IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

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CRIMINAL APPEAL NO. 11 OF 1990
(Criminal Case No. 9 of 1990)

BETWEEN:

1. SAKIUSA MOCEVAKACA
2. SITIVENI TURAGANIVALU
3. TEVITA MATAI — Appellants

and

STATE — Respondent

All three Appellants in person
Mr I. Mataitoga, D.P.P., for the Respondent

Date of Hearing: 27th March, 1992
Date of Delivery of Judgment: 26th June, 1992.

JUDGMENT OF THE COURT

All three Appellants were jointly charged with raping one Vani Digogo at Suva on 25th August, 1989. Each was convicted as charged by the High Court at Suva on 24th May, 1990 after all three assessors expressed the opinion that each accused was guilty. The trial judge had no hesitation in accepting the unanimous opinion of the assessors. Each was sentenced to 5 years' imprisonment. All three now appeal against their sentence and conviction.

The prosecution case was conducted on the footing that there were three separate acts of rape - one by each Appellant committed on the same occasion, at the same premises and against the same Complainant.

In summary the evidence of the Complainant, Vani Digogo, an unmarried girl of 17 or 18 years, was that she normally lived on Koro Island but came to Suva for a visit. On 25th August, 1989 she met her aunt and uncle at the Hibiscus Festival at Albert Park and they invited her to stay at their place. She had been staying temporarily at Spring Street, Toorak with her aunt who is married to the first Appellant, Sakiusa. She went to Spring St after midnight to collect her clothing and found 4 men there sitting on the floor drinking, in the one room rented by the first Appellant. These were the three Appellants and one Taniela. They had been drinking beer for several hours. At some stage she went outside to the toilet and the first Appellant, Sakiusa, was outside also. She said that Sakiusa took her by the hand, pulled her outside the building to the septic tank beside the toilet, forced her to lie on the concrete top of the septic tank, took off some of her clothes and had intercourse with her. She said she was crying and threatened to tell his wife.

The Complainant said that when she went back inside the house the second Appellant, Sitiveni, grabbed her and forced her to lie on the bed. The other two, Tevita and Taniela, were asleep. Despite her struggles Sitiveni removed her clothes and attempted to have intercourse with her. He only achieved partial penetration. He then turned her over and attempted anal intercourse, but again only achieved partial penetration. He then put his penis in her mouth. After that he went out and Vani said she tried to go out also but the door was locked.

By this time she said that Tevita was awake and he forced her to the ground, removed her clothes, and had intercourse with her. She said she struggled against him but unsuccessfully.

When Tevita left her she said that Taniela pushed her on the bed and when he went to close the door she took the opportunity to go to the window and jump to the ground, a distance variously estimated at 6 1/2 to 10 feet.

She ran out onto the road and stopped a passing car. The driver was a taxi driver whom she asked to drive her to the

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Police Station. The taxi driver gave evidence that Vani was crying and in a distressed condition. She told him, in effect, that she had been raped by three Fijian boys. She was taken to the Police Station where she made a written complaint against the Appellants.

Vani was examined by a doctor the same morning. He found that she had anal injuries which he attributed to forced penetration. He said that the presence of sperm suggested recent intercourse, but there were no vaginal injuries. He acknowledged that there was nothing to indicate that the three Appellants had had intercourse with her.

Each of the Appellants was interviewed by the Police. Two of them, Sakiusa and Sitiveni, denied having had intercourse with Vani. The third, Tevita, admitted intercourse but said that was with her consent.

At the trial each Appellant gave evidence in terms which were consistent with their statements.

The first and second Appellant's grounds of appeal in so far as conviction is concerned can be stated as follows:

(a) That there was no corroboration of the Complainant's evidence.

(b) That a trial within a trial ought to have been held to determine the admissibility of their respective statements to Police.

In regard to (a), they both contended that *"the doctor failed to clarify whose sperm was found in the girl's vagina"*.

Ground (b) can be dismissed right at the outset because there is no merit in it whatsoever. The trial record clearly shows that all three Appellants were asked by the trial judge whether they had any objection to their statements to Police being admitted in evidence and all three said they had had no

objection. Neither did the Appellants challenge or question the interviewing officer when he tendered their statements in Court.

In any case their statements were exculpatory.

The third Appellant's ground of appeal relating to conviction for rape reads as follows:

> *"1. That the alleged victims allegation in evidence was proved contridictory when challenged under cross examination by me. If the alleged victim (Vani Digogo) was forced and dragged like she claimed then naturally her clothes would have been torn and injuries have been on her body. But in fact it contradicted her allegation and proves her evidence to be fabricated."*

He does not raise the issue of corroboration nor does he complain about failure to hold a trial within a trial to determine the admissibility of his statement to Police. His defence that he had sex with the Complainant is consistent with his statement to the Police.

