IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA24 of 2016
[Magistrates' Court Case No.11 of 2010)

BETWEEN	:	**SEMISI TUBUNA** ***Appellant***
AND	:	**THE STATE** ***Respondent***

Coram	:	Hon. Mr Justice Daniel Goundar
Counsel	:	Ms S Vaniqi for the Appellant Ms S Serukai for the Respondent
Date of Hearing	:	15 February 2017
Date of Judgment	:	28 February 2017

JUDGMENT

[1] This is a timely appeal against both conviction and sentence. Following a trial in the Magistrates' Court at Nasinu, the appellant was convicted of rape and sentenced to 7 years' imprisonment with a non-parole period of 4 years.

Background facts

[2] The allegation of rape arose on 18 October 2004. The complainant was the appellant's niece. She was 18 years old, while he was 33 years old at the time of the offence. The complainant's evidence was that she accompanied the appellant to clean his employer's house at his request. When she was inside a bedroom, the appellant entered the room and had sexual intercourse with her. She said she did not scream because he had threatened her to keep quiet. After having sexual intercourse, the appellant told her to prepare lunch for him, but she refused. When she returned home, she complained to her aunt (father's sister). The prosecution led the recent complaint evidence from the aunt.

The appellant gave evidence in his defence. He admitted having sexual intercourse with the complainant but said she consented.

[3] The appellant advances the following grounds of appeal:

(i) That the Learned Magistrate erred in law and fact when he failed to properly assist the indigent unrepresented Accused with any cross examination or to see if there was a medical report available given the nature of the offence.

(ii) That the Learned Magistrate erred in law and fact when he failed to take into account that the key witnesses for the prosecution were related to the Accused and complainant, and so their credibility should have been weighed against that of any available independent evidence like a Medical Report by a doctor who would have been more impartial and independent. In failing to do so there was a miscarriage of justice.

(iii) That the Learned Magistrate erred in law and fact when he failed to consider the time the Accused spent in remand, which was 6 months and that he was a first offender.

(iv) That the sentence is manifestly harsh and excessive.

Right to counsel

[4] Although the appellant was formally charged in 2004, the court records commence from 15 February 2010. The parties were unable to offer any explanation for the lack of records from 2004 to 2009. From 2010, the case was adjourned on numerous occasions for various reasons. The appellant was advised of his right to counsel on a number of occasions. He applied for legal aid. The application was refused. At one stage, the appellant pleaded guilty to the charge, but when he was asked to mitigate, the appellant said the sex was consensual. The guilty plea was vacated and a not guilty plea was entered.

[5] Eventually, the case was set for hearing on 17 June 2014 and the appellant was once again reminded to engage counsel or reapply for legal aid. The trial could not commence on 17 June 2014 because the learned Magistrate was attending a workshop. The case was adjourned for mentions on numerous occasions until 30 November 2015 when the trial commenced. After the prosecution case was concluded, the appellant was advised of his options. He elected to give evidence. The case was adjourned to 9 December 2015 for continuation of the trial. On 9 December 2015, the defence case

was concluded after the appellant gave evidence. The judgment was delivered on 12 April 2016 and the sentence was delivered on 25 April 2016.

[6] It is clear that the appellant was aware of his right to counsel. He was advised of his right and was reminded on numerous occasions to engage counsel. The learned Magistrate is not at fault for proceeding with the trial after giving the appellant ample opportunity to engage counsel. Although the right to counsel is a constitutional right provided by section 14(1) (d) of the Constitution, the right is not absolute (*Ratu Jope Seniloli and Others v The State* Crim. Appeal No. AAU0041 of 2004; *Albertino Shankar & Francis Narayan v The State* CAV0008.2005, 19 October 2006)).

[7] When an unrepresented accused is convicted following a trial, the question for the appellate court is whether the trial miscarried due to the appellant being unrepresented (*Samuela Ledua v The State* Criminal Appeal CAV0004 of 2007 (17 October 2008)). What constitutes a miscarriage has been exemplified in the cases. If the accused had been deprived of a prospect or chance of acquittal then a miscarriage has occurred. In other words, the conviction will be set aside if the appellate court entertains a doubt as to the accused's guilt (*Reg. v Beadle* (1979) 21 SASR 67, 70; *Reg. v Howes* (1964) 2 QB 466, 582).

Duty to assist an unrepresented accused

[8] The appellant's contention is that he had been deprived of a prospect or chance of acquittal because the learned trial Magistrate failed to assist him with any cross-examination or see if there was a medical report available to support the complainant's evidence.

[9] It is not in dispute that shortly after the alleged incident, the complainant was medically examined and a medical report was compiled. Although the medical report is part of the court records, it was not formally tendered at the trial. This Court was informed that the prosecution did not find it necessary to lead the medical evidence. I accept that the prosecution was not required to lead corroborative evidence. At trial, consent or lack of it was the only issue. The medical report would have been of little probative value in determining the issue of lack of consent. In any event, the learned trial Magistrate was

under no obligation to conduct the appellant's case by seeing that the medical report of the complainant, relevance of which was questionable, was led in evidence.

[10] The prosecution case was based upon the evidence of the complainant and her aunt. The appellant was offered an opportunity to cross-examine the witnesses but he did not ask any questions. The veracity of the prosecution evidence was unchallenged. When the appellant gave evidence, he admitted sexual intercourse but denied using force.

[11] Counsel for the appellant submits that the learned trial Magistrate failed in his duty to ensure the trial was fair when he offered no assistance to the appellant to cross examine the prosecution witnesses.

Right to a fair trial

[12] The right to a fair trial is a constitutional guarantee provided by section 15(1) of the Constitution. All judicial officers are under an obligation to ensure that the trials are conducted fairly and in accordance with law. There is an onerous burden on the judicial officers to comply with this obligation in cases where the accused persons are indigent and unrepresented. For instance, it is part of the duty of the courts always to be vigilant that a plea of guilty by an unrepresented accused is only accepted if it is a clear, complete and unequivocal admission of the offence charged (*Kumar v The State* [2006] FJCA 57; AAU0048.2006 (10 November 2006), [15]).

[13] It must be borne in mind that in an adversarial system of criminal justice, the State hires qualified or trained lawyers to prosecute, the accused who has money hire counsel of choice and the indigent accused is either represented under a legal aid scheme or left to defend himself. For an unrepresented accused, that which is simple, orderly, and necessary to the lawyer – to the untrained laymen – may appear intricate, complex, and mysterious (*Chand v State* [2008] FJHC 9; HAC138.05 (18 January 2008, [28]). The judge or the magistrate must give an unrepresented accused such information as is necessary to enable him to have a fair trial. A trial in which a judge allows an accused to remain in ignorance of a fundamental procedure which, if invoked, may prove to be advantageous to him, can hardly be labelled as fair (*MacPherson v R* [1981] HCA 46; (1981) 147 CLR 512 (4 September 1981)). While the judicial officers are under a duty to advise an unrepresented accused about the procedural rules designed to ensure the

trial is fair, they are under no obligation to advise an unrepresented accused how to conduct his case. As Wills J said in *Reg. v Gibson* (1887) 18 QBD 537 at p 543:

> It is sometimes said - erroneously as I think - that the judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence.

[14] There is no limited category of matters regarding which a judge must advise an unrepresented accused. In *People v Ainscough* (1960) IR 136, the trial judge advised the unrepresented accused his right to challenge the admissibility of his confession made to a police officer. The accused exercised his right and challenged the admissibility on the ground that the police officer assured that he would get a sentence concurrent with the sentence that he was then serving if he admitted to the offence charged. The trial judge ruled that the confession was admissible after hearing evidence from the officer and the accused in a *voir dire*. The trial continued before the jury. The accused cross-examined the police officer but in this cross-examination he made no reference to the circumstances in which the confession was taken. When the accused went into the witness box he gave evidence along the lines of the evidence which he had given on the *voir dire*. The Irish Court of Criminal Appeal held that the judge should have reminded the accused afresh of his right to cross-examine the officer as to the circumstances in which the statement was made (at p535).

[15] In *Drotini v The State* [2006] FJCA 26; AAU0001.2005S (24 March 2006), the accused was convicted of rape of his step daughter following a trial in the High Court. At trial, he conducted his own defence and cross-examined the complainant. On appeal, he argued that he was adversely prejudiced due to lack of legal representation. The Court of Appeal rejected the argument saying the appellant competently conducted his case. But the Court observed at [10]:

> It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances, the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. **Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence.** (Emphasis added)

[16] In *Tuidravu v The State* [2006] FJCA 55; AAU0035.2005 (10 November 2006), the accused was tried in the High Court for the offence of rape of his juvenile daughter. He conducted his own case after he was unsuccessful in obtaining counsel to represent him at the trial. In cross-examination, he asked the complainant three questions and nine questions in total from all other prosecution witnesses. On appeal, the Court of Appeal quashed the conviction and ordered a re-trial on the ground that the guilty verdict was based on the complainant's evidence that was not tested by competent cross-examination.

[17] The circumstances of the present case are similar to that in *Tuidravu*. The learned Magistrate offered the appellant an opportunity to cross-examine the prosecution witnesses but he did not explain what the procedure entailed. While the manner in which the accused conducts his case is a relevant consideration, the calibre of the accused's forensic performance is not a critical factor in deciding whether there is a doubt as to his guilt. As Mason J said in *McInnis v R* [1979] HCA 65; (1979) 143 CLR 575 (19 December 1979) at [11]:

> 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.

[18] In the present case, sexual intercourse was not in dispute. The appellant's defence was that the sexual intercourse was consensual. The complainant's evidence was that the appellant who was her uncle and twice her age forced her to have sexual intercourse. The appellant's evidence was that he did not force the complainant to have sex with him. There was evidence of recent complaint, but that evidence did not implicate the appellant but showed consistency in the conduct of the complainant. On the issue of consent, the learned trial Magistrate believed the complainant's version. But the fact remains that her evidence was not tested by competent cross-examination. In my judgment, the trial miscarried when the appellant could not carry out a competent cross-examination of the complainant in order to test her credibility. On this ground, the

conviction cannot stand and has to be set aside. It is not necessary to consider the appeal against sentence.

Result

[19] The conviction of rape is quashed and the case is remitted to the Magistrates' Court for re-hearing by a different magistrate. The appellant is remanded in custody. He is ordered to be produced in the Magistrates Court at Nasinu on 1 March 2017 at 9 am for mention.

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Hon. Mr Justice Daniel Goundar

Solicitors:
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Office of the Director of Public Prosecutions for the State