IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0026 OF 2007

BETWEEN : **ANARE TEBA** Appellant

AND : **THE STATE** Respondent

BEFORE THE HON. JUDGE OF APPEAL MR JUSTICE JOHN E. BYRNE

Counsel for Appellant : In Person
Counsel for Respondent : D. Morters

Date of Hearing : 15th August 2007
Date of Oral Ruling : 15th August 2007
Date of Written Ruling : 21st August 2007

RULING

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[1] Pursuant to leave given by the President of this Court on the 1st of June 2007, the Appellant seeks leave to appeal out of time against his conviction for Rape in the High Court at Lautoka on the 9th of June 2005.

[2] After hearing submissions by the Appellant who appeared in person and counsel for the Respondent I stated that after reviewing the evidence and submissions I refused leave to appeal to the full Court of this Court but in

view of certain unsatisfactory features of this case I would publish my ruling later, which I now do.

[3] The first of the unsatisfactory features is that the record of the proceedings in the High Court is incomplete because the file copy of the summing-up of the trial Judge is missing from the file. I am told that the same summing-up cannot be retrieved from the Judge's secretary's computer. This computer was given to a typist named Ganga at the beginning of the year 2006 for her official use when the Judge's secretary received a new one from Suva. While with the typist the computer crashed onto the ground and was therefore sent to ITC in Suva for repair. The computer was repaired and when received in Lautoka it was given to one of the Civil Judges' secretaries for her official use and is still being used by her. All the material stored on it has been found to be erased.

[4] On or about the 26th of March 2007 the Hard drive for Mr Justice Govind's computer went missing from his Chambers. It is believed to be stolen and has been reported to Police. The Deputy Registrar believes that probably the same summing-up was stored in that computer.

[5] The second unsatisfactory feature of the case is that although on page 97 of the Court Record the trial Judge states **"Summing-up delivered (attached)"**, immediately following this the Judge asked counsel for the parties whether they requested any amendment, corrections or deletion from the summing-up and both counsel replied that they did not.

[6] The assessors then retired to consider their opinion.

[7] They returned after about two hours when they delivered their opinions. By a majority of two to one they found the Appellant guilty whereupon the trial Judge said "**I do not have sufficient reason to disagree with the majority opinion. I therefore find this Accused guilty and he is convicted as charged".**

[8] There is no summing-up attached to the Court Record nor, I am told by counsel for the Respondent today, did the State prosecutor keep any notes of the Judge's summing-up which I find very strange.

[9] I consider it of the utmost importance in criminal trials that the trial Judge should prepare a written summing-up and then read it and deliver copies to counsel for the parties. They can then read the summing-up after having heard it and inform the Judge whether they request any additions or amendments to it or re-directions to the assessors.

[10] It would appear that the practice of Judges in this regard differs. In my view it should not and there should be a uniform practice adopted so that if there is an appeal to this Court the Judge's summing-up may be considered by the Court so as to assist it in reaching a decision.

[11] **The Grounds of Appeal**

The Appellant gave eight grounds for seeking leave to appeal but the last four of these refer only to mitigation of sentence and so must be disregarded by this Court.

[12] The four grounds on which I heard submissions were:

1) The learned Justice failed to consider the inconsistencies of the victim's statement.
2) The doctor's report provides no proof that the victim had been raped.
3) The inconsistencies of the victim's father's statements in terms of identification.
4) Witnesses were not called for the Appellant when they should have been.

[13] I shall deal with these grounds in their order now.

[14] In a statement to the Police made on the 12th of October 2002 which was later tendered in evidence the victim named Gangamma stated that she was aged 40 and had lived in Tavakubu for the previous seven years with her husband and three children. The land on which her husband built their house belongs to the Fijians of Tavakubu village. Her husband died in December 2001.

[15] She said that early in the morning of the 12th of October 2002 at about 1.00am she was rudely awakened by somebody shaking her. She opened her eyes and through the light of the lantern in her room saw a Fijian man in his early 30's, wearing a long sleeved coloured singlet, black three quarter trousers and black pompom standing near her. He was of dark complexion, medium built and short. She then shouted to her father to wake up. He came into her room and was told by the Fijian person in Hindi **"if you won't sleep I will press your neck"**. Her father stayed where he was and the Fijian man then pulled her from her bed holding her T-shirt which she was wearing and dragged her outside their back door. He smelt of liquor and dragged her into a bush 50 metres away

from the house where he forcefully pulled her panty and skirt out. He then dragged her another 100 metres into the bush, forcefully pushed her to the ground, took off his pompom and she saw that his head was bald. He then pulled back his three quarter trousers down to his knees and came on top of her, forcefully pushed her legs apart and pushed his penis which she called **"his hard thing"** into her vagina. He went in and out for sometime and ejaculated into her.

[16] In her evidence-in-chief she said that the Fijian man put his penis into her vagina. She saw his face and recognized the person as the Appellant Teba. She had known him for seven years. Her husband worked with him at the Carlton Brewery. She knew him as Teba Anare, the Accused. In cross-examination she said that she had mentioned the Appellant's name all the time but this is not borne out by her police statement. It was put to her that she had said the Appellant **"ejaculated in me"** whereas she had told the Police that he had ejaculated outside her.

[17] This appears to be somewhat contradictory but it is clear that the tribunal of fact ignored any inconsistency in this evidence if there was one, as to which I have serious doubts.

