IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 18 of 1980

Between:

VARINAVA ROKOSEBA TIKODUADUA

Appellant

and

REGINAM

Respondent

E. Vula for the Appellant.
R. Lindsay for the Respondent.

Date of Hearing: 1st September 1980
Delivery of Judgment: 30 September 1980

JUDGMENT OF COURT

Gould V.P.

The appellant was convicted by the Supreme Court of Fiji on two counts of attempting to procure abortion of a woman by unlawfully using instruments on her. The separate counts merely arise from the fact that it was alleged that instruments were used by the appellant on two occasions. The opinion of two of the three assessors was that the appellant was guilty; the third assessor considered him not guilty, and the learned Judge, accepting the advice of the majority, convicted him on both counts. In the circumstances of the case a fine was imposed.

The appellant was a doctor in general practice. The complainant, an unmarried woman, admittedly paid him three visits at his consulting rooms, she said in order to obtain an abortion. At the second and third visits instruments were admittedly used upon her and a few days after the third visit she had a miscarriage. The defence denied any intent to procure abortion, or any connection between the use of the instruments and the miscarriage.

The first three grounds in the Notice of Appeal read:

"(a) The Learned Trial Judge erred in not directing the Assessors that the complainant was an accomplice and as such should also have given accomplice warning as to her evidence. Consequently there has been a substantial miscarriage of justice.

(b) The Learned Trial Judge misdirected the Assessors on the issue of corroboration when he omitted to warn them that although they may convict on the complainant's evidence alone, it was dangerous to do so unless such evidence was corroborated. Consequently there has been a substantial miscarriage of justice.

(c) The Learned Trial Judge erred in not directing the Assessors as to :-

(i) what should have been corroborated;

(ii) What they may treat as corroboration. Consequently there has been a substantial miscarriage of justice. "

In view of the issues involved in these grounds it will be necessary to summarize the evidence. The complainant, who was referred to at the trial as Miss L, aged 22 years, testified that in June, 1979 she consulted Dr. Arun Mehta (who put the date as the 1st June) to ascertain whether

she was pregnant. He told her she was. The complainant said she asked Dr. Mehta if he could give her something to get rid of the child but he said he couldn't. Dr. Mehta denied that this request was made but it is clear that he prescribed some tablets which he said would help to establish the pregnancy. There is no suggestion that Dr. Mehta used any instruments on the complainant and he said that he did not.

The complainant waited for her period to come on (Dr. Mehta having told her that if it did not he could do no more) until the 28th June, on which date she went by appointment (arranged by her cousin) to see the appellant. In evidence the appellant confirmed that the appointment was so arranged but said that he was not told the reason for it. The complainant's evidence continued that she asked him if he could give her an abortion, as she was unmarried and did not wish to tell her parents. He examined her and said he would try; the fee would be $80 and she paid a $2 fee to the receptionist for the visit on the 28th June. An appointment was made for the 30th June.

In his evidence later the appellant's version of this visit was that the complainant had not told him she was pregnant. There had been no conversation about abortion or fees for one. Her complaint was that she was not feeling well and having slight abdominal pains. He recorded this on her card (Exhibit 5).

The complainant's next appointment was for the 30th June. On this occasion she said that in the presence of the receptionist Louisa John the appellant inserted an instrument which seemed to expand the vagina, and she felt as though

he was "clipping". That took about fifteen minutes and he said she would have to come back. She paid him $80 on this occasion but was not given a receipt.

The third appointment was on the 7th July. A similar procedure followed, in the presence of the receptionist, who assisted again with a torch. In cross-examination the complainant said that she felt the instrument "screwing" inside and there was a clicking noice - and "he must have been using another instrument to tap". There was discomfort and slight pain. The proceedings took about half an hour. After that the appellant drew a disgram on a piece of paper (Exhibit 1) to show her how he was trying to get the baby out. He said he was trying to open up the passage for that purpose. She was asked to return in two weeks time. After this treatment she felt all right and went to Deuba that night and for the week-end. The next day (Sunday) however, she had some stabbing pains in the abdomen. They continued during Monday, though she went to work. On that day she telephoned the appellant and told him, he said it would be O.K. On Tuesday, having told her father of her pains she went to the hospital. The next day she had the miscarriage. Her evidence concluded with the statement that she had consulted no other doctor (except Dr. Mehta) before consulting the accused: she had consulted no other doctor for an abortion while accused was treating her and no other doctor tried to procure a miscarriage. She hddtold her "boy friend" of the pregnancy after visiting Dr. Mehta, and her father became aware of it when she went to hospital.

