused by a blunt instrument. Both eyelids were swollen. There was also evidence of recent intercourse; there was bruising of the inner lips of the vagina together with tenderness and congestion which in the opinion of the doctor could have been caused by repeated acts of intercourse within 48 hours.

Arjun Singh, Detective Constable, stated in evidence that about 9 a.m. on the 15th November, 1981, he was returning in a police van from Natokawaqa when he saw a Fijian female who did not appear to be walking normally; he was stopped by her and a complaint was made that she (Lowata) had been raped by some Fijian males. Before he went to the hospital he took Lowata as requested to a spot near the F.S.C. Club where he found a pair of black panties about 6 chains from Drasa Avenue; Lowata identified the panties as her own. Emili Koroi stated that about 5 a.m. on 15th November, 1981, she arrived home; she was stooping and holding her stomach; she could not walk properly.

A trial within a trial was held in the absence of the assessors to determine the admissibility of certain statements made by appellants to the police. After a lengthy hearing the learned trial judge held the allegations by appellants of violence and threats on the part of the police

were unsubstantiated; he admitted the statements in evidence as having been voluntarily made.

Kini Tausasa, a Detective Constable, gave evidence that on 15th November, 1981, he took an interview statement from first appellant who admitted that he had dragged Lowata from the dance hall and started punching her; he also admitted tearing her clothing and removing her panties; further, he admitted that while others stuffed her mouth with clothing he had intercourse with her and that others followed him; he admitted that he was drunk.

Aisake Botei, a police officer, stated that upon charging first appellant with the crime of rape, he signed the charge statement in which he admitted dragging Lowata towards the sugarcane field at Topline; that he tore her skirt after she refused to have sexual intercourse; thereupon he punched her head, pulled her to the ground and by force had sexual intercourse with her. Later others arrived and assaulted Lowata and they forcibly had sexual intercourse; first appellant said that they left Lowata at the canefield and went home; at that time he admitted he was very drunk.

Orisi Ramumu, Detective Corporal, stated that on the 16th November, 1981, he interviewed second appellant who admitted having had sexual intercourse with Lowata at a cassava patch opposite the F.S.C. Club; he denied punching her.

Ilaisa Bolaqari, a Detective Constable, stated that on the 17th November, 1981, he charged the second appellant with the crime of rape; in his charge statement second appellant stated he did not have sexual intercourse with Lowata because he was unable to obtain an erection.

We turn now to summarise the evidence called by each appellant.

The first appellant gave evidence on oath that he attended the dance and danced with complainant; that when the dance ended one Rabitu came and told him Lowata was outside the hall and wished to see him; thereupon he went outside and Lowata asked him to accompany her. They crossed the road, sat down on the grass and Lowata consented to having sex. That during intercourse other male persons arrived covering their faces with their shirts and proceeded to assault both first appellant and Lowata; some of these persons asked Lowata for sex and when she refused they kicked and punched her. First appellant claimed he was punched on the back of the head and rendered unconscious; he recovered about 5 a.m. and claimed Lowata was still there with him and that they both got dressed and went to their respective homes. First appellant denied punching or using force; he stated he had intercourse with Lowata with her consent and that Lowata was his girl friend; that he had had consensual sex with her many times previously.

The second appellant gave evidence and admitted being at the dance; he denied seeing the first appellant at [illegible] stated that at 1 a.m. he left the dance and returned home; he denied knowing Lowata or being at the canefield. In the interview statement given to the police, second appellant admitted having had sexual intercourse with Lowata at the same place as first appellant, but denied punching her; he stated he went to this canefield area at the suggestion of first appellant. In the charge statement, he denied having intercourse with Lowata because he could not raise an erection.

Three grounds of appeal were advanced by first appellant. The first ground of appeal reads :

> "That the Learned Trial Judge erred in law in directing himself and the Lady and Gentlemen Assessors that they were the Judges of fact. Consequently, there has been a substantial miscarriage of justice."

Mr. Khan submitted that the learned judge in so directing the assessors he failed to warn them that their opinions were not binding upon him; as a result the learned judge had led the assessors into believing that whatever conclusions they arrived at would be binding upon him.

