127

IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 12 OF 1989
(High Court Case No. 4 of 1988)

BETWEEN:

BASANT SINGH	1ST APPELLANT
UDIT NARAYAN SINGH	2ND APPELLANT
MUNESHWAR PRASAD	3RD APPELLANT
JAGDISH PRASAD	4TH APPELLANT
RAJESH PRASAD	5TH APPELLANT

-and-

S T A T E	RESPONDENT

Mr. V. Parmanandam & Mr. S. Stanton for the Appellants
Mr. R. Perera for the Respondent

Date of Hearing : 9th March, 1992
Date of Delivery of Judgment : 26th May, 1992

J U D G M E N T

The two Appellants whose appeal has been pursued (1st and 2nd Appellants) were on 5th September 1989 both convicted on charges of abduction and rape. So far as the charge of abduction is concerned the prosecution case was that on the 15th December 1987 two young ladies, sisters, were abducted by nine men in which number the two Appellants were included. The charge alleged that they were abducted from their home with intent to

cause them to be secretly and wrongfully confined. The relevant sections and portion of them of the Penal Code dealing with this offence require that the victim be compelled by force to leave where he/she is, and there must be the intent in the abductor to cause the victim to be secretly and wrongfully confined. The second charge alleged the two were each guilty of rape of the elder one of the two girls.

Two of the other nine accused, as well as being charged with abduction, were also charged with separate offences, one of rape of the younger of the two girls and one of indecent assault upon her.

There is no doubt that on the 15th December 1987 the group of nine young men went to the house where the two girls were living with their family for the purpose of removing them. There is no doubt that to do so the *"raided"* the place, in the sense that there was a show of force, weapons were produced and stones were thrown on the roof. Whatever may have been the state of mind as a result of this on the other occupants of the house, it is claimed that neither of the two girls were taken by force, that they were seeking to escape as it were from the family home, and the raid was put on to scare the other occupants of the house and enable them to do so; the men went there in such numbers and with such a show of force in order to ensure their own security and to ensure there would be no trouble from the occupants - to make it *"easier to bring the girls away"* (record p.126). There is no doubt that they put on a very convincing display, if that indeed was all it was.

There was a considerable amount of somewhat confused background evidence to the raid designed to show that the younger girl was interested in one of the young men who were in the raiding party. The younger one indeed had been taken to a marriage registry in order to marry him, but that marriage was unable to take place for technical reasons.

There is no doubt that whatever was intended to be accomplished by the raid, the accused were acting in consort with all the others and had a common intention.

There was evidence that as a result of onset of this activity by the accused, the younger girl hid behind a structure in the house, and was forcibly pulled out and taken away. There seems to be no doubt that the elder girl fled, but was chased and caught, and taken away, both girls being held while being led away; she claims she was hit with a stick or fist as she was being taken away (record pp. 48-9). There is ample evidence that both were crying, but it is suggested that the younger one at least was merely putting on a show for the sake of her parents. Seeing that the father and mother both escaped and fled this suggestion was not likely to have carried much weight with the assessors or the Judge. The elder girl denies that the raid was only part of a plan to take the girls away (record p.54).

There is no doubt at all that the girls were secreted. They were hidden and kept in the bush until, so far as refers to the elder one, early on the following morning, on the pretext of being allowed to relieve herself, she ran away. This was about

5 a.m. on that day, the raid having taken place about 8 p.m. the previous night. At one stage some vegetation had been cut or collected so as to provide some ground cover to serve as primitive bedding upon which the girls were required to lie down.

It was following the raid that the girls claim they were raped. The elder girl claims that she was raped by the 1st and 2nd Appellant. The 1st Appellant denies it completely. The 2nd Appellant admits that he had sexual intercourse with the elder girl, and claims it was with her consent. However, at the trial he did not claim that he had any previous relationship with her; she denied that there was, and said that there was no reason for her to go with any of the abductors. He claims that he asked her while at this makeshift hiding place to have intercourse with him; at first she refused but consented when he said he would marry her. One of the other accused admits having intercourse with the younger girl, but says it was with her consent. The younger girl claims that one of the other accused tried to have intercourse without her consent, but was unable to do so. Both of the girls were together from the time they were taken from the house until the elder girl ran away at about 5 a.m.

