

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 08 of 2017**

**ROHIT NARAYAN**

**V**

**STATE**

**Counsels** : Mr. A. Sen for the Appellant  
Mrs. D. Kumar for the State

**Date of Hearing** : 27 July 2018

**Date of Judgment** : 28 August 2018

**JUDGMENT**

1. On the 25<sup>th</sup> April 2017, the appellant was convicted in the Magistrate's Court at Taveuni of one count of rape. He was sentenced on the 26<sup>th</sup> April 2017 to 9 years and 11 months imprisonment with a minimum term to serve before parole of 7 years.
2. The appellant appeals the conviction.

**Facts**

3. On the 20<sup>th</sup> May 2006, the complainant ("MM") was 21 years old and had gone to Naqara town in Taveuni to meet one of her friends. The friend arranged for some others to join them both

for drinks. They were drinking gin. Her friend disappeared and the accused who was in the drinking party started pulling her clothes. He punched her in the face and pulled down her pants and underwear. She asked him not to do it but he forced himself on her, penetrating her with his penis. She did not consent but she then collapsed. When she awoke she could not find her undergarments. She walked to a nearby village and was taken to hospital. She identified the accused in Court as her assailant.

### **Grounds of Appeal**

4. The accused by his Counsel has filed 9 grounds of appeal against conviction.
  1. That the medical report was filed by the prosecution without the consent of the defence and the said medical report was not identified by the complainant nor the maker.
  2. That the learned Magistrate erred in law in finding the appellant guilty when there was no corroboration of the victim's evidence.
  3. That the Learned Magistrate misdirected himself on the evidence of recent complaint.
  4. That the Magistrate erred in failing to properly evaluate the evidence in the case, including that of the defence.
  5. That the learned Magistrate erred in law and fact in finding the appellant guilty when there was no cogent evidence that he had raped the victim.
  6. That the trial was not conducted fairly and the Magistrate failed to analyse the evidence of the witness.
  7. That the learned Magistrate erred in failing to direct the Prosecution to release the prosecution witnesses to the

Defence who were not to be called on behalf of the prosecution.

8. That the learned Magistrate erred in law and in fact in failing to take into consideration that the delay of more than 10 years was prejudicial to the appellant.
9. That the appellant reserves the right to alter or add further grounds of appeal on availability of the copy record.

**(Nota bene:** no amended grounds of appeal were filed)

### **Ground One**

5. At the end of the Prosecution case the prosecutor tendered the medical report in evidence pursuant to section 133 of the Criminal Procedure Decree. There was no objection from the Defence.
6. Section 133(2) of the Criminal Procedure Act provides:-  
  
*133(2) In any case in which the prosecutor intends to adduce in evidence a plan, report, photograph or document a copy of it shall be delivered to the accused not less than 21 clear days before the commencement of the trial or any other proceeding".*
7. Counsel in this appeal submits that there was "no record" of the medical report being part of the agreed bundle of documents delivered more than 21 days before trial. He moves from that proposition to claim that the report was illegitimately produced to the prejudice of his client.
8. Counsel in this appeal was not counsel below and he is not therefore in a position to know whether the report had been disclosed in time or not. The State submits that the report was

properly disclosed and the defence had neither before trial nor in trial signaled objection to production of the report. Nor had a request been received to have the medical officer called.

9. This ground is misconceived and it is dismissed.

### **Ground Two**

10. In Fiji, a conviction in a sexual offence case can be founded in the absence of corroboration, provided that the prosecution has satisfied the tribunal with the evidence of the complainant that it has discharged its burden to the requisite standard.
11. The Supreme Court in *Anand Abhay Raj* CAV0003.2014 affirmed that the earlier requirement to look for corroboration had been revoked with the passing into law of the Criminal Procedure Act 2009.
12. The accused submits that because this offence is purported to have been committed in 2006, then the corroboration rule still applies. This submission is misconceived because the transitional provision of s. 301(1) of the Criminal Procedure act extends that Act's application to all cases where judgment and sentence have not been passed.
13. This ground is unarguable and it is dismissed.

### **Ground Three**

14. A recent complaint direction is given in a case where there **has been** a recent complaint made. In this case there were no other witnesses apart from the complainant and the accused.