The record reads that the learned trial judge after advising the assessors that they were "the judges of fact" went on and said :

> "I will remind you of the salient features in the evidence and draw your attention to certain aspects. In so doing it is not my intention to suggest the opinions you should arrive at. It is your independent opinions which are required but I will try to give you some benefit from my experience in approaching the evidence."

Section 246 of the Criminal Procedure Code provides that the trial is by the judge "with the aid of assessors". The assessors are there to advise the trial judge as to whether in their opinion the verdict should be one of guilty, or, not guilty; they must accept what the trial judge tells them as to the law to be applied, but they must make up their own minds as to the facts. The judge is not bound to conform to their opinions, but he must at least take them into account.

We are satisfied that the learned trial judge in so directing the assessors had neither disobled the assessors

from giving him the aid to which he was entitled; nor misdirected them on a vital point.

The learned trial judge accepted and concurred in the unanimous opinions given by the assessors not only as to the guilt of the two appellants but also as to the innocence of Vereti Bureqele. In our opinion there is no merit in this ground of appeal and it fails accordingly.

In the second ground of appeal first appellant complains that :

> "The Learned Trial Judge erred in not allowing the Counsel for the Appellant to address him on points of law after the Appellant's Counsel had addressed the Lady and Gentlemen Assessors on matters of facts. These submissions on facts were made in the presence of the Lady and Gentlemen Assessors as part of Counsel's address at the trial. Such refusal constituted a breach of Section 294 of the Criminal Procedure Code Cap. 21. Consequently, there has been a substantial miscarriage of justice."

Section 294 of the Criminal Procedure Code reads :

> "The accused person or his barrister and solicitor may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. The accused person may then give evidence on his own behalf and he or his barrister and solicitor may examine his witnesses (if any), and after their cross-examination and re-examination(if any) may sum up his case."

Mr. Khan, who appeared for first appellant in the lower court, at the conclusion of his closing address

to the assessors sought leave to address the learned trial judge on certain matters of law which he considered the learned trial judge should deal with in his summing up to the assessors. The record reads :

"Mr. Khan to Court

May I now address the Court on matters of law.

Court:

You may address me if the submission is to the facts but this is not a matter for the assessors.

Mr. I. Khan:

This is a matter for the assessors.

Court:

Thank you. No address on law required at this stage."

Mr. Khan submitted that when he said "this is a matter for the assess rs" he was referring to the issue whether first appellant, who was the boy friend of Lowata, honestly believed, whether on reasonable grounds or not, that Lowata was consenting to the act of intercourse. He was anxious that the learned trial judge should not overlook this matter and direct the assessors that if that essential mens rea was absent the crime of rape had not been established. The learned judge indicated that if it was a matter of fact upon which Mr. Khan desired to address he would be permitted, but he did not wish to be informed by counsel as to the matters of law upon which, he, the learned judge should direct the assessors. Mr. Khan argued that the refusal by the learned trial judge to permit counsel to address on the law was a breach of natural justice which rendered the trial a nullity.

Mr. Sabharwal for the Crown said that the learned trial judge did not wish counsel to address him on the law in the presence of the assessors; no request was made by counsel for first appellant to address the learned judge in the absence of the assessors; it was the responsibility of the learned judge under the Criminal Procedure Code to direct the assessors on matters of law; that no miscarriage of justice occurred.

It is evident from the record that counsel for first appellant opened his case; addressed the assessors on the case generally; called his evidence and made his closing address. The learned trial judge indicated that he did not desire defence counsel to address him on matters of law in the presence of the assessors. We have read the summing up and it is clear that the learned trial judge adverted to all the matters which defence counsel referred to as being the matters upon which he wished to address. No application was made by defence counsel to address the learned judge in the absence of the assessors.

We have no hesitation in concluding that it has not been shown that there was any miscarriage of justice and this ground of appeal fails.

Turning to the third ground of appeal, Mr. Khan submitted that -

> "The Learned Trial Judge erred in not directing himself and the Lady and Gentlemen Assessors as to the necessity for proof of the mental element on a Charge of Rape. Further he ought to have directed as a matter of law that if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of Rape. Consequently, there has been a substantial miscarriage of justice."