The elder girl claims that she was a virgin at the time of the alleged offence and that during the course of both assaults by the first two Appellants her underclothes were torn. After she ran away she walked for a long period of time, and while doing this she waded across a creek with water up to her waist. When she arrived at a house she asked the occupant to take her to the house of her maternal uncle. That occupant describes her

appearance, which was consistent with both the ordeal and the escape as she describes it. She spoke of the abduction, that her sister was still in the bush, and that under the pretext of going to the toilet she had run away. She did not say anything about the rape. Her uncle gave evidence that when he saw her *"the clothings were all dirty, hair disturbed mud on her legs and she was crying"* (record p.64). He took her to the police station. The policeman on duty says she *"looked tired, clothes dirty, hair undone and looked worried"* (record p.67). She complained of the abduction and that the two Appellants *"had sexual intercourse by force"* (ibid). He took her to hospital for a medical examination. He was not present when it took place. At some stage, probably the next day, he took her clothes, probably her underclothes, and some clothes of each of the Appellants, and sent them to Suva for analysis. There was evidence given that these items were sent to the Government analyist but *"the person to whom the items were handed is no long (sic) in the country and the items can not be traced"* (record p.114). The evidence was that the doctor who had examined the elder girl had left the government service and was doing private studies in New Zealand. No medical report about her was produced.

Because of the way the submissions were put on behalf of the Appellants, the following matters should be noted. Firstly, the assessors were of the unanimous opinion that the younger of the two girls had been raped and indecently assaulted as charged (counts 4 and 5). However the learned trial Judge, as he was entitled to do, disagreed with their opinions and found the two

men who were accused on these counts not guilty. As to the younger girl he said (record p.164):-

> *"I find that her evidence on Counts 4 and 5 is quite unreliable and uncorroborated and unworthy of belief. She struck me as a reluctant witness and an untruthful one. For instance her unacceptable explanation for altering her story so dramatically after persistent questioning from her mother leaves me in grave doubts as to her credibility and motivation.*
>
> *Accordingly I am constrained to disagree with the unanimous opinions of the assessors on the 4th and 5th counts and I find the 3rd and 9th accused not guilty as charged on counts 4 and 5 respectively."*

Secondly, in his charge to the assessors at the conclusion of the hearing, the learned trial Judge said (record p.157):-

> *"You would have also noticed that the evidence on each allegation is invariably a "one-against-one" basis. In other words we have the affirmative assertions of the girls and the denials of each of the accused.*
>
> *Now I am required by law to direct and warn you that although you may convict the accused on the evidence of the girls alone if you believe they are credible and accept that they have told you the truth nevertheless, I must warn you that it is dangerous to do so unless the evidence is corroborated in material respects."*

The Appellants appealed against conviction and sentence. As to the charges of abduction, the grounds of appeal were (record pp.2 and 5):-

> *"1. That the Learned Trial Judge having rejected the evidence in his judgment of Lila Wati ought to have found the Appellant not guilty of abduction bearing in mind that the particulars of offence contained the abduction of two persons, namely Lila Wati and Chandra Wati."*

Lila Wati was the younger of the two girls and Chandra Wati the elder. The second ground raised insufficiency of evidence. As to the charges of rape, the grounds were insufficiency of evidence and absence of or insufficient corroboration.

As to the abduction charges, and leaving on one side the first ground of appeal, there was more than ample evidence to justify convictions. There was no doubt that force was used to compel the girls to leave their home and more than ample evidence that each of the accused were part of a plan to remove them and to keep them secretly hidden and confined where they were taken. If the pretext of a charade was rejected, as it clearly was, then that is the end of the matter.

