

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

CRIMINAL APPEAL NO. AAU0013 OF 2002
(Original Suva High Court Criminal Appeal No. HAA 008 of 2002)

BETWEEN: RAINESH RAJESHWAR PRASAD Appellant
Mechanic

AND: THE STATE Respondent

Coram: Hon Jai Ram Reddy, President
Hon Sir Rodney Gallen, Justice of Appeal
Hon Robert Smellie, Justice of Appeal

Hearing: Tuesday, 27th August, 2002, Suva

Counsel: Mr A.K. Singh for the Appellant
Ms J. Hamilton-White for the Respondent

Date of judgment: Friday, 30th August, 2002

JUDGMENT OF THE COURT

The Appellant was charged with rape and tried in the Magistrates' Court, Suva. He was brought before the Court on the 5th of February 2001, when he elected trial in the Magistrates' Court and pleaded not guilty. The trial commenced on the 24th of April 2001, and the judgment of the Court was not delivered until the 11th of January 2002. There were numerous adjournments between those dates. The Appellant was convicted and sentenced to 5 years' imprisonment. He appealed to the High Court, and his appeal against conviction was

dismissed on the 22nd of March 2002. He has now appealed to this Court. Facts relevant to a consideration of the grounds of appeal urged upon us can be briefly stated and are as follows:-

The complainant was 17 years old, at the time of the alleged offence, she lived with her parents in a flat at Makoi, Suva. The Appellant's parents owned the building comprising two flats. The complainant's parents and their children occupied the bottom flat, and the Appellant's parents and their children occupied the top flat. On the 1st of February 2001, the complainant went to work early in the morning but returned home at about 8.30 am, because she said she was not feeling well.

According to the complainant, at about 1.00 pm the Appellant entered the bottom flat uninvited, closed the door, took the complainant into a bedroom, threatened her with a knife, punched her on the stomach, and forcibly had sexual intercourse with her. While the complainant and the Appellant were in the bedroom, the complainant's brother arrived, and knocked at the door, she called out to him, but the Appellant silenced her by threatening her with a knife, and placing a pillow over her mouth. According to the complainant, the Appellant was in her flat until 4.30 pm.

The complainant's mother arrived home at about 9.00 pm, and she told her that the Appellant had gained forceful entry into the house and "raped" her. The following day a report was made to the Police, and the complainant was examined by Dr Bethel Masau Sunia at the Colonial War Memorial Hospital. The doctor found that the complainant had suffered recent tear of her hymen, consistent with sexual intercourse for the first time. The injuries Dr

Sunia saw on the complainant were also consistent with consensual sexual intercourse.

When first questioned by the Police, the Appellant said that he had sexual intercourse with the Appellant with her consent. He claimed that he loved the girl, that there had been talk of the two getting married, involving their respective parents. According to the Appellant, after his release on bail, the complainant agreed to accompany him to his friend's house, where the two stayed overnight, and had consensual sex, it would seem more than once. They were to get married the next day, and went to the Registry for that purpose. They did not go through with the marriage, because the complainant was under age, and needed the consent of her father. He was sent for, but refused to consent. It is apparent from the evidence, and complainant's own statement to the Police made on the 27th of March 2001, that she spent the night of 21st March 2001, with the Appellant at Doddy's House. When it was put to the complainant in cross-examination that she made a statement to the Police on the 21st of March 2001, she responded - "It was not 21st it was 22/3/01": This is what she said in cross-examination:-

Q. Do you remember number of statements gave police?

A. No.

Q. First statement 2/2/01?

A. Yes.

Q. Second statement was on 21/3/01?

A. It was not 21st it was 22/3/01.

Q. Do you remember police officer who took your statement?

A. I do not know name.

Q. Did you sign statement?

A. Yes.

Q. *The statement you took at Police Post - your parents told you to fabricate everything against accused?*

A. *My parents didn't tell me that.*

Q. *What was said in statement?*

A. *They asked me why the reconciliation statement was made. I said accused parents had talked about reconciliation.*

Q. *Do you admit that in that statement you told police accused never raped you?*

A. *I told them he raped me.*

Q. *The statement of the 21st of March?*

A. *Yes."*

The statement in question was not produced. We are satisfied on the material on the record, that such a statement was in fact made by the complainant. Applications made to the Court requiring the Prosecution to produce the statement were denied by the learned Magistrate.

Learned Counsel for the defence did have access to the complainant's statement of 27th March, 2001.

