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

CRIMINAL APPEAL NO. AAU0035 OF 2005
(High Court Criminal Case No. HAC003 of 2005L)

BETWEEN:	**RUSIATE TUIDRAVU**	Appellant
A N D :	**THE STATE**	Respondent

Coram: **Ward, President**
Eichelbaum, JA
Scott, JA

Hearing: **Thursday 2 November 2006**

Counsel: **Appellant in person**
D Goundar for respondent

Date of Judgment: **Friday 10 November 2006**

JUDGMENT OF THE COURT

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[1] The appellant was convicted in the High Court of rape and assault occasioning actual bodily harm and sentenced to 10 years and 2 years imprisonment respectively to be served concurrently. He appeals against conviction and sentence.

[2] His first grounds of appeal against conviction were that:

1. the honourable judge failed to consider my need to obtain legal representation during the trial from 5 April 2005 to 12th. Neither was any alternative consideration granted to consult legal aid for my case.

2. being remanded into custody at Natabua prison from 9 December 2004 to 12 April 2005 severely affected my efforts to consult a lawyer.

3. I was not guilty and stated so in my caution interviews, also the court found me guilty and I was sentenced to (10) years imprisonment on 1 count of Rape and 1count of assault on my daughter.

[3] In written submissions filed subsequently, the grounds of appeal against conviction are stated as:

1. His constitutional right to have reasonable time to make his defence and to have counsel of his choice was denied;

2. The evidence given to the court was not meritous (sic) to warrant a conviction of the serious offence of rape; and/or

3. The evidence was unreliable to the extent that no reasonable tribunal can safely convict for the offence of rape.

[4] In summary they raise two issues; that he was prejudiced by the lack of counsel and that the evidence was insufficient to sustain the charge of rape.

[5] The victim in both charges was the appellant's fourteen years old daughter. The prosecution case was that he had taken the complainant and her younger sisters to pick mangoes. On the way, the appellant told the others to go and bathe in the river and then took the complainant further into the bush. He told her to lie down and he took off her clothes. She protested and pleaded that she was his daughter but he threatened to cut her with his cane knife. He then raped her.

[6] Afterwards, he took her to where the others were bathing. A younger sister noticed the complainant had been crying but, in answer to her questioning, she said she had fallen. However, once she returned home, she complained to her mother but

the mother would not accept it had happened. She took the girl to the river to bathe herself.

[7] Later the victim met her cousins and told them what had occurred and they took her to their home and hid her. However, her parents came and insisted on taking her home and, once there, started shouting at her for leaving home. In the small hours, the complainant again returned to her uncle's house but, the following morning, her mother came and took her home. Once there, her father beat her until the uncle arrived with the police. She was examined by a doctor the next morning.

[8] At the trial the appellant pleaded guilty to the assault but denied the rape.

[9] The appellant's submission is that he was in custody before the trial which made it difficult for him to contact and instruct a lawyer. The denial of bail breached the presumption of innocence and the magistrates' court placed too much weight on convictions for escaping from lawful custody more than ten years before. There was also no evidence from his earlier cases of any breach of bail conditions. The court, he says, did not give him the chance to consider the possibility of legal aid. Even when he succeeded in instructing his own lawyer, that lawyer withdrew and the court did not give him sufficient time to find another. As a result, he had to proceed without a lawyer.

[10] The record of the proceedings gives limited support to the appellant's submissions. It is clear that he was remanded in custody throughout. The record shows that he first appeared in the magistrates' court on 9 December 2004 but the plea was deferred because the appellant wanted to apply for legal aid. At the next appearance on 22 December, he consented to summary trial but was unwilling to go further until he had a lawyer. The prosecution told the court that he had been advised to apply for legal aid and an officer of the Legal Aid Commission confirmed that he had given the appellant, by way of his cousin, the application forms for legal aid. The appellant explained he had spoken to his family in Suva on

the telephone, presumably from prison, seeking their assistance in contacting legal aid.

[11] However, at the next hearing, on 4 January 2005, the appellant said he wished to arrange his own lawyer. He was asked if he wanted to wait until then before making his election but he was content to decide and consented to summary trial. At the next appearance two weeks later, he said he did not want legal aid and told the court that his parents would arrange counsel. Counsel for the prosecution asked that the charges be put and the appellant pleaded not guilty to both but changed his election to trial in the High Court.

[12] The first appearance in the High Court was on 1 February 2005. There followed a number of appearances at which the appellant unsuccessfully sought bail; one of the grounds for which was that he needed to be on bail to engage a lawyer. The case was then listed for hearing on Tuesday, 5 April 2005, and the record shows that a Mr Khan appeared for the appellant that day but asked for an adjournment. The learned judge, having expressed the view that the case was not complicated, adjourned to the Thursday. Defence counsel apparently considered that insufficient and withdrew. The record shows that the appellant indicated he was happy for counsel to withdraw but added that he would still like counsel. The Judge still allowed the two days adjournment and directed the prison authorities to "render all assistance to the accused to contact any legal adviser".