So far as concerns the first ground of appeal on the abduction charges, which is set out above, the argument put was simply this. Because the learned trial Judge, in his charge to the assessors, warned them about the credibility of the younger girl, because in overiding the opinion of the assessors he refused, in effect, to believe her, and because the accused were charged with and convicted of abducting the two girls, not one of them, the case made for the abduction of them both could not stand. We think that what was being put is this, namely that the learned trial Judge, when he came to the question of whether he should accept or otherwise the opinions of the assessors, because he disbelieved the younger girl, could not have been satisfied beyond reasonable doubt that she was abducted. If he was not so satisfied, then he could not have found proved a charge that alleged both were abducted. He should therefore have entered a verdict of not guilty on the abduction charges.

The crucial point, we believe, is that the learned Judge did not say that he disbelieved the younger girl on the abduction question. It seems to us that the general tenor of his remarks to the assessors on this aspect was that notwithstanding the production of certain letters she had written apparently to one of the accused, neither the fact that they were written nor their contents gave support to the accused's reliance on them to show that the raid was a sham as it were. His own judgment (record p.162) shows that he had no doubt at all about what the accused were up to. While it was not encumbent on the accused to prove anything, there was evidence upon which both he and the assessors were entitled to be satisfied beyond reasonable doubt.

The appeal will be dismissed so far as concerns the charges of abduction.

So far as concerns the charges of rape, the main argument was based on absence or insufficiency of corroboration. One aspect of this can be dealt with immediately; other aspects will be dealt with later.

Firstly there was a submission based on the *"boys against girls"* approach, the relevant passage about which we have quoted above. If it was claimed that the assessors may have reached the wrong conclusion because they may have treated the evidence of one girl as corroborative of the other, then this can immediately be rejected by what His Lordship said to them shortly afterwards (record p.158):-

"So in this case, the evidence of both Chandra Wati and Lila Wati requires corroboration and in the circumstances of this case I direct you as a matter of law that neither girl can corroborate the evidence of the other."

If it was claimed that His Lordship invited the assessors to take some sort of global approach to the charges of rape then any such suggestion is dispelled when considering the whole of the summing up. The girls versus boys remark was nothing more than a compendious way of describing what the nature of the case was. In stating, in his own judgment, that he disbelieved the younger girl and in dismissing the sexual charges relevant to her, there can be no suggestion that His Lordship adopted any wrong approach in his confirmation of the opinions of the assessors as to the charges against the two Appellants.

Secondly counsel for the Appellants emphasised a number of what he claimed were deficiencies in the evidence, and the absence of evidence about various matters. These included:-

(i) the failure to call evidence from the examining doctor and the absence of any medical report; and

(ii) the failure to produce the clothing that was sent for analysis and the absence of any report about it.

The brief notes of the appellant's counsel's address to the assessors indicate that he pointed out to them the absence of

any medical report. Whether the matter of the absence of any clothing or any report about it was likewise dealt with does not appear. The learned trial Judge did not mention either matter. But that is immaterial. He did tell the assessors that they had to reach their verdict on the evidence before them. The question was whether there has sufficient evidence to justify a conviction. In the absence of any suggestion of sinister reasons for non-production, then it was simply a matter of whether there was adequate evidence before the Court to support a conviction. It was open to the appellants at the trial to rely on any absence in order to stress this aspect, and to emphasise the paucity of what was presented. Perhaps they did. But it does not advance the case on appeal. We have already noted the evidence of reasons for the non-production of these items and the absence of medical evidence. That was before the Court. The point simply is that there was no evidence in support of the charges stemming from these sources. So the case had to be decided on what there was. There is no reason to suppose it was not so decided.