The burden of Mr. Khan's argument was that the learned judge erred in failing to make it clear to the assessors that if the first appellant believed that complainant was consenting to the act of intercourse, whether or not that belief was based on reasonable grounds, he could not be convicted of rape.

Further, he submitted that the issue of consent was of importance as Lawata said in evidence :

> "Accused 1, Madrai, was my boy friend, and I loved him. I would have married him.
>
> Q. Did he ask to have sex?
>
> A. No.
>
> Q. If he (Accuse' 1) had asked for sex would you have agreed?
>
> A. Yes."

Defence counsel submitted that the learned judge had failed to direct the assessors adequately upon this matter and had he done so an opinion of not guilty may well have been given in respect of first appellant.

The evidence given by the first appellant in Court and the contents of his two statements were summarised by the learned judge when he said :

> "Accused 1, in his evidence-in-chief, stated that whilst he and Lawata were indulging with her consent, in sexual intercourse a group of persons, presumably males, appeared on the scene and asked to have sex with her and punched her. That is evidence which you can accept if you believe it. As I have said you can accept all or part of a witness's evidence or reject it. If you accept it then it supports her contention of violence. There is other evidence which could point to violence and to her being the object of repeated sexual intercourse.

> There is also the statement Exhibit 5 made to the police by accused 1 in which if you accept it, he says that he punched Lowata, and that while others stuffed her mouth with a shirt he had sex with her and others followed him. Of course the accused 1 said in evidence that the statement Exhibit 5 is a police fabrication and that he was beaten into signing it. I will mention the evidence on the taking of the statement later. You can, if you attach sufficient weight to it, regard it as corroboration of her evidence, that accused 1 was one of a group who used the force."

The defence argued that the direction given by the learned trial judge as to the first appellant's mental attitude was defective and fell short; that the assessors should have been directed to consider the first appellant's belief on the issue of consent.

The direction given to the assessors was in the following terms :

> "For the purposes of this trial rape may be defined as having unlawful carnal knowledge of a woman without her consent.
>
> You must therefore be sure that the accused had sexual intercourse with her; that she did not consent and that the accused were aware that she was not consenting or that they did not care whether she consented or not i.e. that they were recklessly indifferent as to whether she had agreed to the act of intercourse. The burden of proving those issues rests upon the prosecution. The accused do not have to disprove them."

Reference was made to the authority of D.P.P. v. Morgan [1975] 2 All E.R. 347, where it was held by the House of Lords that the crime of rape could not be committed if the accused in fact believed that the woman was consenting to sexual intercourse even though

such belief was based on unreasonable grounds; that in this case the assessors task was to decide whether the prosecution had proved that the first appellant did not have a genuine belief that Lowata was consenting and further, that in considering this matter it had to be remembered that there was no requirement of law that such belief must be based on reasonable grounds.

The learned judge had directed the assessors that before they could convict they had to be sure that Lowata did not consent, and that first appellant was aware that she was not consenting or that he did not care whether she consented or not, or that in other words he intended to have intercourse willy nilly not caring whether Lowata consented or not - that is to say he was recklessly indifferent whether she consented to the act of intercourse or whether she did not. A not dissimilar form of words was approved by this Court in Ilaitia Koroicivi v. Regina F.C.A. 43/1979. Literally the words used by the judge meant that the assessors had to be satisfied, not only that Lowata did not consent, but also that the appellant knew that she did not consent. If first appellant knew that she was not consenting, he could not very well have entertained a mistaken belief that she was consenting. If the assessors reached the conclusion that he had such a belief they would, guided by the direction actually given, be required to acquit.

Whether a judge should make sure that assessors are not left under any misapprehension on the matter, and add a direction on the question of the belief of the accused must depend on the particular circumstances.

In Fiji such a belief must of course be genuine, but it seems that it must also be reasonable. Section 10 of the Penal Code of Fiji (Cap. 17) states :

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

We did not hear argument on this matter from counsel, but it appears that by virtue of this statutory provision such a belief must not only be honest, but must also be based on reasonable grounds.