The prosecution called as a witness the appellant's receptionist Louisa John. She confirmed the appellant's version (given later) of the instruments he used and his estimate of the time

taken in the two internal examinations. She confirmed that a fee of $2 was paid on the 28th June; the appellant had followed an usual custom by signalling to her how much to charge. On the 30th June she said she enquired of the appellant how much to charge but he said nothing, so no fee appeared against her name. There was no record of a fee having been paid on the 7th July.

The appellant's version of the first consultation i.e. the 28th June has been given above. There was no mention of pregnancy or abortion. There was no explanation of why another visit was necessary three days later, but the appellant said she was still complaining of lower abdominal pain. On the 30th June he examined her internally, using only two instruments: a vaginal speculum (Exhibit 3) to widen the canal and a sponge forceps (Exhibit 4) with a swab to clean the canal. He gave a demonstration of rotating the forceps which scraped against the speculum making a metallic clicking sound. He used no other instruments and becoming for the first time aware that the patient was pregnant he recorded on Exhibit 5 a diagnosis of early pregnancy. Having informed the complainant, he drew the sketch Exhibit 1 to show her "to explain what could happen to this pregnancy". It could be normal or "with her lower abdominal pain and bleeding" there might be a miscarriage. There are vital differences here from the complainant's version - apart from the fact that she alleges that Exhibit 1 was drawn after the 3rd visit, she denies abdominal pain and claims to have informed the appellant of her pregnancy from the outset.

The account of the third visit was similar. Each examination took about five minutes. The same two instruments were used in the same way. His recorded findings on Exhibit 5 included "Threatened abortion". The appellant was shown a third instrument

which he described as a urethral sound (Exhibit 7). It, together with other exhibits, had been taken from his consulting rooms when a search warrant had been executed. He denied using it in the examinations and there is no evidence that he did.

On the subject of charges to patients the appellant said that he had no fixed charge but for every visit there was a charge. No explanation was given why there was the undisputed departure from the normal procedure in this case.

In hospital on the morning of Wednesday the 11th July the complainant miscarried; she was afterwards examined by Dr. S.W. Raj and Dr. M.E. Schramm. Their evidence can leave no doubt that the miscarriage had occurred through a ragged tear in the fornix - the neck of the womb being still closed. The laceration had been caused by some instrument. Dr. Schramm's evidence on the subject of the possibility of the instruments Exhibits 3, 4 or 7 being used to make the tear is not particularly clear. The passages were quoted by the learned trial Judge in his summing up:-

> " She was then shown the forceps (Exhibit 4) and the urethral sound (Exhibit 7):
>
> > 'It (urethral sound) could be used to pass into uterus but it would not be my choice because of its shape. These instruments could be used for this operation. Lacerations found on Miss L could have been caused by these instruments. The forceps could be used to cause the laceration but I would have used some thing with teeth. Exhibit 7 (urethral sound) could have caused the lacerations found on L. Exhibit 4 (forceps) would not cause those lacerations, not likely. '

In cross-examination she said;

> ' Exhibit 7 (urethral sound) is the only one of the three instruments that would have caused the lacerations I saw. A wide variety of instruments could have caused the lacerations.'"

The learned trial Judge's subsequent direction on this matter was in these terms:-

> " As for the lacerations on L's uterus, the prosecution do not have to establish the exact identity of the instrument used to cause it. In this case, however, evidence has been produced that a speculum and forceps were used on L, and that a urethral sound was found in the accused's surgery. Dr. Schramm's evidence is that she herself would use neither for this kind of operation. The forceps, she said, would be unlikely to cause it. That laceration, however, she said could be caused by a variety of instruments. The evidence of the use of forceps comes from the accused himself and his receptionist called as a witness by the prosecution.
>
> The laceration was undoubtedly there and it was undoubtedly caused by an instrument. "

The learned Judge's summing up is criticized in that the general direction on corroboration is insufficient. It is contained in the following passage:-

> " As counsel for the defence has stated, in a case such as this, it is dangerous to convict a person on the evidence of a complainant alone. In this case L is the complainant. You ought to look for some corroboration of her evidence. Corroboration really means some evidence, which implicates the accused in the offences with which he is charged. Such corroboration is not essential in law and you may, if you are satisfied beyond reasonable doubt that L has told the truth, find the accused guilty on her evidence alone, but as I have said you should look for some corroboration of her evidence.

