IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO: AAU0019/97S
(High Court Criminal Appeal No. HAA0008J.96B)

BETWEEN:

SURUJ PRASAD S/O BANS RAJ

APPELLANT

-AND-

THE STATE

RESPONDENT

Mr. M. Raza for the Appellant
Mr J. Naigulevu for the Respondent

Date and Place of Hearing:	**6 February, 1998, Suva**
Date of Delivery of Decision:	**12 February, 1998**

JUDGMENT OF THE COURT

This is a second appeal on a point of law from a decision of a Magistrate pursuant to s.22(1) of the Court of Appeal Act (Cap. 12).

After a defended hearing in the Resident Magistrate's Court at Labasa on 6th December 1995, the appellant was convicted on one charge of indecent assault contrary to s.154(1) of the Penal Code (Cap. 17). He was later sentenced to 6 months' imprisonment, suspended for 12 months. His appeal to the High Court against conviction was dismissed by the Chief Justice on 7 November 1996.

After discussion with counsel at the hearing in this Court, the following questions of law emerged and were argued:

(a) What was the effect of the failure of counsel for the prosecution to cross-examine the appellant at all, when the appellant elected to give sworn evidence and simply denied ever touching the complaint either indecently or at all.

(b) Did the Magistrate in the above circumstances misdirect himself on the onus and/or burden of proof?

Hearing in Magistrates' Court

The hearing in the Magistrates' Court, commenced on 22 November 1995. The complainant alleged that on 6 April 1993, when she was aged 14, she commenced working for the appellant at his office in Labasa. He had offered to teach her to type. She claimed that after she had made some efforts at typing, the appellant told her to sit on a settee and closed the door, saying he wanted to talk to her. She requested him to open the door before talking to her. He did not do so, but held her by the breast and kissed her on her lips and cheek. She did not consent but asked him again to open the door. He told her that if she wanted employment with him, she had better allow him to have sex with her. She told him she would not allow him to do these things to her.

Eventually she left the appellant's premises and complained to the owner of a nearby restaurant who then put her in touch with a Police Officer. She then made a statement at the Police Station.

The complainant was cross-examined extensively by counsel for the appellant. The Magistrate was critical of the manner of the cross-examination, saying that she was 'ruthlesly cross-examined, her character was viciously attacked, expressions such as "totally, blantly and incorrectly lying were used.' The Magistrate considered that she had given a true account and that she was unshaken in cross-examination, sticking "resolutely" to her story. He characterised many of the allegations put to the complainant as "wild, unfounded and generalised" and was critical of defence counsel for raising them.

The complainant further said in evidence that, as she was leaving the office, the appellant asked her not to report the incident or tell anyone; that when walking to the Police Station with the Police Officer whom the restaurant owner had initially approached, she encountered the appellant who asked her where she was going. She made no reply. The Magistrate accepted all this evidence.

The Magistrate rejected the bulk of the evidence of two prosecution witnesses whom he felt had been sent on behalf of the appellant to the complainant's father to have him persuade her to withdraw her comaplaint. In this regard, the Magistrate accepted the evidence of the complainant's father. He also accepted evidence of recent complaint from the restaurant

owner as well as the evidence of the policeman whom the restaurant owner contacted as soon as the complaint had been made to him by the complainant.

The appellant was interviewed by the Police but denied any allegation of impropriety.

After the Magistrate had rejected a submission of 'no case to answer,' which we consider could have had little chance of success in the light of a fairly strong prosecution case. the appellant elected to give sworn evidence, and not just to make an unsworn statement. All he said in evidence was 'I did not touch that girl or touch her breast'. He did not comment on any of the ancillary evidence - notably the allegations that he may have arranged for the complainant's father to be persuaded to have his daughter withdraw the complaint.

We find it surprising and concerning that counsel for the prosecution failed to cross-examine the appellant at all. We think that various salient points in the prosecution - some of which were relied upon by the Magistrate in his decision - should have been put to the appellant for his comment. It is possible that the clearly favourable view of the prosecution evidence formed by the Magistrate at that stage might have been modiied by appellants' demeanour under cross-examination.