Material parts of that statement were put to the complainant, and this is what she said:-

"Q. *You ran away and slept with accused?*

A. *No.*

Q. *Do you remember having sex with accused after incident?*

A. *No.*

Q. *Did you make a statement to police on 27/3/01?*

A. *I do not remember date nor how many times I gave a statement.*

Q. *Your name is Annies Anshu William, 17 years old and gave phone number 340678, giving statement Actg. Cpl. Chetty.*

A. *I know I went to Police Station several times and Cpl. Chetty had taken my statement.*

Q. *Is this your signature?*

A. *Yes.*

Q. *At the end of the page is this your signature?*

A. *Yes.*

Q. *Read L36, Pg.2 "we spend the night and slept together and had sexual intercourse with consent". Is that what you told the police?*

A. *The police didn't tell me anything.*

Q. *How come you signed it?*

A. *I know I signed it. My mother was a witness.*

Q. *You and the accused come to the court to get married, what day?*

A. *Yes, I do not know date."*

Acting Corporal Chetty who recorded the complainant's statement on 27th March 2001 gave evidence. He confirmed that the Appellant told him what is recorded in the statement. The statement was exhibited as Defence Exhibit 1. As the cross-examination revealed there was serious contradiction between what the Appellant said on oath in cross-examination, on the one hand, and what she told Cpl Chetty, on the other. The conflict was not only relevant to the issue of the Appellant's credibility but also impinged upon the Appellant's substantive defence that the complainant was a consenting partner.

While the Appellant was on remand at the Suva Prison, the complainant visited him with her parents. There she presented him with a copy of the Bible, and also signed a letter withdrawing her complaint of rape against the Appellant. This is what the complainant said in her statement to Cpl Chetty:-

"...Rajeshwar's parents approached me and my parents to get married and withdraw the complaint of Rape. I agreed and also my parents. I also visited Rajeshwar in Korovou prison with my parents for reconciliation and signed the withdrawal letter written by one clerk of Tamara Associates in Suva".

The withdrawal letter was not produced.

The Petition of Appeal raises the following grounds of appeal:-

- "a) That the Learned Trial Magistrate and/or that the Learned Appeal Judge has erred in law in regard to the law of Corroboration in sexual cases.*
- b) That the Learned Trial Magistrate and/or that the Learned Appeal Judge has erred in law when they failed to consider the complainant's inconsistent evidence and/ failed to consider the complainant's evidence coming out as a result of cross-examination.*
- c) That the Learned Trial Magistrate and/or that the Learned Appeal Judge has erred in law when they failed to explain or give reason why they believe the complainant and did not believe the defendant."*

It will be convenient to deal with Ground 1(b) first.

GROUND 4(b) :FAILURE TO CONSIDER INCONSISTENCIES - EVIDENCE ARISING THROUGH CROSS-EXAMINATION

Learned Counsel for the Appellant submitted that there were inconsistencies and contradictions in the complainant's evidence on oath. He said that they were such, that her evidence should not have been believed by the learned Magistrate.

Some of the inconsistencies, related to peripheral issues, such as whether the Appellant

was sitting or standing on the steps when the complainant saw him on the day of the offence, whether he dragged the complainant or carried her into the bedroom, whether the kitchen knife was left in the kitchen or carried into the bedroom. We agree with the learned Judge that those inconsistencies are not significant, they do not detract from the complainant's evidence that she did not consent. However, there were serious contradictions between what the complainant said on oath, albeit in cross-examination, and what she told Actg. Corporal Chetty on the 27th of March 2001. There is no indication whatsoever, in either the judgment of the learned Magistrate or the High Court that these contradictions and their implications were considered. The learned Magistrate should have directed himself in accordance with the advice of this Court in Gyan Singh v State 9 FLR 105, where this Court held that:

"It is the duty of the trial judge to warn the assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the assessors, and of the judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in court at the trial is worthy of credence and, if so, what weight should be attached to it."

In Prem Chand Singh v The State 11 FLR 119 at p.125 this Court said:

"... We accept as an accurate statement of the law the extract quoted by counsel for the appellants from Leonard Harris (1927) 20 Cr.App.R. 144 at 147 :-

"If, therefore, it appears, that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury, and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility."

At the same time it is still a matter for the Assessors in their advice to the Judge, and for the learned trial Judge in his judgment, to determine just what credence can be given to the evidence of the witnesses concerned and just what weight can be placed upon it. This aspect of the matter was examined by this Court in Gyan Singh v. Reginam (1963) 9 F.L.R. 105."