[18] The second ground argued by the Appellant was that the doctors' reports showed there was no proof that the victim had been raped. I have already mentioned the evidence of the victim as to this which indicates clearly to me that there was penetration by the Appellant. Penetration without the consent of the victim is the essential element of rape but the Appellant while denying penetration also relies on the pathology report which was tendered by consent. This discloses that three swabs of the victim's vagina were received by Assistant Forensic Officer Lorima Seru on the 24th of October 2002 from a Police Constable involved in the case at

the Lautoka Police Station. These were listed by Seru as GR1, GR2 and GR3. GR1 was a swab labeled in part as **"Gangamma, vaginal swab"**. The analysis of the swabs showed GR2 and 3 as having dry smears and the conclusion was that spermatozoa or sperm heads were not detected on the swab GR1 and the smears GR2 and GR3.

[19] This does not assist the Appellant because, as it is said, **"the emission of seed is not an element of the offence."** But that does not end the matter for the Appellant because a report by the Medical Officer who examined the victim at 7.50am on the 12th of October 2002 showed that there were bruises on the side of Gangamma's neck and swelling of the Right buttock with bruises as well, including the right hip. The doctor then drew a diagram in her report being a rough sketch of the victim's vagina. At the bottom of the sketch two crosses are marked and beside these there is written **"slight fresh bruises at the lower mid part of the perineal area of vagina"**. In my judgment the Court and the assessors were entitled to conclude that these were evidence of forced penetration.

[20] Ground 3 alleges that there were inconsistencies in the statement of the father of the victim in terms of identification. His evidence was short. He said that he saw a person take his daughter away at about 1.30am on the 12th of October 2002. He referred to him as Teba and started to press his neck **saying "if you yell I will press your neck"**. Then significantly in my view he said **"I recognized his voice, Teba. I have known Teba for the last four years"**. He saw Teba take his daughter into the bush but he could not do anything. When his daughter came back she told him that she had received injuries and was in pain. She told him she had been assaulted. The matter was reported to the Police.

[21] In cross-examination not one question was asked of the father as to the clothing the person who took his daughter away was wearing.

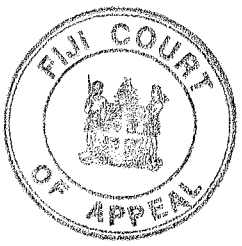
[22] The next evidence which to my mind is clearly capable of showing the guilt of the Appellant was that of Detective Sergeant. Sainiana Lawaicei of Lautoka. He said that he attended the scene of the alleged crime and went to the house of the Accused where he took away a jersey, multi coloured check, one pompom and black boots. Gangamma identified these as being worn by her assailant that day.

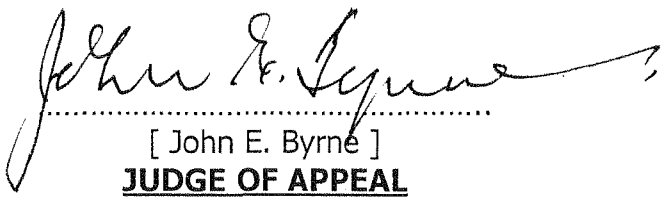
[23] In cross-examination Sergeant Lewaicei said that the only description the victim gave of her assailant was of a Fijian man with a bald head from the village. She did not mention the colour of these items but he was then asked by counsel whether, when he showed the victim the items she claimed the Appellant have been wearing, he prompted her and said **"this is the jersey, this is the boots and this is the pompom"**. The witness denied any prompting and said, **"No"**, I laid out the items in front of her. She said **"this is the jersey, this is the boots and the pompom"**.

[24] The Appellant's defence was first a denial of rape and secondly an alibi that he had not been present at the time the alleged offence was committed but had been drinking with some friends until about 2.30am on the day of the offence. He said however that this was just an estimate because he had neither a watch or radio with which to tell the time and he only assumed this. The Court was entitled to reject this evidence because of the failure by the Appellant to give the notice of alibi required by Section 234 of the Criminal Procedure Code Cap 21.

[25] The last ground argued by the Appellant was the failure by his counsel to call witnesses on his behalf. There is nothing in the court record to show who these witnesses may have been but the Court was entitled to assume that an experienced lawyer such as Mr Shah would have enquired of the Appellant whether there were any witnesses who could support his defence. None was called and no inference adverse to the Appellant should be drawn from this. The fact is however that only the Appellant gave evidence in his own cause.

[26] Although I have commented adversely at the beginning of this ruling on what I regard as serious matters calling for the attention of the authorities, perhaps in the form of a practice direction, in my view these have no bearing on what I consider must be the result of this appeal, that is its rejection. In my judgment the evidence disclosed by the record of the High Court shows that there was an extremely strong case by the State for the identification of the Appellant as the one guilty of the rape of Gangamma and that although there were some apparent inconsistencies in the evidence, overall it pointed beyond any reasonable doubt to the guilt of the Appellant. Before a single Judge of Appeal can allow a case to go to the Full Court of this Court he or she must be satisfied that the case for the Appellant is so strong as to justify a hearing before the full Court. I am not satisfied that the Appellant's case fits into that category. I therefore refuse the Appellant's application.





[John E. Byrne]
JUDGE OF APPEAL

At Suva
21st August 2007