IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0008 OF 1997
(High Court Criminal Case No.HAC0002 of 1996)

BETWEEN: MAIKA SOQONAIVI

Appellant

AND: THE STATE

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Hon. Justice I F Sheppard, Justice of Appeal
The Hon. Justice D L Tompkins, Justice of Appeal

Hearing: **Tuesday, 3 November 1998, Suva**

Counsel: **Mr. Isireli Fa for the Appellant**
Ms. Nazrat Shameem, Director of Public Prosecutions for the Respondent

Judgment: **Friday, 13 November 1998**

DISSENTING JUDGMENT OF SHEPPARD JA

In this matter I have had the advantage of reading the judgment to be delivered by the President and Tompkins JA. They have set out the facts and the relevant parts of the summing up of the learned primary Judge. I regret to say that I have reached a different conclusion from the one reached by them. My point of dissent concerns the way the matter of corroboration was left to the assessors.

The other Judges have set out paragraphs from the summing up which show quite clearly that the primary Judge emphasised to the assessors that there were two conflicting stories and that it was a matter for them to decide, if they could, which of those versions of the events of the evening they accepted. His Lordship correctly emphasised to the assessors that, in

coming to their decision, it was not simply a question of deciding which version they preferred. The onus was on the prosecution to prove that the complainant's version was true. His Lordship also said, again correctly, that, to find the accused guilty the assessors must accept the evidence of the complainant as truthful and reject 'the innocent account of the accused.' He then told them that, in considering what had been proved, they should have regard to some other legal principles that he explained to them. The first of these related to corroboration. He explained that it was dangerous to convict in a case such as this on the uncorroborated evidence of the complainant. As he said, that is a general requirement and not a reflection on the complainant personally. They were bound to assess her credibility and decide what weight was to be attached to her evidence. But, in doing so, they were obliged to bear in mind his warning that it was dangerous to convict on her uncorroborated evidence.

His Lordship then came to the two matters which he said could properly be regarded as capable of corroborating the complainant's testimony. He pointed out that it was for the assessors to decide whether they accepted that evidence and, if they did, whether it did in fact amount to corroboration. I agree that that was the case. The two matters which could amount to corroboration which he left to the assessors were the evidence of the punch marks on the complainant's face and the evidence of her distress. Subject to what follows I would agree that those matters, all things being equal, would be capable of providing corroboration of her evidence. Later he said that only the two items of evidence he had mentioned, the injuries and the distress, were capable of amounting to corroboration. Whether they did so was a matter for the assessors to decide bearing in mind the conflict of evidence and other possibilities he had outlined.

My problem arises because of the way I think that the matter should be approached. In essence the case is one in which the assessors had a choice between two conflicting stories. The complainant says that she was forced by the accused to have intercourse after he had punched her and threatened her with more violence unless she submitted to him. Undoubtedly she had marks on her face which were consistent with her having been punched. Her mother testified to her distress after she arrived home. On the other hand, the evidence of the accused is that the intercourse the two had was consensual and that the punches were not inflicted until afterwards when an argument developed between them over an unrelated matter. The accused thus admits he punched the complainant but denies that he did so in order to force her to submit to his advances.

In the submission of counsel for the accused, the complainant's perceived distress after she arrived home was as consistent with its having been the result of a subsequent assault and perhaps a feeling of remorse about having consented to intercourse, as it was, if one were to accept the complainant's evidence, with its having been the consequence of a rape.

That being the state of the evidence, it was for the assessors to decide, if they could, which version of the events of the evening they preferred. If they preferred the account of the complainant, they would need to consider the further question whether they were satisfied beyond reasonable doubt that the accused was guilty of rape. At the trial, the prosecution relied on the punch marks on the complainant's face and her distress as matters capable of corroborating her evidence. The matter was left to the assessors by the learned trial Judge on that basis. In effect the assessors were told that it was open to them to rely on the punch marks on

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the complainant's face and her subsequent distress as matters tending to corroborate her evidence. In my opinion, the matter should not have been left in this way. My reason for this conclusion is that the marks of the punching and the distress were as consistent with the evidence of the accused as they were with that of the complainant. The effect of the accused's evidence was to neutralise the significance they might otherwise have had for the prosecution case.

