

IN THE COURT OF APPEAL, FIJI ISLANDS  
APPELLATE JURISDICTION

Criminal Appeal No: AAU0059/07

BETWEEN:

PRABHU LAL

Appellant

AND:

THE STATE

Respondent

**Coram:** Byrne P  
Goundar JA  
Temo JA

**Hearing:** 18<sup>th</sup> March 2010

**Counsel:** Ms S. Vaniqi for Appellant  
Mr. S. Qica for State

**Date of Judgment:** 11<sup>th</sup> June 2010

---

**JUDGMENT OF THE COURT**

---

- [1] After a trial in the High Court before Shameem J and assessors, the appellant was convicted of ten counts of rape and two counts of indecent assault. He was sentenced to a total term of 10 years imprisonment.
- [2] He lodged an appeal against conviction raising a number of grounds of appeal. However, he was granted leave only on the ground concerning him being unrepresented at trial.

### **Facts**

- [3] The offences were committed between February 2004 and November 2004, when the victim came to live with the appellant after the death of her biological mother. The victim was 14 years old at the time. The appellant was in his late fifties.
- [4] The victim believed that the appellant was her father although this was disputed by the appellant at trial. The appellant's second wife resided with him.
- [5] The first incident of rape occurred when the victim was alone at home with the appellant. The appellant asked her to massage his head. She massaged his head and he pulled her towards him. She struggled but he threatened her with a kitchen knife. He then raped her. She complained to her step mother when she returned home but the step mother replied to her that she was afraid of the appellant.
- [6] In March same year, the appellant made two love bites on the victim's breasts without her consent. She told her step mother but she convinced her not to tell anyone.
- [7] In April the appellant raped the victim again by threatening her with a knife.

- [8] Thereafter the appellant raped her every month until November. Also in November he pulled her towards him and fondled her breasts.
- [9] The victim said in November she went to live with her brother and complained about the sexual assaults. The matter was reported to the police and she was medically examined. The medical examination revealed an old injury to her cervical entry which was consistent with old trauma.

### Legal Representation

- [10] The appellant was arraigned on the charges in the Magistrates' Court on 29 November 2004. He asked the court to defer the pleas for him to engage counsel.
- [11] On 13 November 2004, Mr. Kohli appeared for the appellant and applied for bail. The court refused bail.
- [12] On 5 January 2005, the appellant entered not guilty pleas.
- [13] On 22 January 2005, the appellant was granted bail. On 25 February 2005, the case was transferred to the High Court for trial.
- [14] On 21 March 2005, the appellant was arraigned in the High Court. Mr. Kohli withdrew as counsel and the appellant was advised to apply for legal aid.
- [15] On 20 September and 28 September 2005, respectively, Mr. Robinson appeared as counsel for the appellant. On 29 November 2005, Mr. Robinson withdrew as counsel because the appellant did not pay his fee. Ms Vaniqi from Legal Aid Commission appeared and informed the court that the appellant's application was being considered.

- [16] On 7 February 2006 Ms Vaniqi appeared and informed the Court that the appellant's application for legal aid was refused. The appellant informed the court his desire to appeal to the Legal Aid Board.
- [17] On 10 July 2006, the case was listed for hearing but the appellant informed the court that he was not ready and asked for more time to engage counsel. The court vacated the hearing and adjourned the case to allow the appellant to engage counsel. The case was then further adjourned on at least five occasions to allow the appellant to engage counsel.
- [18] On 21 May 2007, the case was listed for hearing. The appellant appeared and asked for further time to engage counsel. The learned trial judge refused adjournment and proceeded to trial.
- [19] It is the contention of the appellant that he was prejudiced by lack of legal representation because if he was legally represented, counsel might have asked the medical doctor whether a man who had diabetes would be capable of having an erection and, depending on the answer to that question, other questions might have followed the answers to which might have given some credence to the appellant's claim that he was incapable of having an erection.
- [20] The State concedes the appeal on this ground but it must be made clear that the Court is not bound by the concession made by State. Whether or not the appellant was prejudiced by lack of legal representation is a matter for this Court to determine after considering the conduct of the trial as disclosed in the court record.
- [21] It is well established that right to counsel is not absolute. In the present appeal, no question arises about the appellant being ignorant of right to engage private counsel or seek legal aid.

[22] Following the refusal of his legal aid application, the appellant was given ample opportunity to engage counsel.

[23] When the case eventually came for hearing, it was quite apparent that the appellant did not take any effective measures to engage counsel to defend himself. We cannot find any fault in the learned trial judge's decision to refuse any further adjournment and proceed to trial.

