

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

Criminal Appeal No. AAU 0043/2006
(High Court Criminal Case No. HAA 174 of 2005L)

BETWEEN:

DINESH LAL SHARMA
(f/n Manik Lal)

AND

THE STATE

Appellant in Person

R. Gibson for the Respondent

DECISION

- [1] On 9 August 2005 the Appellant was convicted after trial by the Rakiraki Magistrates' Court of one count of attempted rape contrary to Section 151 of the Penal Code.
- [2] On 11 August 2005 the Appellant was sentenced to eight years imprisonment. As is clear from the detailed sentencing remarks, the Resident Magistrate took into account the only significant mitigating factor which was that the Appellant was a first offender. She however also took into account the very violent and sustained attack by the Appellant on the complainant who suffered numerous bodily injuries as well as very considerable

distress. That distress was further aggravated by the painful necessity for the complainant to relive her ordeal when she was required to give evidence at the Appellant's trial. The maximum available sentence for the offence is ten years imprisonment (see Penal Code (Penalties) (Amendment) Act 2003).

- [3] On 15 December 2005 the Appellant's solicitors filed grounds of appeal against conviction and sentence in the High Court at Lautoka. There were two grounds of appeal against conviction and the sentence was said to have been manifestly excessive.
- [4] The High Court rejected the first ground of appeal which was that the Resident Magistrate failed to consider whether and if so, how, the complainant's evidence had been corroborated. The Court referred to Seremaia Baleilala v. The State (AAU 3/04) which is authority for the proposition that a corroboration warning in sexual cases is no longer mandatory. The High Court also pointed out that the Appellant was seen by several independent witnesses in a state of undress close to where the complainant stated that she had been assaulted, that the Appellant admitted having intimate contact with the complainant and that the complainant had suffered multiple and visible bodily injuries. All this amounted, in the High Court's view, to "an abundance of evidence which does corroborate" the complainant's version of events.
- [5] The second ground of appeal was that the Resident Magistrate had not held a *voir dire* although the Magistrates' Court had been told that the admissibility of the Appellant's statement to

the police was to be challenged. The High Court accepted that a formal trial within a trial had not been held but took the view that in light of the abundance of other evidence against the Appellant no miscarriage of justice had occurred.

- [6] As is also clear from page 10 of the Resident Magistrate's comprehensive judgment, the voluntariness or otherwise of the Appellant's statement to the police was indeed carefully considered. The Resident Magistrate pointed out that at no time prior to his cross-examination of the police officers had the Appellant ever complained of a police assault upon him and that following his cross-examination of the police the matter of assault was not raised again. In these circumstances the Resident Magistrate found as a fact that the Appellant's confession to the police was voluntarily made.
- [7] So far as sentence was concerned the High Court took the view that although the sentence was at the top of the range it was not manifestly excessive or wrong in law.
- [8] On 10 February 2006 the appeal against conviction and sentence was dismissed.
- [9] The present application was filed on 11 July 2006. Under Section 26 of the Court of Appeal Act an appeal from the High Court in its appellate jurisdiction must be lodged within 30 days of the decision of the High Court.
- [10] This application is an application for leave to appeal out of time against the decision of the High Court confirming the Appellant's

conviction by the Magistrates' Court. The sentence passed by the Magistrates' Court was clearly lawful and there is nothing to suggest that it was "passed in consequence of an error of law" (Court of Appeal Act, Section 22 (1A) (a)). Accordingly, no appeal against the sentence as confirmed by the High Court lies. The question of granting leave to appeal against the sentence does not arise.

[11] In his petition of appeal to this Court entitled "Application for leave to appeal against sentence" the Appellant did not refer to the grounds of appeal against conviction presented to the High Court. He did however complain that he was unrepresented by counsel for part of his trial.

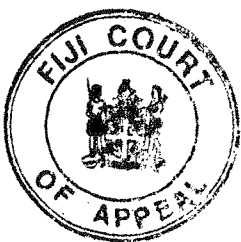
[12] The trial commenced on 13 April 2005. The complainant was a foreign tourist who wanted to return home. Her evidence in chief was taken on the first day of the trial and she was then cross-examined by counsel. On the adjourned date for the continuation of the trial defence counsel did not appear. The Resident Magistrate, after considering the matter, decided to proceed in his absence. The five independent lay witnesses who gave direct eye-witness evidence inculcating the Appellant were cross examined by the Appellant who then gave evidence on oath on his own behalf.

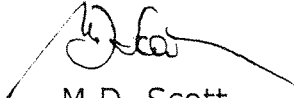
[13] The Appellant suggests that the right to legal representation given to him by Section 28 of the Constitution had been compromised by the Resident Magistrate's failure to adjourn the trial when defence counsel failed to appear. The Appellant suggests that as the result of this decision his trial was unfair. I

do not agree. As pointed out by this Court in Albertino Shankar & Another v. The State (AAU 26/03 – FCA B/V 05/612) the constitutional right to be represented by counsel is not absolute. Where counsel fails to appear, an accused does not thereby acquire an automatic entitlement to an adjournment. What has to be considered by the Court is whether, in all these circumstances, it would be just to proceed in counsel's absence. In the present case there were good reasons to proceed with what was a relatively straightforward case in which an abundance of independent and direct evidence was presented by lay witnesses.

[14] In my opinion this Appellant has no right of appeal against the sentence imposed upon him and no arguable ground of appeal against conviction. The only explanation for failing to file a petition of appeal within anything like the required period was a claimed ignorance of legal procedures. If accepted, such a ground would render the time restrictions on appealing wholly nugatory.

[15] In all these circumstances, leave to appeal out of time is refused.




M.D. Scott

Resident Justice of Appeal

4 September 2006