[13] This was a very short case in which the prosecution evidence consisted of the complainant, of a doctor and of four very short witnesses. It was completed in less than one and half days. Any competent counsel should have been able to master the case in a few hours and it is hard to understand counsel's withdrawal after having, presumably, accepted instructions. The day he appeared was the day fixed for the trial and he should not have accepted instructions if he was not ready to conduct it. The appellant suggests his withdrawal was the result of the refusal to allow a longer adjournment and that, unfortunately, would appear to be the case. It would have been instructive if the court had made more enquiries before

agreeing to allow counsel to withdraw. However, we note that the appellant appears to have raised no objection but subject to being able still to have a lawyer.

[14] On Thursday, 7 April, the record reads:

> *"Accused: I am not able to get lawyer.*
> *Court: Will proceed. Given enough time."*

The trial then commenced after the appellant changed his plea to the assault to one of guilty. At the conclusion of the prosecution case, the appellant gave an unsworn statement from the dock following which he indicated he wished to call his wife. The court allowed him to contact her and, on being told that she could only come the following Monday, adjourned until then. However, on that date, his wife did not appear and the appellant advised he had no witness. It would appear that neither the prosecutor nor the appellant addressed the assessors. After the summing up, the assessors unanimously found the appellant guilty of rape. The learned judge agreed and convicted him.

[15] In his submissions before us, the appellant suggests the lower courts did not properly consider the question of bail, placed unreasonable emphasis on his previous conviction for escape and gave too little credit for other matters favourable to the appellant. This is not an appeal against the refusal of bail. The issue for this Court is whether the appellant was given adequate opportunity to arrange counsel. The refusal of bail is relevant only to the suggestion that it unfairly hindered him in making such arrangements and we accept that it is more difficult when remanded in custody to contact a lawyer than when on bail.

[16] The respondent contends that it is clear the appellant was give adequate time to engage counsel. Despite his claim to the contrary, the record shows that he declined to apply for legal aid even when he was supplied with the application forms. He was, counsel suggests, advised correctly by the judge about his rights. Mr Goundar for the State relies on the test set out by this Court in *Asesela Drotini v State*; App No AAU 1/05, 24 March 2006, that the question for the

appellate court "is whether there is a possibility that he was adversely prejudiced by his lack of representation". In that case, the Court found that he had been given more than adequate time to find a lawyer and had conducted his case competently.

[17] The appellant correctly concedes that the right to counsel of his choice under section 28 of the Constitution is not absolute. This Court has ruled on this issue many times most recently earlier this year in *Drotini's case*:

> *"It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances, the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence.*
>
> *The question for the court is whether there is a possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel ..."*

[18] Those comments apply equally to this case. The appellant adds that, once he had a lawyer, it was the court's refusal to give sufficient time which led to counsel withdrawing. That is clearly correct but, as was said in *Drotini's case*, the court also has a duty to get on with the case. The record shows that the case was adjourned in the magistrates' court four times to allow the appellant to instruct counsel. In the High Court, it was only on the day fixed for trial that counsel eventually appeared and asked for an adjournment.

[19] The Supreme Court has recently considered the right to counsel in *Albertino Shankar & Francis Narayan v. The State*, CAV 8/05, 19 October 2006. In that case there had been a late application to change defence counsel. The new counsel was not available on the date of trial and the judge allowed two days for him to appear. He was still unable to do so and the trial proceeded with the original counsel. The Court stated:

> *"In adjourning the trial until 22 May 2003, the trial judge applied the criterion of reasonableness. The Court of Appeal adopted the same approach. Mr Singh rightly accepted that the right to counsel under section 28(1)(d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. Such a construction would, practically, be unworkable. It is implicit in the section that the right to counsel conferred thereby is qualified by considerations of reasonableness. The Constitutional right is one which must be exercised at the proper time. It cannot be exercised on the eve of the trial to force an adjournment."*

[20] Clearly the court had already adjourned the case more than once to allow the appellant time to obtain a lawyer. The trial had been fixed for hearing on Tuesday, 5 April 2005, and so the witnesses, including two juveniles, would have been waiting at court. Even then it was delayed a further two days but the inescapable consequence was that the appellant still had no lawyer and no inquiry appears to have been made as to what assistance the prison authorities had or had not given in the two days adjournment.

[21] However, as *Drotini's case* shows, the length of time or the number of adjournments allowed is not the sole test. In *Seremaia Balelala v The State*, App No AAU 3/04, 11 November 2004, this Court also pointed out that, where the trial has proceeded in the absence of counsel, it will not necessarily be fatal to a conviction which is obtained after a trial which is fairly conducted. Whether a trial is fairly conducted must involve consideration of whether the accused was able to conduct his case competently or was otherwise adversely prejudiced by having to represent himself and that is the test we must apply.

[22] The record shows that the trial followed the proper course and the appellant was given the opportunity to conduct his defence. He cross-examined prosecution witnesses and exercised his right to make an unsworn statement from the dock. He clearly appreciated his right to call defence witnesses although he was, in the event, unable to do so. That demonstrates compliance with the right to defend himself under section 28(d) but we must pass on to consider whether he was able

to do so competently or whether the absence of counsel in any other way adversely prejudiced his right to a fair trial which is guaranteed by Section 29 (1) of the Constitution.