In his judgment, the learned Magistrate reviewed the prosecution evidence. He accepted the complainant's evidence of the indecency and was critical of the conduct of the

defence. He noted the accused's evidence but did not comment on the total failure of prosecuting counsel to cross-examine the appellant. He did comment that the appellant did not mention any other item of prosecution evidence, except to deny the indecent assault.

The Magistrate opined that 'the accused had no defence right from the word go' He was of the view that the case had been defended in the hope that with no admissions, under vigorous cross-examination, the complainant might have broken down and said things which may cast doubt upon her credibility or that there may be no corroboration because PW 6 and PW7 might turn hostile. The Magistrate said that the only defence raised, if the Court believed it, was that the complainant had concocted the story. "The defence did not advance or even suggest any reason as to why a 14 year old girl would do such a thing against a person she did not even known before that day."

Despite comments which we feel were inappropriate because of the appellant's constitutional right to defend the charge, the Magistrate made it clear in his judgment that he was not putting any onus on the defence.

The Magistrate went on to find corroboration of the complainant's evidence in:

(a) the accused's request to the complainant after the incident not to tell anyone or report it to the Police.

(b) the accused's attempt to speak to her when she was on the way to the Police Station.

(c) The attempt by the accused's friends to procure the withdrawal of the complaint.

The first two of these matters cannot constitute corroboration because they constituted evidence from the complainant herself. The policeman said nothing about the appellant accosting the complainant when he and the complainant were en route to the Police Station. The attempt by the accused's friends was capable of constituting corroboration.

The Magistrate went on to say that he found the complainant's evidence so convincing and uncontradicted that he would still have convicted despite a lack of corroboration, after warning himself of the dangers of so doing. He opined that one rarely found a witness "who can so admirably withstand such vigorous cross-examination as the complainant in this case did."

The Magistrate ended his judgment with the statement that he was satisfied that the prosecution had proved its case beyond all reasonable doubt.

High Court Appeal

When rejecting the appeal in the High Court, the Chief Justice emphasised the well-known principle that an appellate Court will interfere with findings of fact only if the findings are shown to be manifestly wrong or cannot be supported by the evidence. He quoted extensively from the Magistrate's judgment to show that the Magistrate had clearly preferred the prosecution evidence. He considered that the trial in the Magistrate's Court had been conducted exceptionally fairly and that there was ample evidence to justify the conviction.

Points of Law on Appeal

A second appeal to this Court against a finding of a Magistrate's Court in a criminal prosecution is allowed only on a point of law. The only point of law which we find worthy of consideration is concerned with the total failure by counsel for the prosecution to cross-examine the appellant.

Although counsel for the appellant submitted that the Magistrate misdirected himself on the onus of proof, we can find no justification for that submission from a perusal of his judgment. Basically, the appellant complains about the Magistrate's findings of fact which were against him. His appeal against those adverse findings of fact was rejected by the High Court. The legislation permits no further appeals on fact.

In Hart v. R. (1932), 23 Crim. App. R.202 the accused's defence was one of alibi: he called several witnesses who were not cross-examined, even although prosecution witnesses had raised doubts about their evidence. The jury was invited by the prosecution to disbelieve these alibi witnesses, even though they had not been cross-examined. Without disbelieving them, the jury could not have found that the appellant had been present at the time of the alleged offence. The summing-up failed to point out the obvious difficulties arising from this situation.

The English Court of Criminal Appeal said at 205

> *"In our opinion, if, on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness-box or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted. Here no questions were asked in cross-examination. Having regard to that matter, and also to the summing-up, we have come to the conclusion that the conviction was unsatisfactory and cannot stand, and that the appeal ought to be allowed."*

This authority was followed in the Supreme (now High) Court of Fiji by Mishra, J. in Baleikasavu v. R. (Unreported Criminal Appeal No. 11 of 1979, judgment 3rd May 1979).

In the present case, we consider that counsel for the prosecution should have cross-examined the accused for the reasons stated in the above quotation. However, in a case where the prosecution evidence was so strong we cannot see that a substantial miscarriage of justice has resulted from this failure. We therefore think it appropriate to apply s.22(6) of the Court of Appeal Act.

The appeal is accordingly dismissed.

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Sir Moti Tikaram
President
FIJI COURT OF APPEAL

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Sir Ian Barker
JUDGE OF APPEAL

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Justice J. D. Dillon
JUDGE OF APPEAL