Rape 42
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IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 6 OF 1990
(Criminal Case No. 1 of 1989)

BETWEEN:

JOSESE TOGOVA

JONE TUI

SEMI TUBUNA Appellants

v.

STATE Respondent

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: 27 February, 1991

JUDGMENT OF TIKARAM JA
AND ORDER OF THE COURT

The three Appellants were charged, along with another (the second named accused), on an information that they raped the Complainant at Nasinu on 9th July 1988.

The second accused was on bail but did not turn up for t trial. The trial judge decided to proceed with the trial agai the three Appellants after the Police failed to arrest the seco accused on bench warrant notwithstanding several adjournment

The Appellants were convicted as charged by the High Cou at Suva on the unanimous opinion of the 3 assessors. Each w sentenced to 10 years' imprisonment on 19th January 1990.

Each of the three Appellants appeals against his convicti and sentence.

Their grounds of appeal overlap each other on many poin and are for the most part untidy and imprecise in the formulation. However, it is possible to glean from the seri of allegations five broad groups of grounds of appeal into whi all their complaints and grievances can conveniently encompassed.

Firstly, all the Appellants complain that they were n properly identified. Some of them complain that the summing- of the learned Judge did not measure up to the Turnbull standa on identification.

Secondly, they point out the discrepancy in the stateme of the Complainant said to have been made to the Doctor that on one man raped her and her evidence in Court that all four rap her.

Thirdly, they argue that there was no corroboration of the evidence of the Complainant on the allegation of rape. Fourthly, the Appellants complain that the summing-up of the learned trial Judge was not fair to them in that it was slanted in favour of the prosecution and did not put their defence fairly to the assessors.

Fifthly, the Appellants allege that there were many vital contradictions and inconsistencies in the evidence of the prosecution witnesses which vitiated their convictions which they say were against the weight of evidence in the case.

As regards the appeal against sentence each Appellant contends that the term of 10 years' imprisonment is harsh and excessive especially when compared with the usual sentence passed in rape cases.

In the trial below it was the prosecution's case that during the early hours of the morning of 9 July 1988 the three Appellants and one other person invaded the house where the Complainant was staying, terrorised the occupants and each raped the Complainant over a period of about 2 1/2 hours. The prosecution primarily relied on the evidence of the Complainant and her female companion at the house.

The principal line of defence of each of the Appellants was mistaken identity and alibi. Each gave evidence on his own behalf and the third Appellant also called a witness in support of his alibi. They ably conducted their defence subjecting prosecution witnesses, in particular the Complainant, to searching cross-examination.

I have considered the grounds of appeal of each of the Appellants but for reasons which will become clear later I do not consider it either necessary or prudent to discuss the pros and

cons of all the grounds of appeal except to deal with th complaint contained in ground 2.

However, I can say right at the outset that in my opinio none of the other grounds warrants allowing the appeal o quashing the conviction. This is not to say that the conduct o the trial was impeccable and the summing-up flawless in ever respect bar one.

Ground 2 is common to all three Appellants. Th Complainant, throughout her evidence, maintained that four me raped her but according to the Doctor (the 6th PW) who examine the Complainant at about mid-day on the day of the incident, sh (the Complainant) told her ***"four men came to the house and on of them raped her"***. Nowhere in his summing-up did the tria Judge refer to the Doctor's evidence which is favourable to th three Appellants and is in conflict with the Complainant' assertions.

This failure, in my view, constitutes a misdirection of nature sufficient to uphold the complaint implicit in the seco ground of appeal. The proviso to Section 23(1) of our Court o Appeal Act empowers this Court to dismiss an appeal if the consider that no substantial miscarriage of justice has occu notwithstanding that they are of the opinion that the poi raised in the appeal might be decided in favour of the Appellan It could be argued that the assessors must have taken th conflicting evidence into account because they heard th testimonies of the Complainant and the Doctor and because the

Judge did ask them in his summing-up, although in general terms, to consider the inconsistencies and discrepancies in the prosecution case. Furthermore, it could be argued that the assessors must have been mindful of the possibility of some misunderstanding in the conversation between the Complainant and the Doctor, a Kiribati, who only spoke a little Fijian. But I am unable to say what view the assessors would have taken had the trial Judge specifically drawn their attention to this conflict in evidence and then properly directed them on the subject. I cannot therefore rule out the possibility of substantial miscarriage of justice occurring. Consequently, I would give the benefit of the doubt to the Appellants and would not dismiss the appeal by applying the proviso. I would, therefore, allow the appeal, quash the conviction and set aside the sentence of each of the Appellants.

The next step in the adjudication of this appeal is for this Court to decide whether to acquit or to order a new trial.

Section 23(2) of the Court of Appeal Act, Cap. 12 provides as follows:

> *"Subject to the special provision of this Act, the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."*

Kermode JA is of the opinion, for reasons which will appear in his judgment, that the proper outcome of the whole of this

appeal is that a verdict of acquittal should be entered in respect of each Appellant. Jesuratnam JA is on the other hand of the opinion that the interests of justice require an order for a new trial, which opinion accords with my own views. It, therefore, follows that the outcome of the appeal would be an order by majority for a new trial.

There is high authority to support the view that if there is to be a new trial then in the interests of justice at the fresh trial the less said by the appellate Court the better. It is for this reason that I have refrained from spelling out the reasons why I came to the view that none of the other grounds warrants quashing the conviction either individually or collectively. Similarly, in fairness to the Appellants I shall refrain from referring to the various pieces of evidence which might be considered supportive of the prosecution's case.

The statutory power to order a new trial is a discretionary one but needless to say it has to be judicially exercised and exercised in the interests of justice.