[23] This was a charge of a very serious offence. The learned judge, later in the hearing, stated his opinion that it is the most serious crime in the Penal Code. In order to present his case that his daughter was giving a totally fabricated account and that nothing of the sort occurred, the appellant had to cross examine her. Both he and his daughter would have found that a very difficult experience. There can be little question that any such cross-examination is more easily and, as a result, probably more effectively conducted through counsel. The record shows only three questions were put by the appellant to the complainant. Apart from those three questions, the appellant asked a total of nine questions of the six remaining prosecution witnesses. We cannot find that represented a competently conducted defence.

[24] Whilst many courts may not agree with the learned trial judge's categorisation of rape as the most serious offence, there is no doubt it is a terrible offence and shares, with the most serious crimes, a maximum penalty of life imprisonment. When the offence is alleged to have been committed by a father on his daughter, an unrepresented accused has to conduct a cross-examination which will be particularly harrowing for one or both the participants. It is difficult to envisage a case which would more clearly suggest the interests of justice require the services of a legal practitioner. The interests of justice require trial in a manner which will allow the court the optimum opportunity correctly to assess the credibility of all witnesses. Whether the allegation is true or fabricated, if the complainant is a child and the accused is her father, a direct confrontation between them is fraught with difficulties which will hinder the objective presentation of the evidence.

[25] We would strongly recommend that, in all such cases, the accused is given the opportunity to be represented under the legal aid scheme if he is unable to afford his own lawyer. Equally the courts must be conscious of the special difficulties of

such a case and ensure an accused who is not eligible for or unwilling to accept legal aid is given a proper opportunity to arrange counsel. This is always subject to the need to hear such cases as quickly as is reasonably possible as was suggested in *Shankar and Narayan's case* and courts should be aware of the warning by the Supreme Court in that case that the right to counsel should not be used solely to delay trial.

[26] In the present case, the judge gave the appellant a number of opportunities to obtain the services of a lawyer. The record gives little indication of the reasons each time he did not instruct one or why he declined to apply for legal aid. Clearly it is far harder to arrange representation when in custody and the court should always allow for that. However, as has been said, the court must also ensure repeated requests for adjournments to instruct a lawyer are not simply a means to delay the trial. In cases such as this where the victim is a juvenile, it is especially important to hold the trial promptly and allow the complainant to put the experience behind her.

[27] In the present case, the request for time to instruct counsel had undoubtedly delayed the case but we do not consider it would have been unreasonable to allow more time in view of the nature of the case and the manner in which counsel had withdrawn leaving the appellant unrepresented on the day the trial was to begin. By allowing two days further adjournment, the witnesses were already having to return on a later date. In those circumstances, a longer adjournment of a case where the accused was in custody would have been reasonable and more likely to result in him being able to arrange representation.

[28] The prosecution case depended, as is frequently the case in a charge of rape, on the evidence of the complainant. There was evidence from her younger sister that, as she returned with her father, she was red eyed and sad. Later in the day she spoke to a female cousin and complained about what had happened. That witness told the court the complainant was bleeding from her vagina. The next day, nearly 24 hours later, when she was seen by a doctor, she was still bleeding

and there was bruising of the area around her vagina consistent with recent intercourse. Clearly these do not link the appellant to the sexual intercourse but are consistent with her account.

[29] The verdict depended on the credibility of the complainant. The grounds of appeal challenging the strength of the evidence amount to no more that a reassertion by the appellant of his innocence. The three assessors and the judge all found the appellant guilty of rape and they cannot have done so unless they believed her account and disbelieved the appellant's statement to the court. However, the fact remains that her evidence was not tested by competent cross-examination. This Court cannot know how her account would have survived such scrutiny. Equally uncertain is the question of whether, with the benefit of legal advice, the appellant would still have chosen to make an unsworn statement.

[30] The question we must ask, as stated in *Drotini's case*, is "whether there is a possibility (*which we would read as a reasonable possibility*) that [the appellant] was adversely prejudiced by his lack of representation." In *McInnis v. The Queen* [1979] 143 CLR 575, 583 MasonJ explained:

> *"But I do not think ... that the calibre of the accused's forensic performance is a critical factor in the making of the decision. The question is primarily to be resolved by looking to the nature and strength of the Crown case and the nature of the defence which is made to it. If the Crown case is overwhelming then the absence of counsel cannot be said to have deprived the accused of a prospect of acquittal ... But if the Crown case is less than overwhelming I have some difficulty in perceiving how in general the conduct of the case by an accused who is without legal qualification and experience can demonstrate that, even with the benefit of counsel, he had no prospect of an acquittal. How is it to be said, for example, that cross-examination of Crown witnesses by counsel would not have been more effective?"*

That, with respect, aptly expresses the position in which we find ourselves in the present case.

[31] In those circumstances we are not satisfied the appellant had a fair trial. The conviction is quashed and we do not therefore need to consider the appeal against sentence.

[32] **Result:**

The conviction of rape is quashed and the case is remitted to the High Court for re- hearing by a different judge.

Ward, President

Eichelbaum, JA

Scott, JA

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions, Suva for the respondent