There were two predominant directions which the judge was obliged to give to the assessors in such a case, namely that relating to corroboration and the need to consider the case against each Appellant separately. With regard to the latter we are satisfied that the trial judge did in general give the appropriate direction.

Corroboration

We now proceed to deal with the issue of corroboration both as regards the direction given and the manner in which he dealt with evidence relating to it.

The allegation against each Appellant was one of rape. Accordingly it was necessary for the assessors to be given the customary warning as to corroboration. In view of the way the judge dealt with that topic we need first to set out the principle of law which applied and which comes from the longstanding and well known dicta in R v. Baskerville (1916) 2

KB 658. That was a case of accomplices, but the same principle has long been held to apply in sexual cases. The principle is that the jury (or assessors) must be warned that it is dangerous to convict on the uncorroborated evidence of the Complainant. (See also R. v. Henry and Manning 1969 53 Cr. App. R. 158 C.A.) In the Fiji context they should be told that bearing in mind the warning already given they may nevertheless express the opinion that the accused is guilty on the Complainant's uncorroborated evidence if they think the Complainant is without doubt speaking the truth.

What the trial judge actually told the assessors in this case was:

> *"I must warn you about this. In the case of rape or indeed of any sex offence, the law requires corroboration of the evidence of the complainant."*

Whilst the warning given was not in the customary form the Appellants have not, in our opinion, suffered any prejudice or unfairness. In fact it was to their advantage because the judge's direction made corroboration a mandatory requirement thus placing the proof of guilt at higher level than is really necessary in law.

The judge then gave a direction as to what amounts to corroboration and cited the following passage from DPP v. Kilbourne (1973) 1 All ER 440 at p.461 - *"Corroboration is therefore nothing other than evidence which confirms or supports or strengthens other evidence. It is, in short, evidence which renders other evidence more probable."* That was really a case of similar facts and the passage cited was perhaps not entirely appropriate for the present case. The better direction is that taken from the judgment (per Lord C.J. Reading) in R v. Baskerville (supra), namely:

> *"... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it."*

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Lord C.J. Reading went on to say -

"The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime."

ARCHBOLD Vol. 1 (43rd Ed.) 16-6 rightly points out that application of the Baskerville principles do not require that there should be independent evidence of everything which the witness relates or his testimony would be unnecessary (see R. v. Mullins [1948] 3 Cox 528, 531).

From the summing-up as a whole it is quite clear that the assessors were only to look for corroboration if they found the Complainant's evidence to be credible. This in our view was the correct approach (see DPP v. Kilbourne (1973) 5 Cr.App.R.381). The judge then went on to identify 2 pieces of evidence which in his opinion were capable of providing corroboration. These were -.

(a) The Complainant's evidence that she jumped out of the window of the room in question and made an escape.

We note that there was also evidence of this fact from each of the 3 Appellants themselves although they gave their own reason why the Complainant jumped out of the window. Furthermore the 3 Appellants admit being present in the room from where she escaped. They also admit that intercourse took place in the room in their presence but with the third Appellant only and that too with the consent of the Complainant.

(b) The taxi driver's evidence relating to the Complainant's distressed condition soon after the alleged offence and soon after she jumped out of the window.

Again we note that the taxi driver's evidence was in no way disputed. He was in fact a stranger to the Complainant. It was clearly evidence from an independent source. There was no suggestion or likelihood that the Complainant was feigning distress.

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It is now established law that in certain circumstances independent evidence of the distressed condition of the Complainant (as distinct from recent complaint) in sexual cases can constitute corroboration (See (i) R v. Redpath (1962) Cr. App. R. 319, (ii) R v. Chauhan (1981) 73 Cr. App. R. 232).

There is no doubt in our mind that the above 2 pieces of evidence constituted corroboration of Complainant's evidence against the 3rd Accused who admitted having sex with Complainant but claimed that it was with her consent. It will be recalled that he was the last person to have allegedly raped the Complainant. These pieces of evidence individually and collectively constitute corroboration as envisaged by the judgment in the Baskerville Case.

Although the third Appellant did not raise the issue of corroboration we felt that we should nevertheless scrutinize the evidence to see if the Complainant's testimony was corroborated. We did this first because of the way the trial judge directed the assessors on the requirement relating to corroboration and secondly because he like the other 2 Appellants was not represented by counsel.

The third Appellant's argument that absence of injury to Complainant's body and absence of damage to her clothing contradicts the Complainant's evidence of forced rape has no validity. Complainant was a young girl in the midst of 3 adult men in various stages of intoxication in a locked room. She had already allegedly been raped by the first and second Appellants. She certainly was not in a position to put up strong or violent resistance. As she was not a virgin absence of injury to her vagina is also understandable. This Appellant's claim that she consented to have sex with him in a small room with only one bed and in the presence of the other 2 Appellants stretches the limits of credulity a bit too far. All the evidence adduced by the prosecution tend to negate consent.