In coming to the conclusion that a retrial order would be the appropriate course in this appeal I have borne in mind the totality of the evidence presented in the trial and that the decision of the High Court was based essentially on questions of fact. The summing-up took almost an hour to deliver but the assessors took only 20 minutes to return their unanimous opinion of guilty. The trial Judge had left the question of veracity to the assessors.

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I have also considered and balanced a number of factors, some of which were for and some against the Appellants.

As was said by the Privy Council in Au Pui-kuen v. Attorney General of Hong Kong (1979) 1 ALL E.R. 796 the interests of justice are not confined to the interests of the prosecution and the accused in a particular case. They include the interests of the public. As to what is included in the *"interests of the public"* the headnotes read as follows:-

> *"It was implicit in the judicial character of an unqualified power to order a new trial, such as the power under s 83E(I), that it should be exercised judicially, ie in the interests of justice, and the express reference in s 83E(I) to the interests of justice did no more than state that implicit requirement. The interests of justice included the interests of the public that persons guilty of serious crimes should be brought to justice, as well as the interests of the prosecutor and the accused. It was not a condition precedent to the exercise of a discretion to order a new trial that the court should have reached the conclusion that conviction was probable on the retrial, and it was sufficient if the court were of the opinion, on a proper consideration of the evidence, that conviction might result on the retrial."*

The following concluding passages from the unanimous judgment of this Court of Appeal in the Flour Mills of Fiji Case (Criminal Appeal No. 25 of 1979) are also to the point in so far as they have reference to the question of miscarriage of justice and the basis for ordering a new trial:-

> *"We turn now to the important question of the proviso.*
>
> *Section 23(1) of the Court of Appeal Ordinance*

(Cap. 8) enacts that notwithstanding that certain grounds of appeal may have been decided in favour of an appellant the appeal may be dismissed if the Court considers no miscarriage of justice has occurred. This appeal in respect of both appellants turns on the credibility of the first appellant on the one hand and that of two accomplices on the other hand on important central issues on which they were in direct conflict. There were substantial deficiencies in the general directions on law relating to corroboration, and, in particular on the use to which lies might be put. Some important individual documents were wrongly treated as capable of being considered as corroboration. The same occurred in respect of a number of documents or matters dealt with as a single item of corroboration. On reading the summing up as a whole there were other matters of lesser concern. The effect, if the jury accepts evidence not amounting to corroboration, is that the warning may then be disregarded. In R. v. Lewis [1937] 4 All E.R. 360, 364 Lord Hewart L.C.J. said:

> *"The question for this court is: Does there exist in this case corroboration of such manifest cogency that the conclusion is not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion? Evidence there was, strong evidence there was, but, in the opinion of this court, the evidence was not so strong as to entitle us to say that tbe jury must inevitably have convicted if the chairman had not inadvertently omitted to give a proper direction. In such circumstances, we are bound to allow this appeal, and to quash this conviction."*

The exact point arose in R. v. Ridgway [1949] N.Z.L.R. 269, 272, where the New Zealand Court of Appeal said:

> *"The jury was given the customary warning of the danger of convicting upon the uncorroborated evidence of the girl. This had been followed by an erroneous statement that certain evidence was corroborative. We think it would be dangerous, in the circumstances of this case, to speculate that the jury relied upon that which is now claimed to be corroboration but to which their attention was not drawn, instead of upon that upon which the Judge had misdirected them. For these reasons, we are of opinion that the appeal should be allowed and the conviction set aside."*

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The case of Reeves [1979] 68 Cr. App. R. 331 at p.334 is also apposite. After a careful review of all relevant considerations we are unable to say in view of the importance and character of the errors that no miscarriage of justice has occurred.

Therefore, in respect of the first appellant we quash the convictions on counts 1, 2 and 3 and set aside the sentences imposed; in respect of the second appellant we quash the convictions on counts 4 and 5 and order that the fines and costs be repaid.

There was a strong body of evidence upon which a court with assessors properly directed might well have convicted both appellants. We are mindful that the appellants have undergone a long and arduous trial, but we believe in view of the importance of the issues involving as they do, the public of Fiji, that the interests of justice will be served by an order for a retrial of both appellants."

Bearing in mind the nature of direct and circumstantial evidence available in this serious criminal case I feel that it would be in the interests of justice generally and in the public interest in particular that the Appellants be tried afresh before another judge. I am also satisfied that in the particular circumstances of this case an order of retrial will not offend against the maxim *Nemo debet bis vexari de una et eadem causa* - See Nirmal Son of Chandar Bali v. The Queen Privy Counsel Appeal No. 46 of 1970 where it was held that an order for new trial should not be made to enable the prosecution to make a new case or to merely fill in any gaps in evidence. No question of affording the prosecution an opportunity to fill in a gap arises in this appeal in view of the nature of evidence given by the Complainant and her companion, which if believed after proper directions to the assessors might well have supported a conviction for rape.

The following extract from the judgment in Pascal Clement Braganza v. R (1957) E.A. 152 at p.153 (also quoted by the Fiji

Court of Appeal in Dhani Chand v. Reginam - Criminal Appeal No. 35 of 1979) is apposite:-

> *"...It is possible that on the retrial there may be more evidence against the appellant than was produced at the first trial. That is not either a reason against ordering a retrial or a reason in favour of it. The order was not made on the basis that the Crown had failed to prove its case the first time, but might be able to do so the second time, and it could not properly have been made on that footing. We say no more than that there was evidence on the record indicating that on a retrial a conviction might eventuate."*

Order of the Court

This appeal is allowed, the conviction and sentence of each Appellant is set aside and a new trial, by majority, is ordered before another judge. Each Appellant will be admitted to bail in his own recognisance in the sum of $500.00 to appear before the High Court at Suva on a date to be notified.

Moti Tikaram

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Sir Moti Tikaram

Presiding Judge of Appeal