Other matters were relied upon before this Court. The absence of complaint of rape by the victim to the owner of the house she first came to; the absence of evidence of sexually related injury to the victim; the similarity of her evidence with that of her younger sister; the failure to point out any tear in her underclothes to the police; the absence of any injuries or marks of violence resulting from her assault or her journey to reach safety.

But these are what we might call forensic matters. It was open to counsel for the accused to stress them in his address to the assessors as pointing up the weakness of the case of rape made out by the State. Perhaps he did; he did so to this Court. But it takes this appeal no further. As we said earlier, it was what was in the evidence that is the crux of the matter, and whether there was sufficient to enable the assessors and the learned trial Judge to be satisfied beyond reasonable doubt of the guilt of both accused. Emphasis on defiencies was proper to be made use of at the trial in an effort to persuade those who had to make finding of fact that they should not convict; it is not the task of this Court to do so, nor to decide the appeal on the basis of the weight that ought to have been given by the assessors and the Judge to matters that were established by evidence.

The real difficulty in this appeal, as we see it, lies in the matter of corroboration.

The learned trial Judge correctly advised the assessors that although they might convict each appellant of rape on the evidence of the elder girl alone, it was dangerous to do so unless her evidence was corroborated in some material respect. He advised the assessors in effect that they could treat as corroboration the evidence of the occupant of the house to which she first came after her escape, the evidence of her uncle and that of the police constable who first saw her, each of whom described her physical and emotional appearance. He also reminded the assessors of the complaint of rape that she made to

the constable in terms that would entitle them to treat the complaint as corroboration. However, when giving his own judgment about his acceptance or otherwise of the opinion of the assessors, His Lordship said (record p.163):-

> *"As for the charge of Rape against the 1st and 2nd accused I am satisfied that Chandra Wati was telling the truth and that her evidence is corroborated not only by her escape but also by her distressed condition. I am also satisfied that her complaint to Cpl Malkeet Singh amounts to a recent complaint in the circumstances and although not corroborative of her evidence of rape is consistent with her sworn evidence."*

This correctly stated the use that might be made of recent complaint; it cannot in law be treated as corroboration.

The problem arises not out of this but out of the use as corroboration of the evidence as to her condition. The learned trial Judge did not advert to the possibility that the girl's dishevelled and distressed appeareance was consistent with her having been abducted and held most of the night in the bush by some of her abductors, her escape and the arduous journey to the house she eventually reached. We feel that her appearance and her condition was equally as consistent with the one crime as it was with the other.

In these circumstances we do not believe that in law the evidence of her appearance and condition could amount to corroboration. It seems to us that as a matter of law where what is relied upon to furnish corroboration is equally as

consistent with having been caused by some other proved traumatic contemporaneous event as by the claimed sexual assault, then it would not be proper to treat it as such. Accordingly we feel that there was in this case a wrong decision on a question of law because the assessors and the learned Judge should have treated the case as one without evidence corroborating the story of the victim.

What are the consequences? Before reaching any decision in the matter it would appear to us that if the conviction of the two accused should be set aside on the ground of a wrong decision of law on this aspect, then there could be no question of ordering a new trial. No further evidence than that already given would be likely to be available, and it would not be fair to the accused to run their cases through before another Judge and fresh assessors to see if there might be a conviction on the second occasion.

However we feel that this is a proper case in which this Court ought to direct its attention to the terms of the proviso to subsection (1) of s.23 of the Court of Appeal Act. It reads:-

> *"Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."*

The reason why we believe that this is a proper course to be adopted in the circumstances of this case is that the assessors

must have accepted the girl as a truthful witness, and so far as the learned Judge was concerned, he said, in his judgment (record p.163):-

> *"I formed the distinct view that her evidence was truthful and she impressed me by her demeanour in Court. Accordingly I find the 1st accused Basant Singh guilty of the Rape of Chandra Wati as charged on the 2nd Count and the 2nd accused Udit Narayan Singh also guilty of the Rape of Chandra Wati as charged on the 3rd Count."*

On this basis we proceed to consider the application of the proviso.