> There are two main elements of the offence of this kind of attempted abortion, firstly that the accused did use instruments on L and secondly, that in doing so his intent was to procure her miscarriage. The first element is admitted by the accused himself and is fully corroborated by Louisa John's evidence. The main issue before you is that of the second element, the element of intent. What was the purpose of using instruments. "

In considering the gounds of appeal we would emphasize that, as shown by the cases of Director of Public Prosecutions v. Hester [1973] A.C. 296 and Director of Public Prosecutions v. Kilbourne [1973] A.C. 729, a direction to a jury on a matter of corroboration may be framed in accordance with the particular requirements and circumstances of the case before the Court. Ground (a) appears to complain that the learned Judge should have designated the complainant as an accomplice. There are some circumstances, as in the case of Sidhu (1976) 63 Cr. App. R. 24 in which it has been thought better not to do so, but even if it might have been done in the present case, it is not a material matter. the learned Judge gave the warning in respect of the particular witness, having earlier included her among witnesses who might have a reason for being interested one way or the other. He passed on counsel's suggestion that she had concocted her evidence to save face with her parents. It would not have assisted the assessors further to have had her described as an accomplice.

It is true that the learned Judge did what this Court deprecated in Shardha Nand and Another v. Reginam (Criminal Appeal No. 25/1979) and may have watered down the word "dangerous" by the phrase "should look", but in the present circumstances

we do not consider that a matter of any moment. This aspect of the matter is challenged in Ground (b) of the appeal. Our view of the case is that, while as a matter of law, the appellant was, on her own evidence, an accomplice, there is a singular lack of the motivation that would normally render it desirable to seek confirmation of an accomplice's evidence, Such possible motivation appeared in a high degree in Shardha Nand's case. All that counsel suggested here was that she had concocted her evidence to save face with parents. Admittedly and naturally she wished to conceal her condition at an earlier stage, but by the time she gave evidence her secret was out. Her father and boy friend at the very least knew all about it. There was no question of shifting blame from herself; on her own story everything the appellant did was at her request. A motive to accuse the appellant in order to protect someone else could be suggested, but is entirely speculative and appears to put an undue strain on the proved and admitted facts. It appears to us that the necessity for corroboration arising out of the complainant's position qua accomplice as a matter of degree, is slight. In the circumstances we think that the way in which the learned Judge used the word dangerous was adequate.

The learned Judge did not tell the assessors in his direction that they must first decide whether they considered the evidence of the complainant capable of belief. This has not been made a ground of appeal and we think rightly so. Almost the whole of her evidence (except on the vital issue) in coincident with the defence version, and such a direction would be superfluous.

Ground (c) attacks the summing up on the ground that the learned Judge failed to point out the particular evidence which the assessors could treat as corroboration. As this Court said in Shardha Nand's case - "The pieces of evidence which are capable of constituting corroboration ought to be pointed out by the Judge who should also state that no other evidence can be considered by them on this topic."

We do not consider that this rule has been elevated so far as to have become a rule of law though it has become established as a rule of practice. R. V. Charles (1976) 68 Cr. App. R. 334 and R. v. Reeves (1978) 68 Cr. App. R. 331 indicate that where there has been failure to direct in the respect mentioned, the summing up is regarded as "defective", though in Reeves' case the Lord Chief Justice used the words "in this case at all events". These judgments appear to have followed on that in R.v.Rance (1975) 62 Cr. App. R. 118 in the report of which, at p.122, the following passage occurs:-

> " The sixth ground in Rance's case is that the judge, whilst properly directing the jury that the evidence of one Flannery, a witness for the prosecution, required corroboration, failed to direct the jury as to what evidence was capable of corroborating the said witness. Our conclusion is that in so far as there is justification for that criticism it cannot carry sufficient weight to affect the safety or satisfactory character of the verdict. "

In that case it would appear that the defect was not treated as necessarily fatal. Mr. Lindsay for the respondent submitted that the case of Kilbourne (supra) is now the leading authority on corroboration and that it had the effect of easing the stringent rules on the subject. That may be so, but it does not appear to touch the particular topic

under discussion, and the cases we have mentioned are later in time than Kilbourne.