In our view, there is considerable merit in Mr A.K. Singh's submission, that both the learned Magistrate and the learned Judge did not pay sufficient attention to matters that emerged from the cross-examination of the complainant. As a result of cross-examination, the complainant's credibility was severely eroded. She offered no explanation for the contradictions, indeed if Actg. Cpl Chetty's evidence is believed, and there was no reason not to, then she had lied on oath. In the circumstances of this case we are concerned that the learned Magistrate in assessing the effect of the inconsistencies in the evidence did not assess the credibility of the complainant in a manner which took into account those inconsistencies.

We uphold this ground of appeal.

GROUND 4(a) : MISDIRECTION ON THE LAW OF CORROBORATION

The learned Magistrate warned herself of the danger of convicting on the uncorroborated evidence of the complainant. She found that neither the recent complaint nor the medical evidence amounted to corroboration. Having administered the warning to herself, she said that she could still convict if she was "satisfied and convinced by the complainant's evidence". Learned Counsel for the Appellant argued that in view of the fact that the complainant's credibility was seriously compromised, it was unsafe for the learned Magistrate to act on her uncorroborated evidence that she did not consent. We think there is

considerable force in the argument.

Learned Counsel for the State countered that the medical evidence was sufficient corroboration of the complainant's evidence that she was not a consenting partner. Counsel argued that the medical evidence confirmed that the complainant had suffered rupture of her hymen due to penile penetration in the previous 24 hours, whereas, the Appellant claimed that sexual intercourse on the 1st of February was not the first, but that he had intercourse with the complainant on previous 2 or 3 occasions. We are unable to accept this submission, because the evidence on this issue, was equivocal at best. The Appellant's evidence in chief was that he had gone to the Appellant's house on three to four occasions prior to 1st February 2001, kissed and undressed the Appellant but not much else happened. In the Appellant's words:-

"Prior to 1/2 I had gone 3-4 times to her house. During those 3-4 times I kissed her and undressed but we didn't do much- I undressed her with her permission- We had agreed to having sex."

We do not think that the medical evidence amounted to corroboration of the complainant's evidence that she did not consent.

While the learned Magistrate did not misdirect herself on the law of corroboration as suggested, nonetheless in view of the serious misgivings we have about the credibility of the complainant, for reasons explained, we think that was unsafe to act upon her evidence without corroboration.

GROUND 4(c) : FAILURE TO GIVE REASONS FOR PREFERRING THE EVIDENCE OF COMPLAINANT AS OPPOSED TO THE APPELLANT

At the end of the prosecution case, and in the absence of any corroboration, the learned Magistrate was left with the evidence of the complainant as against that of the Appellant. In expressing her preference for the evidence of the complainant, the learned Magistrate placed considerable reliance on her assessment on the credibility of the two, based on their demeanour as they gave evidence. On appeal to the High Court, the learned Judge, concluded:-

“ It is perfectly clear, on a reading of her judgment, why she believed the complainant, and disbelieved the Appellant. Not only was her finding based on the complainant’s evidence as supported by evidence of recent complaint and distress, but she had evidently decided, on the basis of the demeanour of both Appellant and complainant, that she believed the complainant. I cannot therefore agree that her judgment lacked analysis or reasons.”

In Nirmal v Reginam 15 FLR 194 at 196, this Court said:

“ We think that the learned Judge here fell into the error of endeavouring to assess the respective credibility of witnesses by their demeanour and the way they gave their evidence, and by that alone. This is wrong if it can be avoided. We adopt a passage from the judgment of the Court of Appeal of East Africa in Uganda v. Khimchand Kalidas Shah and Ors. [1966] E.A. 30 at p.31 —

“Of course, a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject.” ”

We have already said that in our view there was a failure by the learned Magistrate at

the conclusion of the case to weigh all the evidence and then to decide what to accept and what to reject. We uphold this ground of appeal.

CONCLUSION

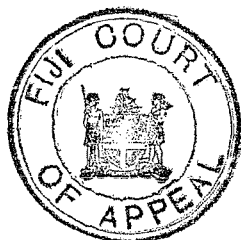
We uphold ground 4(a) and (c) of the grounds of appeal. We allow the appeal, and quash the conviction, and order a new trial before another Magistrate. In our view the Appellant should have bail, which we grant on the following terms:-

1. In the Appellant's recognizance of \$2000.
2. Two sureties of \$2000 each.
3. The Appellant to report on Mondays and Fridays to the manned police station nearest to where he is living.
4. The Appellant to surrender his passport (if any) to the Chief Registrar of the High Court.

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Hon Jai Ram Reddy
President

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Hon Sir Rodney Gallen
Justice of Appeal

.....
Hon Robert Smellie
Justice of Appeal



Solicitors:

Messrs A.K. Singh Law, Nausori for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent