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: **Monday, 3 November 1998, Suva**

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

Date of Judgment: **Friday, 13 November 1998**

MAJORITY JUDGMENT OF SIR MOTI TIKARAM - P AND JUSTICE TOMPKINS - JA

The appellant was charged that on 28 June 1995 at Navua in the Central Division he had unlawful carnal knowledge of the complainant without her consent. Following a trial and the unanimous opinion of the assessors of the appellant's guilt, he was convicted on 11 August 1997 of the rape of the complainant. On 13th August 1997, he was sentenced to 6 years imprisonment. He has appealed against conviction and against sentence.

THE FACTUAL BACKGROUND

The appellant and the complainant have known each other for some 2 or 3 years. For part of that time they worked for the same employer. On 27 June 1995, the appellant telephoned the place where the complainant was living, and left a message with her mother that he had Australian

friends at his place. As a result, she went to his house. There were no Australian friends there. The complainant, the appellant and his two brothers consumed a substantial quantity of rum. Later in the evening, when she was considering returning to her house, she was instead persuaded to stay at the appellant's place. She went to sleep on a bed in his bedroom. There is a marked conflict between the evidence of the complainant and the evidence of the appellant about what then occurred. This conflict was succinctly described in the Judge's summing up:

> ***"What you are faced with, is two completely conflicting accounts of what occurred. The complainant says that the accused lay on top of her on the bed and gave her love bites on the neck. She struggled and managed to push him away. She got up from the bed, saw the love bites on her neck and slapped him. He then pushed her on to the bed and tried to unfasten her belt. Twice she tried to get up and each time he punched her. First on the left eye and then on the nose. She was screaming. He used the sheet to block her mouth and said he would kill her if she screamed again. She was scared and lying there rigid. He forcefully took off her jeans and then took his own clothes off. It was then that sexual intercourse occurred. The complainant said that the accused raped her. She said she was scared to scream because she thought that the accused might really kill her. She said that because she did not want to have intercourse the accused beat her up and raped her. In cross-examination she denied that the sexual intercourse was a voluntary act by her without any force being used by the accused.***
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> ***If that is what occurred it would certainly amount to rape as I have explained it to you. The complainant did not agree to having sexual intercourse. The accused was aware of this and therefore punched her and forcefully had sexual intercourse without her consent.***
>
> ***The accused, on the other hand, says that is not what happened. He says that during the evening the complainant was kissing and caressing him and lying on his lap. He later went into the room where she was sleeping to get some cigarettes. He heard her cough and turn over. He thought she wanted something, so he woke her and asked her if they could have sex. She replied with a smile and they kissed. He then lay down beside her on the bed and they were kissing. They each took off their own clothes. They then had sexual intercourse and she approved. From her actions he knew that she wanted to have sex with him. During the sexual intercourse he bit her on the neck and she approved of that and made no complaint. The accused says that after they had sexual intercourse they started talking. The complainant started talking about his relationship with another girl and they quarreled. The complainant said things about the girl that made him get really angry and he punched the complainant on the nose. She swore at him and he then punched her on the face. He used the sheet to wipe her nose where it was bleeding.***
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> *If that is what occurred it would certainly not be rape. The punching of the complainant may be inexcusable but it was done after they had sexual intercourse. That sexual intercourse was with the consent of the complainant."*

It is apparent from this summary of the evidence that sexual intercourse between the complainant and the appellant occurred. The issue before the court was whether the prosecution proved beyond reasonable doubt, that this intercourse took place without the consent of the complainant or without the appellant believing on reasonable grounds that she was consenting.

The Grounds of Appeal

The notice of appeal set out eleven grounds. At the hearing of the appeal, Mr. Fa, counsel for the appellant, abandoned five of those grounds. Those remaining centered around two issues, namely whether the Judge correctly directed the assessors on corroboration, and whether the sentence of 6 years imprisonment was excessive in all the circumstances.

Corroboration

It was the case for the prosecution that the complainant's account of the events that occurred, particularly her evidence that the sexual intercourse had occurred without her consent and without his believing that she was consenting, was corroborated in two respects, namely, the independent evidence of the injuries that she suffered and of her distress observed after the event.

Before dealing with the requirements for corroboration, the judge directed the assessors as follows with regard to the complainant's evidence:

> ***"The onus is on the prosecution to prove that the complainant's version is true. To find the accused guilty you must accept the evidence of the complainant as truthful and reject the innocent account of the accused. If you have a reasonable doubt on the matter, if you feel that the accused's version might be true, then you could not find him guilty."***

Judge correctly directed the assessors that it is dangerous to find the charge of rape proved against the appellant on the uncorroborated evidence of the complainant. He correctly directed the assessors on what was corroboration, that it was for him to decide whether evidence was capable of

corroborating the complainant's evidence, and for them to decide whether it does in fact amount to corroboration.

And again he correctly told the assessors:

> *"You must still assess her credibility and decide what weight you attach to her evidence, but in doing so you must bear in mind the warning I have just given."*

The Judge directed the assessors that there were two items of evidence that were capable of corroborating the complainant's evidence that she did not consent to sexual intercourse. The first was the injuries. He said:

> ***"First there are the injuries to the complainants nose and eye. The observation of those injuries is evidence that is independent of the complainant herself. They were observed by Ana immediately after the incident, the complainant's mother a very short time afterwards and the Police later that day. They were obviously inflicted upon the complainant by somebody else. She says it was the accused and he admits that. Those injuries are capable of supporting the complainants evidence that she refused to have intercourse and the complainant assaulted her and forced her to have intercourse. However, you must exercise some caution before accepting this evidence as corroboration. The accused said that these injuries were inflicted after the intercourse took place. If that is so, then the injuries would not be corroboration of the complainant's evidence that she did not consent. Accordingly, you could only act upon this evidence as corroboration if you are satisfied that the injuries were inflicted before the intercourse occurred."***

Mr. Fa submitted that this amounted to a misdirection. He submitted that the Judge should have told the assessors that the evidence of the injuries was not capable of corroborating the complainant's evidence of lack of consent.

He submitted that the source of the corroboration was not independent of the complainant. That is because the evidence of the injuries only supported her account of intercourse without consent if the assessors accepted her evidence that the injuries were inflicted before intercourse, and rejected his evidence that the injuries were inflicted after intercourse. He also submitted that it was unsafe for the assessors to rely on the injury evidence as corroboration when there was an alternative explanation of how those injuries occurred.

It is the function of the trial Judge to rule whether or not there is any evidence which is in law capable of amounting to corroboration and, if there is such evidence, it is for the assessors to determine whether or not that evidence affords corroboration: *R v Mohamed Farid* (1945) 30 Cr App Rep 168 at 175.

Corroboration of a witness's evidence must be afforded by independent evidence which affects the accused by connecting or tending to connect him with the offence charged. It must be evidence which implicates him, that is which tends to confirm in some material particular not only that the offence was committed, but also that the accused committed it; *R v Baskerville* 1916 2KB 658 at 667.

In *R v Hills* (1988) 86 Cr App Rep, the Court of Appeal in England said:

> ***"It is therefore always important to consider: (1) what are the real issues in the case; (2) what the evidence being put forward as corrobation does in fact prove ...(3) whether that evidence; (a) come from a source or sources independent of the accomplice; (b) goes some significant part of the way towards showing that the offence was committed and that the accused committed it."***

In *Director of Public Prosecutions v Kilbourne* [1973] AC 729, 760 Lord Simon said that corroboration is nothing other than evidence which confirms or supports or strengthens other evidence. It is, in short, evidence which renders other evidence more probable.

The crucial evidence in the present case is that of the complainant that the appellant inflicted the injuries on her in order to force her to have sexual intercourse without her consent. Evidence of the injuries given by other persons who observed them after the event is capable of corroborating her evidence because it supports her account of the injuries occurring for the purpose of forcing her to have sexual intercourse without her consent. That independent evidence of the injuries

renders her evidence, that the intercourse was without consent, more probable.

That the injury evidence was *capable* of corroborating her evidence is not affected by the appellant's evidence that the assault took place after the sexual intercourse and therefore was not relevant to the issue of consent. The appellant's evidence goes to whether the injuries *did* corroborate her evidence. The Judge correctly directed the assessors that they must exercise some caution before accepting the evidence as corroboration because the accused had said that the injuries were inflicted after the intercourse took place. As he pointed out, if that were so, the injuries would not be corroboration of the complainant's evidence that she did not consent. Put another way, the appellant's claim that the injuries were inflicted after intercourse was a matter to which the assessors should have regard in deciding whether the injury evidence, as a matter of fact, afforded corroboration of the complainant's evidence. The onus rested on the prosecution to establish that the injury evidence did corroborate the complainant's evidence as to consent. Thus in this case, it was for the prosecution to prove that her evidence that the injuries were inflicted before the intercourse was correct. The Judge made that clear when he directed the assessors that "... you could only act upon this evidence as corroboration if you are satisfied that the injuries were inflicted before the intercourse occurred."

For these reasons, we are satisfied that the Judge's direction that the injury evidence was capable of corroborating the complainant's evidence about the lack of consent was correct. This ground of appeal cannot succeed.

We turn now to consider the submissions relating to the evidence of her distress. The Judge directed the assessors:

> ***"The second item of evidence that is capable of amounting to corroboration is the distress of the complainant immediately after the incident. The complainant's mother gave evidence that she was asleep and heard the frig door open. Then she heard the complainant in her bedroom and the complainant was crying. That was shortly after the complainant got***

home from the accused's house. Significantly, the complainant was not crying in front of her mother. She was in her bedroom, on her own, and her mother, who had been woken by the frig door closing, happened to hear it. Mrs. Davis said that she then went into the complainant's room. She described the complainant as crying and shaking. Constable Kumar said that when he saw the complainant later the same morning she looked very sad and distressed. However, that was a considerable time after the incident. If you are satisfied that the complainant was genuinely distressed shortly after the alleged rape then that could be corroboration of her lac of consent. However, again you must exercise some caution in using the evidence for that purpose. You must first exclude the possibility that she was distressed for some other reason that is consistent with the accused's explanation. For instance, remorse because she had participated in sexual intercourse with the accused or because he had assaulted her causing a painful injury."