15. There was no need for the Magistrate to direct himself on recent complaint nor did he.
16. This ground is frivolous, wasteful of court's time and dismissed forthwith.

**Ground Four**

**Ground Five**

**Ground Six**

17. These grounds all concern what Counsel submits is inadequate and improper evaluation of the evidence.
18. In his written submissions Counsel appears to suggest that the prosecution evidence was lacking in detail; for example there was no time of the rape given, there was no evidence about the place the parties were drinking, and there was no evidence as to what article of clothing the accused was said to be pulling. He also complains that the victim's trousers and panty were not produced in Court.
19. The charge is one of rape and the Magistrate quite correctly set out the elements that the State had to prove to the requisite standard for the accused to be convicted. The issue at trial was consent, not time, place or clothing. None of the submissions of the accused on lack of evidence are relevant. It is not helpful or necessary for the State to produce the clothing. Such exhibits would assist neither the prosecution, nor the defence.
20. Again the accused complains that the conviction on the evidence of the complainant and the medical report alone is insufficient and that the "friend" should have been called.

21. As has been said above, the evidence of the complainant alone is enough for a Magistrate to find the case proved if he believes it.

22. As the Magistrate himself says at para 12.

*“Presently there is no need to corroborate the evidence of the victim in a sexual offence, and the Court can convict an accused based solely on the evidence of the victim if it is satisfied about that evidence”.*

23. The only issue being consent, there was no need for the prosecution to call the “friend”. She was not present at the time of “sexual negotiations” not at the time of the act.

24. In his fifth ground Counsel repeats his submission that the admission into evidence of the medical report was unfair to the accused.

25. This court has dealt with that issue in Ground One, and the ground is not made any stronger by repeating it as an unfair trial ground.

26. After rehearsing the evidence of both the complainant and the accused the learned Magistrate said this at para 17:

*“Having gone through her evidence and demeanour also I find the victim is telling the truth in the court. Even though the accused denied having sex without the consent of the victim I reject his version.”*

27. This is a fair and reasoned conclusion by the Magistrate.

28. None of these three grounds have merit. All three are dismissed.

**Ground Seven**

29. The court assumes that this very unhappily worded ground suggests that the defence wanted to call prosecution witnesses who were disclosed but not called in the State's case.
30. Counsel submits that the accused was placed "in an ambush position". There were other witnesses disclosed but not called.
31. It is entirely a matter for a prosecutor to call as witnesses whoever he/she wants in any case. It is not for the Court nor the accused to dictate who should give evidence for the prosecution. Quite clearly the prosecutor in this case was of the view that the evidence of the complainant was confident and cogent enough to prove its case and called no further evidence. That is their right.
32. Should the defence want to hear the evidence of other witnesses disclosed then a prosecutor would make them available and tender them for cross-examination or alternatively he/she would co-operate with the defence and ask the court to summons the witness?
33. There is nothing on the record in this trial that counsel for the defence below requested prosecution witnesses to be made available or summonsed. A Magistrate cannot make directions for something that is not applied for.
34. As the State submits in their very helpful written submissions:

*"The contested issue was only consent, or the lack of it, while the only two material witnesses for the determination of this issue were the victim and the appellant".*

35. This ground is misconceived and would appear to be an extension of Counsel's refusal to accept that a sexual offence can be proved on the evidence of one witness alone.

36. The ground of appeal is dismissed.

### **Ground Eight**

37. This case has had an extremely unfortunate history through the judicial system. The accused first appeared on a charge of rape in May 2006. The matter was set for hearing several times but vacated because of unavailability of the complainant who had married and had children. The matter was delayed in 2009 by the abrogation of the Constitution and several times the accused absented himself.

38. The Court file was lost, not once but twice resulting in further delays, none of them the fault of any one party. There were delays occasioned by both the prosecution and the defence as well as systemic delays in this small provincial Court.

39. None of these delays prejudiced the accused. He was not relying on other witnesses or evidence of alibi. His only defence was that the complainant was a willing party to sexual activity. Support for that defence can only come from the accused himself. There was no witness who saw the rape.

