Rape 42B

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 6 OF 1990

Between:

JOSESE TOGAVA
JONE TUI
SEMI TUBUNA — Appellants

- and -

S T A T E — Respondents

The Appellants in person

Mr. Isikeli Mataitoga, Director of Public Prosecutions for the Respondent

Date of Hearing: 10th October, 1990

Date of Delivery of Judgment: 27th February, 1991

JUDGMENT OF JESURATNAM J.A.

In this case the three appellants who were named as the first, third and fourth accused in the information were tried on a charge of rape in the High Court in the absence of the second accused who was not apprehended and did not face trial.

The information was not amended to reflect the absence of the second accused. But that did not confuse the identity of the respective accused and it seems clear that no one was misled by the omission.

All three appellants were convicted on the unanimous opinion of the assessors and sentenced to 10 years' imprisonment each on 19th January 1990. They have appealed against their conviction and sentence.

I have had the advantage of reading in draft the judgment of the learned presiding judge, Sir Moti Tikaram and I am aware of the views of my learned brother Sir Ronald Kermode who is writing his own Judgment. I too therefore wish to indicate separately my own reasons for the view I have taken and the conclusion to which I have arrived in this case.

There may have been shortcomings and imperfections in the conduct of the trial and the summing-up of the learned trial judge - as indeed there are bound to be in any trial of some complexity before assessors. But it seems to me that in most such instances in this case no miscarriage of justice has occurred and the proviso can be applied to save the convictions. However, there is one aspect in this case which has disturbed me considerably. And that relates to the evidence of the doctor in the case - not the medical evidence as such.

One ground of appeal common to all three appellants is that the complainant had told the doctor that ***"four men came to her house and one of them raped her"*** whereas she stated in evidence that all four raped her. There is no doubt in my mind that this was a serious discrepancy favourable to the accused to which the attention of the assessors should have been pointedly drawn and then left to them to decide with this aspect too in mind in the context of all the other evidence on this issue in this case.

But this was not done by the learned trial Judge in his summing-up.

In my view the non-direction on such a vital issue amounts to a misdirection which has vitiated the trial.

It appears that the doctor, who examined the complainant about seven hours after the alleged rape, was a Kiribati who was married to a Fijian. She did not know much Fijian and she stated that she questioned the complainant in English. It is also clear from the evidence that the complainant did not know English. She (the complainant) gave her evidence in Court in Fijian and her statement to the Police too was made in Fijian although recorded in English. The question as to whether therefore there was any possible misunderstanding on this point should have been specifically addressed to the assessors for them to consider along with other aspects of evidence on the same issue to which I shall presently draw attention.

There is evidence that the complainant had told Corporal Goundar Sami long before she was taken to the doctor that four men raped her. According to this same police officer that is what Salote (complainant's sister) too had told him when she made the first complaint to the Police. Unaisi too said in her evidence that she had told Salote long before the complainant was taken to the doctor that four men had raped the complainant.

Non-direction on this aspect of the case in the circumstances may well have left the impression in the minds of the assessors that such discrepancies in the evidence on this point were matters of no consequence.

It is my view that the attention of the assessors should have been drawn to all these items and aspects of evidence inclusive of the doctor's evidence which ex facie seems to be in favour of the appellants. If that had been done and the assessors had nevertheless arrived at the same conclusion with open eyes there cannot possibly be any room

for complaint by the appellants because such a conclusion appears possible on the totality of all aspects of the evidence on the point. But this did not happen. And I am unable to say that if the assessors had been so directed they would without doubt have come to the same conclusion.

I therefore agree with my learned brothers that the convictions should be quashed. But the next step as to whether there should be a re-trial or an acquittal has caused me considerable anxiety.

However after a great deal of deliberation I have come to the conclusion that in the language of Section 23(2) of the Court of Appeal Act *"the interests of Justice require"* a re-trial and not an acquittal.

I do not wish to elaborate any further on the detailed reasons which prompted me to come to this view. As was stated by Lord Diplock in the Privy Council case of Au Pui-Kuen and A.G. of Hong Kong (1979) 2 WLR 274 at 278

> *"If a new trial is to be ordered it is often the case that in the interests of justice at the fresh trial, the less said by the Court of Appeal, the better."*

It may be of interest to cite His Lordship further at p.280.

> *"The strength or weakness of the evidence is a factor to be taken into account but it is only one among what may be many other factors; and if the Court of Appeal are of opinion that upon a proper consideration of the evidence by the jury a conviction night result it is not a necessary condition precedent to the exercise of their discretion in favour of ordering a new trial that they should have gone further and reached the conclusion that a conviction on the re-trial was probable."*

The underlining is mine. Lord Diplock went on to cite with approval the following passage in the judgment of the full Court of Hong Kong in Ng Yuk Kim v. the Crown (1955) 39 H.K.L.R. 49, 60 in which it was said that there may be cases where

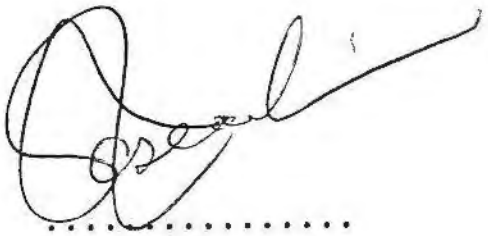
> *"It is in the interest of the public, the complainant and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury and not left as something which must remain undecided by reason of a defect in legal machinery."*

That too was a case of rape. It is my view that this is such a case.

It is my view that it is not necessary to give a further opportunity to the parties to be heard on the question as to whether there should be an acquittal or a re-trial. These two alternatives are always implicit in the scope of the argument in a criminal appeal. It is always in the contemplation of parties at the hearing of a criminal appeal that the alternatives open to an appellate court are dismissal of the appeal, acquittal of the appellant and an order for re-trial, and arguments are accordingly addressed to meet any possible eventuality.

The local case of Shinodra and the State (FCA Criminal appeal 7 of 1988) appears to be in point if any authority is needed. However there may arise exceptional situations where such re-hearing or further hearing may become necessary. But in my view this is not such a case. My brothers were made aware of my views on this aspect in the course of our exchange of views.

In all the circumstances therefore I would quash the convictions of all three appellants and order a re-trial. The appellants are entitled to bail which I would fix at $500.00 each to appear when noticed.



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M. D. Jesuratnam

Justice of Appeal