Mr. Fa accepted that evidence of distress is capable of amounting to corroboration. But he submitted that the Judge's warning to the assessors that that evidence should be treated with caution, was inadequate.

In *R v Redpath* (1962) 46 Cr App Rep 319, Parker LCJ said:

"It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight or little weight could be attached to such evidence as corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little if any weight to that evidence because it is all part and parcel of the complaint. The girl making the complaint might well put on an act and stimulate distress."

That approach was adopted by this Court in *Maciu Gonevou v The State* Criminal Appeal No 12 of 1992.

The example in *Redpath* does not apply in the present case. The complainant's distress was observed by her mother on the night of the event. At that time, the complainant made no complaint to her mother, because, she said, she was ashamed of what had occurred. Evidence of her distress was quite separate from the evidence of complaints to her mother and to others.

Mr. Fa however submitted that the Judge should have pointed out to the assessors other possible explanations for the complainant's distress. He relied particularly on the consumption of a substantial amount of alcohol by the appellant and the complainant. In his submission, the complainant's

distress may have been the result of that consumption, and the Judge should have put this possibility to the assesssors.

We do not accept that submission. The Judge, in the direction we have set out, made it clear to the assessors that they must exercise caution in using the distress evidence as corroboration. They must exclude the possibility that she was distressed for some other reason consistent with the accused's explanation. He gave remorse as an example. We do not consider that there was any need for him to give other possible examples. We also note that there was no cross-examination of the complainant to support the possibility that her distress was caused as the result of the alcohol she had consumed.

The Judge's direction on the distress evidence as corroboration was correct. That ground of appeal also cannot succeed. In accordance with the judgment of the majority, the appeal against conviction is dismissed.

The Appeal Against Sentence

Mr. Fa submitted that the sentence of 6 years imprisonment was harsh and excessive and did not take sufficient consideration of matters relating to mitigation. He relied on the appellant being a first offender, the appellant's personal circumstances, his having lived in a village surrounding, the effect on his family, and that the sentence imposed will not serve the purpose of rehabilitation. He submitted that an appropriate sentence was a term of 4 years.

The maximum sentence for rape is life imprisonment. In *Mohammed Kasim v The State* Criminal Appeal No 21 of 1993, this court gave a clear guidance to the courts in Fiji concerning the appropriate approach to sentencing for rape.

"We consider that in any rape case without aggravating or mitigating features, the starting point for sentencing an adult should be a term of imprisonment of 7 years. It must be recognised by the Court that the crime of rape has become altogether too frequent and that the sentences imposed by the Court for that crime must more nearly reflect the understandable public outrage."

The court went on to stress that the particular circumstances of the case will mean that a proper sentence may be substantially higher or substantially lower than that starting point.

At the time of the offence, the appellant was aged 26. Six months after the offence, he married. At the time of sentencing he had a 10 month old child. He had been employed by the same employer for 5 years. He was a regular church attendant and rugby player.

The Judge recognised as aggravating features the violence that was used and the breach of the trust the complainant put in him as a friend. There should be no reduction for remorse. He had regard to the absence of previous convictions and for his being well-liked in the community. He also recognised the tragic effect that the sentencing would have on the appellant's family, his personal character and circumstances, and the hardship to his wife and child.

The Judge's approach to sentencing was entirely appropriate. Having regard to the aggravating features, particularly the violence, the appellant may have been fortunate to have received a sentence less than the 7 year starting point.

In accordance with the unanimous judgment of the Court, the appeal against sentence is also dismissed.

Before parting with this case, we refer to the law in Fiji requiring a judge to direct assessors that, in a sexual case, it is dangerous to convict on the uncorroborated evidence of the complainant. This requirement is based on the requirement of the common law. It has been regarded as unsatisfactory in many jurisdictions. This is because of its inflexibility, the apparent

assumption that complainants' evidence is inherently unreliable, and the direction may result in a guilty person being acquitted solely because of the effect of the direction. Justice to an accused and the complainant can better be achieved if the judge is permitted to give a direction that is tailored to the circumstances of the particular case.

In New Zealand, the law has been amended to remove the requirement, and leave the nature of any direction to the discretion of the trial judge. Section 23AB of the Evidence Act 1908 now provides:

> **``23AB. Corroboration in sexual cases - (1) Where any person is tried for an offence against any of sections 128 to 144 of the Crimes Act 1961 or for any other offence against the person of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the Judge shall not be required to give any warning to the jury relating to the absence of corroboration.**
>
> **``(2) If, in any such case, the Judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words shall be required."**

We suggest that consideration be given to a similar amendment to the law in Fiji.

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Sir Moti Tikaram
President

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Justice D.L. Tompkins
Justice of Appeal

Solicitors:

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Office of the Director of Public Prosecutions, Suva for the Respondent

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