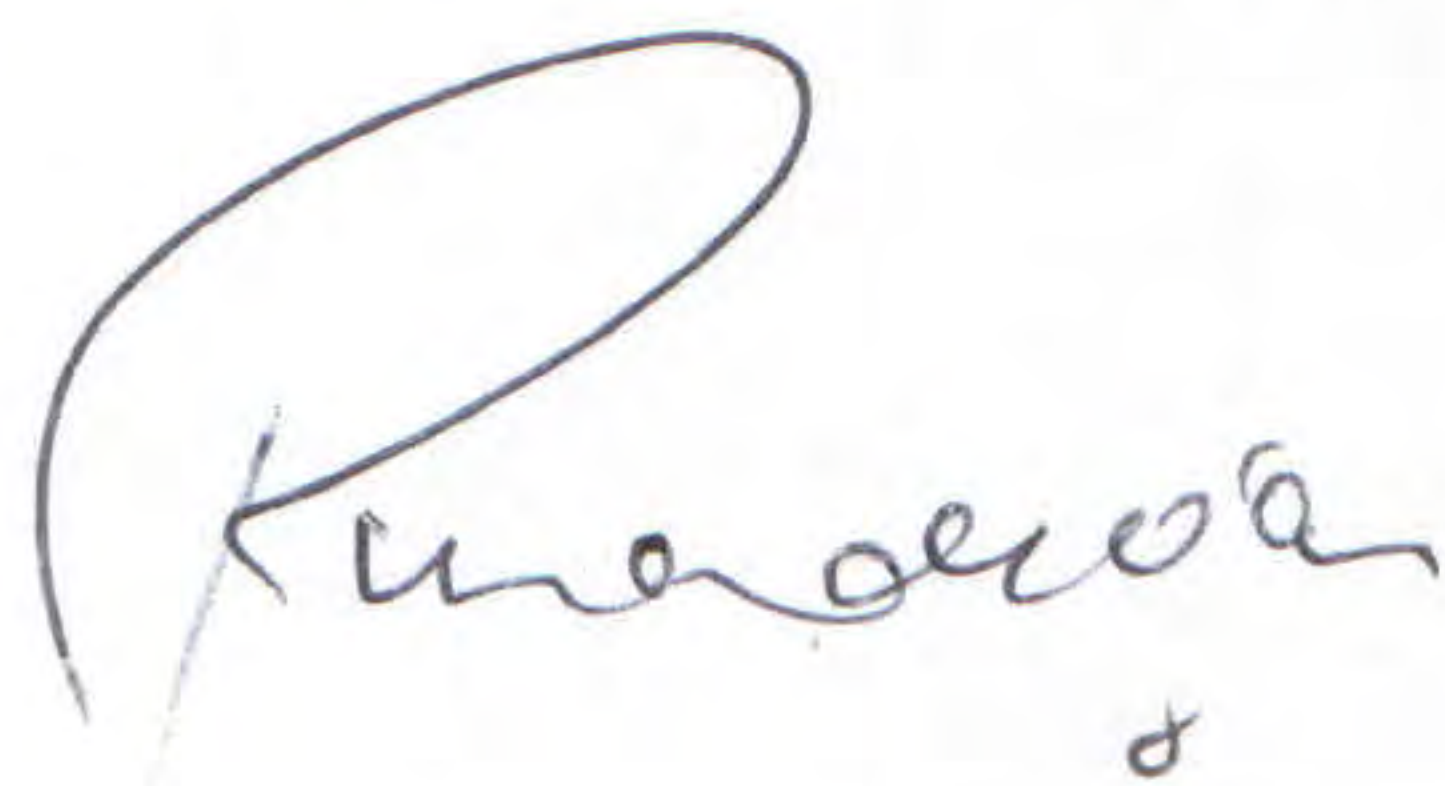
40. Counsel submits that these delays denied the accused his right to a fair trial within a reasonable time.



41. The accused was represented by counsel below and there was never an application for stay made on the grounds of delay. It appears that Appeal counsel was at one time briefed to defend the accused and thus being appraised of the length of delay; he too was at liberty to make a stay application but chose not to.
42. It is not for this Court to make a retrospective order to stay proceedings that have already been completed by a fair and reasoned decision on the part of the Magistrate to convict.
43. The Magistrate being aware of the delay gave the accused 12 months discount on his sentence to compensate for it.
44. This ground has no merit.

**Conclusion**

45. The appeal against conviction is for these reasons stated **dismissed.**



**P. K. Madigan**

**Judge**

At Labasa  
28 August 2018

