IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Criminal Appeal No. 4 of 1982

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Between:

RAM KEWAL s/o RAM NATH

and

REGINAM

Mr. V. Maharaj for the Appellant
Mr. J. Subhrawal for the Respondent

JUDGMENT

The appellant was convicted after trial in the Nausori Magistrate's Court on 17th November, 1981 of rape contrary to section 143 of the Penal Code and sentenced to three and a half years' imprisonment. The prosecution case was that on 28th February, 1981 at Tauli, Koroqaqa, Nausori, appellant unlawfully had carnal knowledge of one Ram Wati d/o Ram Sami Reddy without her consent.

Appellant has appealed against his conviction and sentence on a number of grounds and to these I will refer in a moment.

The basic facts found by the learned trial Magistrate were as follows:-

> "At about 11 or 12 a.m. Meena Kumari (P.W.2) came to the house of Ram Wati (P.W.1). They decided to go and pick cherries about two miles away in the bush. On their way they went past one Annamalle's house and when they were picking cherries the accused came from the opposite direction and got hold of Ram Wati. He pulled her to the ground and when she asked Meena to save her the accused told Meena to go away or else he would assault her.
>
> The accused unbuttoned his trousers, took off his supporters and her panties forcibly. She struggled and tried to run away, but could not and when she was on the ground she tried to crawl away but he pulled her by her leg and slapped on her thigh and she fell.
>
> The accused had sexual intercourse with her. She felt his penis when he was on top of her and

when he inserted his penis in her vagina she felt pain. She kept on struggling and the accused was on top of her for about five (5) minutes.

After having sexual intercourse he got up and went away and she got up and came home. Her dress was soiled and a button came off her dress.

While she was coming home she met one Krishna who asked her what had happened and she told him 'Pilu got hold of me in the bush'. With one Yenktamma she went to his house and subsequently she went with her mother and reported the matter to the Police. On the same day she was examined by a doctor. She did not consent to have sexual intercourse with the accused, nor did she invite him to come where she went to pick cherries."

The first ground of appeal states that the learned trial Magistrate failed to direct himself as to the necessity for proof of the mental element in the crime of rape. In support of this ground counsel for appellant referred to the case of D.P.P. v. Morgan /1975/ 2 All E.R. 347. In that case it was held that the crime of rape consisted in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. It could not be committed if that essential mens rea were absent.

Clearly a distinction must be drawn between a court sitting with a jury or assessors and one sitting alone such as a Magistrate's Court. In the latter case a Magistrate who is professionally qualified is presumed to know the legal principles involved in the case before him and in general it is not necessary for him to direct himself on matters of law as if he were addressing a jury or assessors. The onus is on the appellant to satisfy an appellate court that a Magistrate has misdirected himself on some matter of law or has followed an erroneous legal principle (see Anthony Steven v. R. /1971/ 17 F.L.R. 48). Here a

non-direction on a matter of law is alleged i.e. a direction on the mental element in the crime of rape but no question of misdirection on a point of law is raised in relation thereto so as to compel this Court to pronounce definitively on the matter. In any event in his judgment the learned Magistrate said after evaluating the complainant's evidence:

> "I accept her evidence as the truth and I find as a fact that she did not consent to have sex with the accused who knew at the time that she did not consent to his having sexual intercourse with her."

The above finding not only shows that the learned Magistrate was fully aware of the necessity of proof that appellant knew that the complainant did not consent and yet persisted to force himself on her but also there was ample evidence to support such finding.

It was also submitted that such a finding against appellant was not properly open to the learned Magistrate because of numerous inconsistencies appearing not only in the evidence of the complainant, Ram Wati (P.W.1) but also between her evidence and that of Meena Kumari (P.W.2). The learned Magistrate had quite properly directed his attention to these inconsistencies in the evidence which he regarded as merely marginal in effect because they concerned matters of detail only which did not detract from their credibility as witnesses of truth. The credibility of a witness is essentially a matter for the trial Court which had the advantage not available to an appellate court of having seen and heard the witness. Only in exceptional cases will this Court be justified to interfere with a trial Court's assessment of credibility and the present case is not one of them (see Benmax v. Austin Motor Co. Ltd. /1955/ A.C. 370).