It is necessary to look at the learned Judge's treatment of the evidence in his summing up after he reached the stage of his direction on corroboration. In the last passage we have quoted he rightly divided the isssues into the use of instruments and (the main issue) the intent with which they were used. As to the first there was no need for him to say more than he did; there was full corroboration by admission and by the receptionist's evidence. He did not, however, refer any further to corroboration.

In approaching the main issue he first dealt with the laceration of the uterus and its significance. He expressed the view that there was no doubt that it was caused by someone with an instrument with intent to cause a miscarriage. There has been no criticism of this and we will return later to this aspect of the summing up.

He then dealt with the diagram Exhibit 1. He mentioned the opposing versions of the reason for its being drawn. He then left the matter to the assessors as "issues of fact for you to decide". In our opinion this was not a matter capable of providing corroboration in the absence of any evidence that the diagram itself (including a sport which the appellant had marked on it) was more consistent with one version than with the other. It's evidential value remained to be determined as a matter of pure credibility between the evidence of the complainant and the appellant.

Then the Judge referred to Dr. Mehta's evidence as having confirmed the fact that the complainant was pregnant four weeks earlier. This evidence, if believed (and there was no challenge to it) would amount to some degree of corroboration implicating the appellant by discrediting his version of the purpose of the complainant's visits. The learned Judge mentioned the evidence without referring to the aspect of corroboration.

The next matter discussed was the card Exhibit 5. The direction was entirely negative. In effect it pointed out that if they believed the complainant's evidence that abortion was discussed on the 28th June the card could be seen as a cover-up. If there was no such discussion the card would be reliable. As the card itself did not help to resolve this issue it did not corroborate the complainant's evidence and was not held out as doing so.

The next aspect of the evidence dealt with by the learned Judge was that concerning payment or non-payment of fees. He reminded them that the complainant, a new patient, had been charged $2 for the visit of the 28th June, and nothing thereafter. It was put as a question of fact and as a query whether it supported the complainant's version of having paid $80 on the 30th June. In our opinion the evidence on this topic was corroborative and could have been formulated more strongly. The receptionist confirmed that no payment was recorded except the original $2. She gave evidence of a practice of the fee being signalled to her and of her having raised the question of a fee on the 30th June without receiving a reply. The appellant's evidence, augmented by that of the

receptionist, amounted to an admission of special treatment of the complainant in the matter of fees, a course of conduct which the assessors could have regarded as so unlikely in the circumstances as to corroborate the complainant's version.

We return now to the most important matter - the laceration of the uterus. This shows an abortion by instruments and therefore of the nature which could be anticipated pursuant to the complainant's evidenc The evidence tends to confirm that of the complainant and came from an independent source quite outside her own testimoney. Does it implicate the appellant so as to be available as corroboration of her story? The answer to that is that it was open to the assessors to give it weight in conjunction with the appellant's own evidence, as a major item of circumstantial evidence against him.

In R. v. Baskerville [1916] 2 K.B. 658, at 667, the judgment reads -

> " The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in Reg. v. Birkett. Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice. "

The appellant's own evidence is that he used instruments on the complainant and examined her as late as the 7th July. It must be taken that had his patient at that stage had a laceration in the uterus caused by instruments he would have observed it. The medical evidence from the doctors at the hospital, by discrediting the appellant's version that if a

miscarriage ensued it would be a natural one, could be accepted by the assessors as corroboration of the complainant. We would observe in passing that the complainant's evidence that, having started pains on Sunday the 8th July, she telephoned the appellant to report them on the Monday 9th July, is also corroborated by the appellant's own evidence.

