IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction

Criminal Appeal No. 38 of 1982

BETWEEN:

MACIU MELINIBUA — Appellant

- and -

REGINAM — Respondent

Appellant in person
J. Sabharwal for respondent

Date of Hearing: 2 November, 1982
Date of Judgment: 19th November, 1982

JUDGMENT OF THE COURT

Marsack, J.A.

This is an appeal against a conviction of attempted rape entered in the Supreme Court, Suva on 13 May, 1982 and also against the sentence of 2 years' imprisonment imposed upon that conviction.

The appellant has been without the assistance of counsel throughout. He conducted his own case in the Supreme Court and also before this Court. The grounds of appeal, prepared by himself, are very lengthy and do not, in our opinion, require setting out in detail here. Briefly summarised the grounds consist of a submission that the witnesses for the Prosecution were largely telling

lies. With reference to the evidence of the complainant, he sets out in his grounds of appeal:

> "That the evidence that she was telling all lies the whole lies and nothing else but lies."

He further contends that complainant was a willing partner in what took place. With regard to the other witnesses he states in his grounds of appeal:

> "The complainant herself was telling lies therefore other witnesses were brought to witness themselves telling lies."

The Court is unable to find, in the record, any possible support for these contentions. The evidence for the Prosecution, which was examined in detail by the learned trial Judge in his summing up, was accepted by him and by the assessors as being substantially true. Nothing put forward by the appellant, either in his grounds of appeal or in the argument before us, establishes any basis for criticising the judgment of the learned trial Judge, following the unanimous opinion of the assessors.

There is, however, one aspect of the appeal which we think it necessary to consider, although it was not argued before us; and the appellant himself, without legal advice, could not be expected to put it forward. That is the lack of direction by the learned trial Judge on the necessity for corroboration of the complainant's evidence in a case of this character. As to the summing up generally, we are of the opinion that what was said by the Court of Criminal Appeal in Trigg (1963) 47 Cr. App. R. 94 at page 98 applies here:

> "If this court may say so, apart from the topic of corroboration which will be dealt with hereafter, this was a summing up against which no possible criticism could be directed."

However, as is pointed out in Trigg's case there is a definite obligation on the trial Judge to warn the Jury of the danger of acting on the complainant's evidence

unless there is corroboration. No such warning was given in this case.

The authorities reported elsewhere on this point all refer to a trial before a Judge and jury; whereas in Fiji the trial is before a Judge sitting with assessors whose duties are not the same as those in the jury. Notwithstanding this difference the obligation to direct the assessors in the same manner as a jury still remains. This is set out in the judgment of this Court in Uday Narayan v. R 19 FLR 127 at page 130:

> "Although the constitution of a court with assessors is different from that of a Judge and jury, yet we are unable to accept Mr. Ramrakha's argument that the summing up to the assessors should be essentially different in principle from that of a jury. The assessors are not part of the court, in the sense that the verdict is a matter for the Judge alone. They are there to advise the Judge as to whether in their opinion the verdict should be one of guilty or not guilty; and as in the case of a jury they must accept what the trial Judge tells them as to the law but must make up their own minds as to the facts."

The question then arises as to what should be the result of the lack of direction to the assessors on the point in issue. The general principle is that failure to give such a direction in sexual cases necessarily results in the quashing of a conviction. The only way in which a conviction in those circumstances could be upheld would be by the application of what is known as the proviso. In Trigg's case at page 101 the principle is set out that where no warning as to corroboration is given where it should have been, then normally the proviso to Section 4(1) of the Criminal Appeal Act 1907 should not be invoked. In our Court of Appeal Act the proviso is set out in Section 23(1):

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

In the present case we are not satisfied that it would be proper to apply the proviso. In Trigg's case the learned Judges pointed out that only in exceptional circumstances can the proviso properly be applied in such cases and the court proceeded to quash the conviction because of the non-direction on the necessity for corroboration. Here we can find no such exceptional circumstances as would justify the application of the proviso and the conviction for attempted rape cannot stand, for the proof of appellant's intention to proceed without consent depended solely on the complainant's evidence.

But there was ample evidence of an indecent assault, and in fact that was admitted by appellant. In the course of his evidence at his trial he stated:

> "We went down the flight of steps and sat on the beach. While sitting on the beach I told her that we were to have sex. She said, "Wait a minute". We then stood up. We were holding arms around each other. I laid her down, took her panties off and I held her vagina. After that she told me to get her trousers. I stood up to find where her trousers was. She stood up and ran away.
>
> I forcefully took out her panties from her and half-slip to teach her a lesson not to do that to other persons - she tried to and tricked me. .....
>
> I taught her a lesson by touching her vagina with right hand."

Accordingly we think it proper to apply Section 24(2) of the Court of Appeal Act which reads:

> "Where the appellant has been convicted of an offence, and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

Accordingly we substitute for the verdict of attempted rape found in the Supreme Court one of indecent assault. Upon conviction for that offence we pass, in substitution for the sentence of 2 years imprisonment imposed in the Supreme Court, a sentence of 12 months imprisonment, to date from that of the original sentence, 13 May, 1982.

.....
Judge of Appeal

.....
Judge of Appeal

.....
Judge of Appeal