IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0008 OF 1997S
(High Court Criminal Action No. HA0002 of 1996)

BETWEEN:

MAIKA SOQONAIVI

Appellant

AND:

THE STATE

Respondent

Coram: **The Rt. Hon. Sir Maurice Casey, Presiding Judge**
The Hon. Sir Ian Barker, Justice of Appeal
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing: **Wednesday, 10 February 1999, Suva**

Counsel: **Mr I. Fa for the Appellant**
Ms N. Shameem for the Respondent

Date of Judgment: **Friday, 12 February 1999**

JUDGMENT OF THE COURT

The appellant seeks leave to appeal to the Supreme Court against the judgment of this Court of 13 November 1998 dismissing his appeal against his conviction in the High Court on 11 August 1997 on a charge of rape. Under s.122(2) (a) of the 1997 Constitution this Court may only grant leave to appeal on a question certified by it to be of significant public importance.

On his appeal to this Court the only question left for decision was the adequacy of the trial Judge's direction to the assessors about corroboration of the complainant's evidence. Two matters were relied on by the prosecution -- namely, evidence of injuries to her face which she said were the result of blows struck by the accused to force her to have intercourse; and evidence of her distressed state when seen at home shortly after the alleged offence. In his

evidence the appellant said she consented to intercourse and that he hit her about the face afterwards in the course of an argument.

The judge told the assessors that to find the accused guilty they must accept the evidence of the complainant as truthful and reject the accused's evidence; and that if they felt his version could be true, they could not find him guilty. He gave a standard direction on corroboration, and pointed to the evidence of facial injuries and of her distressed state as capable of corroborating her evidence that she did not consent. But he warned them that they had to exercise caution before accepting that evidence as corroboration because of the accused's evidence that they were inflicted afterwards, telling them that if this was so these matters could not corroborate her evidence that she did not consent. They could only use them for this purpose if they were satisfied the injuries were inflicted before the intercourse occurred.

After referring to the evidence of her distress as capable of affording corrroboration, he again warned them to exercise caution about it, saying that they must first exclude the possibility that she was distressed for some other reason consistent with the accused's explanation, such as remorse because she had participated in intercourse, or because he had assaulted her causing painful injury.

The appeal to this Court was dismissed on the majority judgment of the President and Tompkins J.A., upholding as correct the trial judge's direction that the evidence of injury and distress was capable of amounting to corroboration. In his dissenting judgment Sheppard J.A. thought the judge was wrong in leaving the assessors with the impression that they could regard that evidence as corroborative before they had reached a conclusion on whether they preferred the complainant's evidence or that of the accused. He added:-

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> ***"I do agree that, if one reads the summing-up as a whole, one may be able to spell out an approach by his Lordship which does explain the need for the assessors to reach a conclusion on the veracity or otherwise of the complainant's evidence before coming to the question of corroboration. But I do not think that one can safely take the view that lay assessors would necessarily have followed the path which I think was the correct one. It must be remembered that, if they decided to accept the complainant's version of events unaided by the evidence which was said to be capable of corroborating her account of the night's events, they would have gone a long way towards deciding the case. There would be little left for them to decide except whether they were satisfied beyond reasonable doubt. I think the problem is that the matters available to be used by the assessors if they thought it appropriate, as corroborative of the complainant's evidence were put on her side of the case as if they, in some way could themselves persuade the assessors to prefer her evidence to that of the accused. This is where I think there is an error".***

This analysis highlights the potential for circularity of reasoning that might influence the reception of corroborative evidence when there are conflicting accounts by the complainant and the accused about how the matters sought to be relied on arose. Mr Fa submitted that such evidence should not be regarded as corroborative at all, because it does not fulfil the requirement that it comes from a source independent of the complainant -- see Gonevou v State (FCA No.12 of 1992; 9 February 1994), citing R v Baskerville [1916] 2 KB 658 at 667.

However, the evidence relied on for this purpose came from independent witnesses describing the complainant's condition after the alleged rape. There can be no doubt that if the accused had not contested her account of the cause of her injuries and distress, this evidence would have been accepted without hesitation as being capable of corroborating her claim that intercourse took place without her consent, if her evidence of what happened was believed. The fact that their cause was disputed by the accused cannot alter the essential

character of the evidence of injury and distress, as being evidence capable of corroborating the alleged lack of consent, provided that the assessors believed the complainant's account of how they were caused, and rejected that of the accused. As the judgments on appeal demonstrate, their Lordships were concerned about whether this proviso had been made with sufficient clarity in the Judge's directions.

A "question" on appeal within the meaning of s.122(2)(a) of the Constitution must be one that is realistically capable of argument. Generally speaking, it is not enough for an applicant to put forward a challenge to existing law already finally settled by long standing authority, as is the law relating to coroboration affecting this case. On similar grounds the applicant's contention that corroboration must be proved beyond reasonable doubt must also be rejected. It is only the essential elements of the offence and the guilt of the accused which must be proved to this standard.

Any appeal in this case would be confined to the way the legal requirements of corroboration were put to the assessors and can have no significance beyond it. The question at issue, therefore, lacks the requirement in s.122 (2) (a) of the Constitution that it be "of significant public importance", and the application for leave must therefore be dismissed.

It may still be open to the accused to apply to the Supreme Court for special leave to appeal under s.122 (2) (b) of the Constitution, the limitations to its power to grant it under s.7(2) of the Supreme Court Act 1998 being apparently less restrictive than those imposed on this Court .

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Result:

The application for leave to appeal is dismissed.

M.L. Casey

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Sir Maurice Casey
Presiding Judge

Ian Barker

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Sir Ian Barker
Justice of Appeal

I.R. Thompson

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Mr Justice Ian R. Thompson
Justice of Appeal

Solicitors:

Messrs. Fa & Company, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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