I am re-inforced in my conclusion in this respect by some remarks made by Lord Hailsham in ***Director of Public Prosecutions v. Kilbourne [1973] A.C.729.*** That was a case where the respondent to the appeal had been convicted of one offence of buggery, one of attempted buggery, and five offences of indecent assault on two groups of boys. Counts 1- 4 related to offences in 1970 against the first group of boys and counts 5 - 7 related to offences against the second group of boys in 1971. The defence was one of innocent association. The Judge directed the jury that they would be entitled to take the uncorroborated evidence of the second group of boys, if they were satisfied that the boys were speaking the truth as to what the appellant had done to them, as supporting the evidence given by the first group of boys. The Court of Appeal having quashed the conviction, the Crown appealed to the House of Lords. It was held that the Judge's direction was proper and that the respondent was rightly convicted since the sworn evidence of a child victim could be corroborated by the evidence of another child victim of alleged similar misconduct, where the evidence was otherwise admissible and, under the general law regarding relevance, was probative of the facts in dispute and indicative of the guilt of the accused.

In the course of his speech, Lord Hailsham said (at 746-7):

> ***"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise. It is for this reason that evidence of complaint is acceptable in rape cases to defeat any presumption of consent and to establish consistency of conduct, but not as corroboration. The jury is entitled to examine any evidence of complaint, in order to consider the question whether the witness is credible at all. It is not entitled to treat that evidence as corroboration because a witness, though otherwise credible, "cannot corroborate himself," i.e., the evidence is not "independent testimony" to satisfy the requirements of corroboration in Rex v. Baskerville [1916] 2 K.B. 658, 667. Of course, the moment at which the jury must make up its mind is at the end of the case. They must look at the evidence as a whole before asking themselves whether the evidence of a given witness is credible in itself and whether, if otherwise credible, it is corroborated. Nevertheless, corroboration is a doctrine applying to otherwise credible testimony and not to testimony incredible in itself. In the present case Mark's evidence (count 3) was corroborated. But it was not credible and the conviction founded on it was rightly quashed."***

The *Kilbourne* case is a very different type of case from the present, but the importance of it for the purpose of this case lies, in my opinion, in what Lord Hailsham has said in the passage I have quoted, particularly in his statement that corroboration can only be afforded to or by a witness who is otherwise to be believed. In the present case one cannot say that the punch marks and the distress relied on here by the prosecution provide corroboration unless one accepts the evidence of the complainant as to how they occurred. The position may have been different if the accused had called no evidence or if he had not in his evidence given an explanation, consistent with his innocence on the charge of rape, as to how the punch marks

came to be inflicted. In other words, until one makes up one's mind about which testimony is to be preferred, that of the complainant or that of the accused, one cannot give any significance to the punch marks or the distress. That is because, until one decides whether to accept or reject the complainant's evidence, one cannot say that the punch marks did occur in the way that the complainant has described. If the assessors were satisfied, assuming they had been directed along the lines I have foreshadowed, that they should accept the complainant's evidence and reject that of the accused, they would then have needed to consider whether they were satisfied of the accused's guilt beyond reasonable doubt. At that stage of their deliberations, so it would seem to me, it would have been quite in order for them to say that the punch marks and the distress provided strong corroboration of the complainant's evidence and reached a conclusion of guilty accordingly. What I think was wrong was leaving the assessors with the impression that they could regard the evidence of the punch marks and the distress as corroborative of the complainant's evidence before they had reached a conclusion on whether they preferred her evidence or that of the accused.

I do agree that, if one reads the summing-up as a whole, one may be able to spell out an approach by his Lordship which does explain the need for the assessors to reach a conclusion on the veracity or otherwise of the complainant's evidence before coming to the question of corroboration. But I do not think that one can safely take the view that lay assessors would necessarily have followed the path which I think was the correct one. It must be remembered that, if they decided to accept the complainant's version of events unaided by the evidence which was said to be capable of corroborating her account of the night's events, they would have gone a long way towards deciding the case. There would be little left for them to

decide except whether they were satisfied beyond reasonable doubt. I think the problem is that the matters available to be used by the assessors if they thought it appropriate, as corroborative of the complainant's evidence were put on her side of the case as if they, in some way, could themselves persuade the assessors to prefer her evidence to that of the accused. This is where I think there is an error.

Before concluding, I should mention that, subject to what I have said about corroboration, I am otherwise in agreement with the judgment to be delivered by the other members of the Court. I am particularly in agreement with their remarks in relation to sentence and also their remarks in relation to the undesirability of maintaining a rule that it is always necessary to warn assessors trying cases such as this that it is dangerous to convict on the uncorroborated evidence of a complainant. The difference of judicial opinion in this case is illustrative of the undesirability of retaining the present rule. It prevents a trial judge from bringing to bear on the instant case the flexibility which its individual facts make desirable.

In my opinion, the appeal should be allowed, the conviction quashed and the matter remitted for a new trial.

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Justice Sheppard
Justice of Appeal

Solicitors:

Messrs. Tevita Fa & Company, Suva for the Appellant
Office of the Director of Public Prosecution, Suva for the Respondent

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