We have dealt with five aspects of the evidence: Exhibits 1 and 5, Dr. Mehta's evidence, the question of the professional fees, and the medical evidence of the laceration of the uterus. The learned Judge should have directed the assessors clearly which of these matters were capable of providing corroboration and which were not. He did not do so, and it must be accepted that his summing up is deficient in this respect. It remains to decide whether the deficiency is so material as to be fatal to the conviction.

We have said that the two exhibits 1 and 5 could not on the evidence in the case have provided corroborationl We think that the risk of the assessors having misunderstood the situation by thinking they were being told that they should regard them as corroborative, is remote. The learned Judge dealt with them in a neutral way as part of the evidence. The other three matters were in our opinion capable of providing corroboration of the complainant from the technical viewpoint and the assessors would not have fallen into error by so treating them. It was made clear that the weight of all the evidence in the case was to be decided by the assessors.

The crux of the matter, as it appears to us, lies in the direction given in relation to the all important medical evidence concerning the laceration

of the uterus. In this connection also we bear in mind Ground of Appeal (d) which complains that no direction concerning circumstantial evidence was given.

Towards the end of the summing up the learned Judge said:-

> " The laceration was undoubtedly there and it was undoubtedly caused by an instrument. What you have to ask youself is: Is it at reasonably possible that between 30th June 1979 and 11th June 1979 some other doctor or some other person caused that laceration?"

The puts the vital issue clearly and strongly. He continued:-

> "L's evidence is that she was being treated by the accused and no one else inserted any instrument into her vagina at all. She did not see any other doctor at all during that period. That gentlemen, is the issue before you. In answering that question you will consider the whole of the evidence before you including the evidence relating to the instruments produced in Court.
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> If you are satisfied beyond reasonable doubt that the accused alone was treating L during that period and no one else inserted any instruments into her vagina then, you may think that the inescapable inference is that the laceration on her uterus was caused by the accused and no one else.
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> If, on the other hand, you consider that she may have allowed someone else to examine her vaginal passage with instruments and had thus acquired the laceration for which she is now blaming the accused, you will hold that the accused did not cause that laceration. You will so hold even if you have a reasonable doubt on the issue.
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> If you are satisfied beyond reasonable doubt that no one but the accused deliberately caused the laceration on the wall of L's uterus, you will find the accused

guilty on each count, for in that case the intent to procure miscarriage will have been conclusively established.

If, on the other hand, you are not so satisfied, you will find the accused not guilty. "

So far as a direction on circumstantial evidence is concerned we are satisfied that what was said was amply sufficient. The existence of the laceration itself being unchallengable; would it have made the matter any clearer in the assessors' minds if the learned Judge had used more stereotyped words, such as "Can you exclude every other reasonable hypothesis except ....." instead of "Is it at all reasonably possible ....." Obviously not, in our opinion. There is therefore nothing in Ground (d).

As regards the failure to tell the assessors that this aspect of the evidence could constitute corroboration, it would in our judgment and as a matter of logic, have been superfluous if he had done so. He was in effect telling the assessors that the evidence of the laceration was damning if they were satisfied beyond reasonable doubt that the appellant caused it, which amounted to a direction that they should regard the evidence of the laceration as capable of corroborating the complainant's story. It has not been argued before us that in this last part of his summing up the learned Judge narrowed the issue too greatly by over emphasis of the importance of the evidence of the laceration. In our opinion he was justified by the evidence and the approach could have assisted the assessors in their task. Though our view of the matter is not strictly relevant we agree with his approach in this respect.

In the result we find that the appellant was convicted on ample evidence. The warning given by the learned Judge in relation to the danger of acting on accomplice evidence alone was in the circumstances sufficient. The summing up was subject to the criticism that there was failure to point out what aspects of the evidence could, or alternatively could not, have amounted to corroboration, but in this respect we are satisfied that the omission did not cause a miscarriage of justice, and we apply the proviso to section 23(1) of the Court of Appeal Ordinance (Cap. 3). No other ground of appeal is sufficiently meritorious to induce us to allow the appeal.

The appeal is therefore dismissed.

(SGD.) T. Gould
VICE PRESIDENT

(SGD.) C.C. Marsack
JUDGE OF APPEAL

(SGD.) T. Henry
JUDGE OF APPEAL