Firstly, we are of the opinion that the proviso cannot be applied unless there was available evidence sufficient to establish all the ingredients of the offence charged. Secondly, in considering whether any substantial miscarriage of justice has occurred it is open to this Court to consider for itself all the evidentiary material and not merely that to which the attention of the assessors was expressly drawn by the trial Judge, nor only to that to which he may have appeared to have confined himself.

From all the evidence we can safely reach the conclusion that the first accused was what might be called the ringleader of the group that made the raid. Whatever may have been the position so far as concerns the younger girl, there does not seem to be any suggestion that the older girl Chandra was involved in any so called rescue plan; indeed the 2nd appellant

who admits having had sexual intercourse with her does not allege that the group of young men went to the house in order to take her away; it is clear that she was chased and caught as she fled and then taken away. The allegation by this accused that having been captured and taken away in the manner that she was and kept at night in secret, she then consented to have sexual intercourse with him, seems more than improbable. He did not go into the house to get her during the raid nor did he chase her, although he saw her running away (record p.205). Before this event he had never spoken to her, never had any sort of relationship with her and there had been no suggestion of marriage (record p.206). Indeed, this appears in his statement to the police (ibid):-

> Q. Then how did you on the first meeting tell her that you will marry her. This only means that you were giving her false promises?
>
> A. When we had brought her away then I thought of this.
>
> Q. Did anyone call you people to the house of Ram Jiwan to come and take the girls?
>
> A. No we brought them by force.

We add to this the fact that the girl escaped from him in the way we have earlier described. In these circumstances the claim by the 2nd appellant that this young lady consented to intercourse on the promise of marriage seems to us to be so

inherently unlikely that it constitutes a significant matter in considering whether any miscarriage of justice occurred.

The really significant aspect is the fact that her evidence was believed, and the statements made from the dock by the accused were not. Having admittedly been involved in sexual activity with the 2nd appellant, one is entitled to wonder why she would have fabricated a story about the first appellant. It is interesting to note, although it is probably not of weight, that when first charged by the police officer, one of the offences he was charged with (third charge) was abduction pursuant to s.152 of the Penal Code, followed by a charge of rape under s.149. The former section reads:-

> *"152. Any person who, with intent to marry or carnally know a woman of any age, or to cause her to be married or carnally known by any other person, takes her away, or detains her against her will, is guilty of a felony, and is liable to imprisonment for seven years, with or without corporal punishment."*

He said (record p.201):-

> *"On the third charge I say I did not bring the girls by force, to my knowledge they came of their own free will. I do not accept the forth (sic) charge as I did not do this."*

There is, of course, the consistency of the victims allegations against this accused shown by her complaint to the police.

In all the circumstances, it seems to us that the assessors and the Judge were entitled to, and probably did, treat the so called corroboration as having little or no weight, which indeed it has been said in other cases is the proper way to treat evidence of the appearance of distress of the victim after an alleged rape unless very special circumstances exist. We acknowledge that each case must be decided upon its own circumstances.

Bearing all these matters in mind, in particular the credence that the learned trial Judge placed in the sworn evidence of the victim, we have reached the conclusion that the proper course for this Court to adopt is that notwithstanding that we are of the opinion that the point raised in the appeal against conviction might be decided in favour of the appellants, we should dismiss the appeal because we consider that no substantial miscarriage of justice has occurred.

The appeals will therefore be dismissed.

The formal orders of the Court will therefore be:-

1st Appellant's appeal against conviction on counts 1 and 2 dismissed.

2nd Appellant's appeal against conviction on counts 1 and 3 dismissed.

3rd, 4th and 5th Appellant's appeal against conviction on count 1 withdrawn.

.....
Justice Michael Helsham
President, Fiji Court of Appeal

.....
Sir Moti Tikaram
Justice of Appeal

.....
Sir Mari Kapi
Justice of Appeal