In the present case, the learned trial judge, as we pointed out to counsel at the hearing of this appeal, did in fact draw the attention of the assessors to the relationship between Lovata and first appellant when he said :

> "She agrees that she had regarded accused 1 as her boy friend, that she had had sex with him previously and that she would have consented to sexual intercourse had the accused 1 asked her in a decent manner.....Did she consent to have intercourse with accused 1 and were they jointly attacked by men who covered their faces as the accused 1 alleges?",

On this question of consent and the genuiness of the belief entertained by first appellant that Lovata was consenting to sex with him, the assessors had before them in evidence the statements given by the first appellant

to the police in which he admitted punching Lowata and having sexual intercourse by force. Clearly the assessors accepted those statements and they are entirely inconsistent with a genuine belief by the appellant that Lowata was consenting to intercourse.

If it be thought that the learned judge's summing up might have been improved by a reference on the above lines to the appellant's belief as well as to his knowledge, we are of opinion that it could, on the evidence accepted by the assessors, have made no difference to the outcome. In dismissing this ground of appeal we would accordingly, if need be, apply the proviso to section 23(1) of Court of Appeal Act (Cap. 12) as in our opinion no miscarriage of justice resulted.

This ground of appeal accordingly fails.

The appeal by the first appellant against conviction is dismissed.

Five grounds of appeal were argued by counsel for second appellant.

Ground 1 was couched in terms similar to those urged upon this Court by counsel for first appellant. We have considered counsel's submission hereon and have no hesitation in rejecting this ground of appeal for the same reasons which we have given in respect of ground 1 of first appellant's appeal.

In arguing the 2nd ground of appeal, Counsel presented the same argument as in the case of the first

appellant with the variation that the matter of law on which it was desired to address the learned judge related to the probative value of the two statements made by second appellant to the police.

In our opinion there is no merit in this ground and it is dismissed for substantially the same reasons which we have given in respect of a like appeal by first appellant.

The burden of ground 3 of the second appellant's appeal is that the learned judge misdirected himself in not informing the assessors that before giving weight to the statements taken by the police from the second appellant they should first consider whether such statements contained the truth.

The police took an interview statement from the second appellant in which he admitted having sexual intercourse with Lowata at the place where first appellant was having intercourse with Lowata; he denied punching the girl. In the charge statement second appellant denied having intercourse at all because he claimed he was unable to obtain an erection. A trial within a trial was held and at the conclusion thereof, for the reasons given, the learned judge ruled that the prosecution had satisfied him that the statements were voluntary in the sense that this expression is used in Courts in Fiji - that is to say - that they had been obtained without threat or hope of reward and without oppression. Accordingly such statements were admitted in evidence.

In R. v. McCarthy [1980] 70 Crim. A.R. 270, Lord Lane, Chief Justice, at p. 272 said :

"All questions of fact are for the jury. The judge's ruling on the voire dire only decides the question of admissibility. He may rule that the evidence should not be admitted and that is the end of the matter. If he allows the evidence to be given, then it is for the jury to consider whether or not there was an inducement and whether or not it was voluntary and it is for the jury after a proper direction to assess its probative value: see Chan Wei Keung v. R. (1966) 51 Cr. App.R. 257."

The learned judge in his address to the ass ssors said :

"It is alleged by the prosecution that the accused 1 and 2 made statements to the police which amount to confessions. You have heard those statements and when you retire you can examine them. Anything said by an accused outside the court can be evidence against him to the extent that he refers to himself.
.....
Of course when you consider these statements you will have to consider the evidence of the accused and of the police as to the manner in which they were obtained. The way in which they were obtained is bound to affect their value. Should you consider that the police brought pressure to bear to get the accused to speak or to make admissions then you will take that into account and only give the alleged confessions the weight which you consider they deserve.

In dealing with the contents of second appellant's statements to the police, the learned judge said :

"The accused 2, Taniela says in his police statement Exhibit 7 that he had sex with Lowata at the place in question. As in accused 1's case he shall note that statement. His statement does not say that force was used against Lowata or that Lowata had not consented. In his reply to the formal charge Exhibit 8, accused 2 said he did not manage to have sex with Lowata because he could not get an erection thereby contradicting his previous statement."