[24] As was pointed out in *McInnis v. The Queen* [1979] 143 CLR 575:

"The question before the Court of Appeal was whether or not there had been a miscarriage of justice. It was not simply whether an adjournment of the trial ought to have been ordered. It was whether assuming the adjournment to have been wrongly refused, that refusal resulted in a miscarriage of justice."

[25] Mason J in the same case stated that court needed to be shown to constitute a miscarriage:

"If the appellate court finds that the course of the proceedings had deprived the accused of a prospect or chance of acquittal then a miscarriage has occurred. Or to express the same thought in another way, the conviction will be set aside if the appellate court entertains a doubt as to the accused's guilt ... The question is primarily to be resolved by looking to the nature and strength of the Crown case and the nature of the defence which is made to it. If the Crown case is overwhelming then the absence of counsel cannot be said to have deprived the accused of a prospect of acquittal. If the accused in such a case has presented his defence with skill that may constitute some confirmation that conviction was inevitable in any event. But if the Crown case is less than overwhelming I have some difficulty in perceiving how in general the conduct of the case by an accused who is without legal qualification and experience can demonstrate that, even with the benefit of counsel, he had no prospect of an acquittal.

How is it to be said, for example, that cross examination of Crown witnesses by counsel would not have been more effective?"

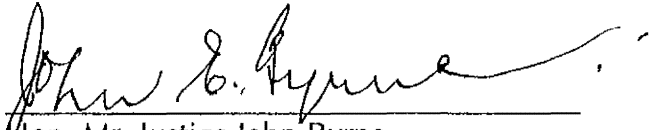
- [26] In a more recent case of *Samuela Ledua v. The State Criminal Appeal CAV0004 of 2007 (17 October 2008)*, the Supreme Court in considering the constitutional right to counsel pointed out:

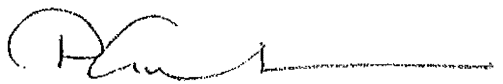
"It will, of course, be open to a convicted person to raise issues touching compliance with relevant constitutional mandates as grounds of appeal against conviction. But such an appellant who went into a trial having decided not to press in advance any claim for legal assistance based upon the *Legal Aid Act* or who made an unsuccessful stay application invoking the constitutional guarantee will face a difficult task. It will be necessary in that event to show that the trial actually miscarried in consequence of s28(1)(d) or some other basis. Merely to argue, as this appellant at times did, that the trial might have been conducted differently had the accused been legally represented will not suffice to establish breach of the guarantee, let alone a substantial miscarriage of justice justifying the setting aside of the conviction as required by s23(1) of the *Court of Appeal Act*."

- [27] In the present case, the only incriminating evidence against the appellant was the evidence of the complainant. The guilty verdict indicates that the assessors and the trial judge were satisfied of the truth of the complainant's evidence. According to the court record, the trial judge explained to the appellant the purpose of cross-examination and summarised the evidence of the complainant at the end of the direct examination.
- [28] Under cross-examination, the appellant asked approximately twenty-six questions. He challenged the veracity of the complainant's evidence by suggesting to her she was lying and that he never had sex with her.


- [29] The appellant's spouse gave evidence. She was called by the prosecution but during examination-in-chief she was declared a hostile witness. Under cross-examination by the appellant, the witness said the appellant could not have sex because he could not get an erection. The appellant also gave evidence of not being able to have erection due to his diabetic condition. However he did not ask the doctor when she gave evidence on the medical report of the complainant whether a diabetic person can have an erection.
- [30] At this stage we can only speculate what the doctor would have said if she was questioned on the medical condition of the appellant. However, even if the doctor would have said that a diabetic person cannot have an erection, the doctor would not have been in a position to say whether at the time the rapes occurred the appellant was diabetic and therefore could not have had an erection.
- [31] Whether or not sexual intercourse took place between the complainant and the appellant was an ultimate question for the assessors and the trial judge. The evidence of the appellant's incapacity to have sex was before the trial court, but the assessors and the trial judge rejected that evidence. The trial court was convinced of the veracity of the complainant's evidence despite the evidence led by the appellant of his capacity.
- [32] We are satisfied that the trial did not miscarry due to the appellant being unrepresented. For the reasons given we do not accept the concession made by the State.

[33] The convictions are confirmed. The appeal is dismissed.

  
\_\_\_\_\_  
Hon. Mr. Justice John Byrne  
**President, Court of Appeal**

  
\_\_\_\_\_  
Hon. Mr. Justice Daniel Goundar  
**Judge of Appeal**



  
\_\_\_\_\_  
Hon. Mr. Justice Salesi Temo  
**Judge of Appeal**

**Solicitors:**

Office of the Legal Aid Commission for Appellant  
Office of the Director of Public Prosecutions for State