I can find no merit in this ground of appeal.

In the next ground of appeal complaint was made that the learned trial Magistrate failed to direct himself on

the inconsistencies to be found in the evidence of the complainant and Meena Kumari in his direction on corroboration.

In dealing with the first ground of appeal I dealt with the question of inconsistencies and how the learned Magistrate found them to be of marginal consequence in relation to the credibility of the witnesses concerned. As I have already indicated that was peculiarly a matter for the trial Court to evaluate because of the advantageous position it had over this Court. As to corroboration there can be no doubt that once Meena Kumari was accepted by the trial Court as a basically truthful witness, her evidence clearly corroborated the evidence of complainant as to the non-consensual nature of the act of sexual intercourse which had taken place soon after Meena Kumari left the scene.

Corroboration could also be found as was in fact found by the learned Magistrate in appellant's interview with the police when the following exchange took place -

"Question: Did you at any time force her for sex?

Answer : Yes, forced her. She told me to come in the afternoon and I told her I will go to Suva. I then held her from her back forced her to the ground took out her panty. Then I took out my trousers and forced my penis inside vagina. She said not to do. She never agreed for sex with me then I forced her to the ground and had sex."

Complainant's own bedraggled and distressed appearance when she was seen by Krishna (P.W.3) soon after the incident also strongly tended to confirm the fact given the other circumstances of the case that the complainant was forced into having sexual intercourse with the appellant.

I can find no merit in this ground of appeal.

The next ground was to the effect that the learned Magistrate erred when considering the medical report in holding that the complainant's hymen could have been ruptured by injury and sporting activities whereas, it was submitted, it could equally be consistent with the appellant's contention that the complainant did not struggle and that he had had previous sexual relations with her. The medical evidence consisted solely of a medical report. The doctor did not give evidence. The medical report stated that the result of the vaginal examination indicated that the hymen had been ruptured and healed and painlessly admitted one finger. Counsel for appellant submitted that that evidence clearly put the lie to complainant's claim that she had not previously had sexual intercourse before the day of the incident and what was more it tended to support appellant's claim that she had had sex with him on two former occasions in May and August 1979. In any case it should have created a reasonable doubt on the question of consent. The learned Magistrate was not impressed with the argument. He took the view that at best the medical evidence as it stood was equivocal since it did not follow as a matter of inexorable truth that the mere rupture of the hymen indicated previous sexual experience with a man. This Court is unable to say that the learned Magistrate was not justified in the view he took of the matter having regard to the weight of evidence directly implicating the appellant in this case.

The last ground put forward in relation to the appeal against conviction was in terms that the learned Magistrate erred in relying on the appellant's confession in isolation whereas, so it was said, he should have considered the same in the light of the appellant's whole statement to the police and in the context in which it was made. I have closely perused the interview statement given

by the appellant to police and it seems to me that the learned Magistrate was perfectly entitled to reach the conclusion that he in fact did from the statement. In my view it is as clear as can possibly be from the statement that force was used by appellant upon the complainant before he succeeded in having sexual connection with her. I think that the last two answers to the questions put to appellant could not be plainer in their connotation:

"Q. Was Rama disagreeing for sex with you until the end?

A. First time when I was holding her she was not agreeing then I forced her to the ground, then she agreed.

Q. I put it to you that you forced her and had sex with her?

A. At first I forced her and then she gave me properly."

There was no suggestion that the answers given by appellant were other than voluntary. Thus I do not think there is any basis for concluding that the learned Magistrate was not justified in drawing adverse inferences against appellant from his interview statement. This ground of appeal also fails.

In the result the appeal against conviction is dismissed.

Appellant also appeals against his sentence of three and a half years' imprisonment on the ground that it is harsh and excessive. The offence of rape has always been regarded as most serious by the courts and what is more the crime is prevalent. A deterrent sentence was called for. From the circumstances of this case this Court is unable to say that the sentence passed by the learned Magistrate was harsh and excessive. The appeal against sentence is also dismissed.

(T.U. Tuivaga)
Chief Justice

Suva,
16th April, 1982.