Later the learned judge dealt with the possible effect of inducement, pressure or other like measures being applied to the appellants when interviewed by the police; he specifically invited the assessors to make up their own minds as to the weight and value they could place upon the statements. He said :

> "The accused 2, Taniela, when formally charged on 17.11.81 allegedly made the statement Exhibit 9 in which he denied ..aving sex with Lowato and explained that it was because he could not get an erection. In evidence he said that the answer to the charge is a fabrication and that he was threatened with further punching if he did not accept it Therefore he signed in the places shown in Exhibit 9. Detective Constable Ilaisa, P.W. 11, who charged him denies the allegations of assault or threats. You have heard all the evidence and the witnesses in relation to the alleged confessions of accused 1 and 2 and you are familiar with the whole background. If you think that the confessions were accompanied by pressure, beating, hunger, and such like measures you would regard them as having little weight or value..... You must decide what weight and value you give to them."

The directions given to the assessors by the learned judge upon this is ue were correct; he advised them that the weight they should attach to the statements depended on all the circumstances in which they were taken and that i. was their prerogative to give such weight to the statements as they thought fit.

Accordingly this ground of appeol fails.

In Grounds 4 and 5 of second appellant's appeal, counsel for defence argued that the leorned judge fell into the error of dealing conjointly and collectively with the

statements of both appellants and that the learned judge had treated the two statements taken from the second appellant as confessions.

In his summing up the learned judge made it clear at the outset that the assessors should treat each appellants case separately. The learned judge said :

> "Each accused's case must be considered separately. As you must have observed the evidence concerning each accused is different and you must approach their cases separately. It will be open to you to convict all or only one of the accused, or to acquit them all."

Again at the conclusion of his summing up the learned judge said :

> "Remember the case against each accused is to be considered separately. Only if you are sure of an accused's guilt will you give an opinion to that effect. You are men of the world. You must use your commonsense and experience of your fellowmen in arriving at your decisions. You can find one, two or three of the accuseds guilty or not guilty."

The learned judge was careful to differentiate between the evidence applicable to the first appellant and the evidence applicable to the second appellant. In referring to certain of the statements produced in evidence the learned judge gave incorrect exhibit numbers to the statements, but in our view nothing turns on this point as the exhibits were admitted in evidence and before the assessors who were enabled to make such use of them as they saw fit.

In conclusion we are satisfied having examined the record and the summing up as a whole that no grounds exist which warrant our interference with the conviction entered in the Supreme Court.

The assessors were left to consider the evidence after full and proper directions by the learned judge.

Accordingly second appellant's appeal against conviction is dismissed.

Each appellant appeals against the sentence of 6 years imprisonment imposed upon him.

The complainant at the date of the offence was aged 16 years; she was, according to the evidence, experienced in sexual matters. As a result of the happenings on the morning of 15th Novemb·r, 1981, no serious injury was occasioned to Lowata although the experience undergone by her was no doubt very distressing.

In Roberts (1982) Crim. App. Repts. 242 which involved appeals against sentences of rape, Lord Lane, Chief Justice, said :

> "Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence..... A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasise public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of

rape vary widely from case to case.

> Some of the features which may aggravate the crime are as follows. Where a gun or knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury (whether that is mental or physical). Where violence is used over and above the violence necessarily involved in the act itself. Where there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. Where the rape - or succession of rapes - is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman."

These guidelines substantially state what has been the practice of this Court for many years.

Not many of the circumstances of aggravation listed in Roberts case (supra) were present in this matter under appeal, but some unnecessary and additional violence was used and the girl Lowata suffered some hurt. More than one person was involved in the rape. After careful consideration we do not think that the first appellant's previous relations with the complainant justify any differentiation on the matter of sentence in his favour.

The sentence of 6 years was imposed by an experienced judge and we are unable to say that the sentences imposed were either excessive or imposed upon a wrong principle.

Accordingly, both appeals against sentence are dismissed.

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Vice President

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Judge of Appeal

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Judge of Appeal