We are in no doubt that trial Court was amply justified in convicting the third Appellant of having sex with the Complainant without her consent.

We now turn to the first and second Appellant's ground of appeal which are identical. We are satisfied that the 2 pieces of evidence referred to by the trial judge did on the particular facts in the particular circumstances of this case constitute corroboration of the Complainant's evidence against these two Appellants also.

We, however, agree that the presence of sperm in the Complainant's vagina did not directly implicate either of the 2 Appellants. But it did prove that intercourse had taken place recently. Proof of intercourse is an essential requirement on a charge of rape. The medical evidence in this regard at least enhances credibility and consistency of the Complainant's evidence.

As regards the second Appellant there is the additional medical evidence of anal injury. Viewed in isolation this evidence can only be seen as being consistent with the Complainant's testimony that at the time of the alleged rape by the second Appellant he also forced his penis into her anus. But viewed in conjunction with other pieces of circumstantial evidence this evidence becomes corroborative of the Complainant's evidence. The following extract taken from ARCHBOLD (43rd Ed) page 1309 is apposite:

> "***Pieces of circumstantial evidence can, in combination, provide corroboration: R. v. Hills (H.) (1988) 86 Cr.App.R.26, C.A.***
>
> *Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case where the defendant denied even having sexual intercourse with the complainant, it might be possible to prove; (1) by medical evidence that she had had sexual intercourse within an hour or so before the medical examination; (2) by other independent evidence that the defendant and no other man had been with her during that time; and (3) that her underclothing was torn and that she had injuries to her private parts.*
>
> *None of those items of evidence on its own would be sufficient to provide the necessary corroboration but the judge would be entitled to direct the jury that, if they were satisfied so as to feel sure that each of those items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence."*

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There is now authority for the proposition that in certain circumstances evidence of one rape can corroborate a second rape. In R. v. Pountney (1989) C.L.R. 21 the English Court of Appeal held, inter alia, -

> *"....It was a startling proposition that if a female had the misfortune to be raped by two men within a relatively short space of time that evidence which might corroborate her account, e.g. marks of violence, could never be placed before a jury for that purpose. Such evidence might be less likely to afford corroboration of either incident, but it did not thereby become less capable of doing so. Corroboration was independent evidence which either showed or tended to show that the crime had been committed by the accused (see R. v. Baskerville (1916) 12 Cr.App.R.81). The evaluation of the effect of such evidence was one of fact for the jury. Where successive acts of rape had been alleged against different persons, evidence which otherwise would be capable of corroborating the complainant's account of rape No. 1 did not become inadmissible or incapable of being corroborative of such merely because it might also be capable of corroborating rape No. 2."*

It must be borne in mind that in Fiji the trial judge is the ultimate judge of both fact and law.

We have examined the trial Record with care and have come to the conclusion that there were several pieces of circumstantial evidence which taken together constitute corroborative evidence against each of the 3 Appellants.

From the time of the alleged offence till the time of the Complainant's medical examination there was evidence of an unbroken chain of events taking place within a short period which in our view entitled the Court below to come to the conclusion that not only was the crime committed but that each of the 3 Appellants committed it.

We, therefore, have no hesitation in dismissing this appeal against conviction.

Sentence

The sentence of 5 years imposed on each of the 3 Appellants was neither wrong in principle nor manifestly excessive. Consequently their appeal against sentence is also dismissed.

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Before we dispose of this appeal we feel that we ought to comment on the following passage in the judge's summing-up:

> *"This is a straightforward case. You either believe the complainant or you believe the accused. In the case of the accused, they have put up a joint defence. All of them united in saying what actually happened. Nevertheless you will have to consider the case against each accused separately. You will be asked for your opinions as regards each accused."*

We are of the view that in a trial where corroboration is being looked for it is not desirable that the question of credibility be put to the assessors in such a simplistic way. We say this for two reasons. First, it could create the impression that corroborative evidence is not necessary and secondly, it overlooks the fact that it is possible for the assessors to disbelieve or have doubts about an accused but still conclude that a doubt has been raised as to the evidence of the Complainant. But fortunately in the context of the whole of the summing-up the passage quoted above could not have created any misunderstanding.

Conclusion

First Appellant's appeal against conviction and sentence dismissed.

Second Appellant's appeal against conviction and sentence dismissed.

Third Appellant's appeal against conviction and sentence dismissed.

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Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Justice of Appeal

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Justice Michael D. Scott
Justice of Appeal