MOHAMMED KASIM

A

v.

REGINAM

[SUPREME COURT, 1976 (Williams J.), 17th, September]

B

Appellate Jurisdiction

Criminal law—evidence and proof—victim shown number of photographs of different men from whom she selected that of the accused as her attacker—identification of accused later confirmed by victim at identity parade—whether proper for victim to identify accused at identity parade having already been shown his photograph.

C

Criminal law—evidence and proof—evidence of similar fact—circumstances in which such evidence may be admitted.

Criminal law—evidence and proof—rape—whether evidence of distress of victim can corroborate absence of consent.

D *Criminal law—evidence and proof—corroboration—when lies told by accused can amount to such.*

After the victim alleged that she had been raped, she was shown a number of photographs of different men out of which she picked that of the accused as her attacker. This was before his arrest. Subsequently she picked out the accused at an E identity parade. There was nothing improper in this procedure, the only proviso being that her evidence must be taken subject to the fact that she had seen a photograph.

The accused had been seen the day before the offence at the same location threatening a passer by and his girl friend and endeavouring to drive the man away leaving the girl behind. Evidence of such similar facts were properly admitted where F mistaken identity was put forward as a defence.

Evidence of the victim's distress can corroborate lack of consent, but it was a matter for the court to examine such evidence carefully.

Although lies do not necessarily amount to corroboration, lies told out of court G may amount to such.

Cases referred to:

Haslam v. R. 19 Cr. App. R. 59.
R. v. Ferguson 18 Cr. App. R. 145.
Seiga v. R. (1961) 45 Cr. App. R. 26
R. v. Reading 50 Cr. App. R. 98; [1966] 1 W.L.R. 836.
H *Thompson v. R.* [1918] A.C. 221.
Redpath v. R. (1962) 46 Cr App. 319; (1962) 106 S.J. 412.
Tom Wilson v. R. 58 Cr. App. R. 304

D.P.P. v. Boardman [1974] 2 All E.R. 958; [1975] A.C. 421.
Credland v. Knowler (1951) 35 Cr. App. R. 48.
R. v. Chapman [1973] 2 All E.R. 624; [1973] 2 W.L.R. 876.
R. v. Knight (1966) 50 Cr. App. R. 122; [1966] 1 All E.R. 647.
Chiu Nang Hong v. Public Prosecutor [1964] 1 W.L.R. 1279; 108 S.J. 818
R. v. Trigg (1963) 47 Cr. App. R. 94; [1963] 1 All E.R. 490.
R. v. Turnbull (1976) 3 All E.R. 549; 63 Cr. App. R. 132.

Appeal against conviction and sentence in the Magistrate's Court for rape.

S. M. Koya and M. Tapoo for the appellant.
D. Williams for the respondent.

WILLIAMS J.: [17th September 1976]—

This is an appeal against the conviction and sentence on a charge of rape.

The brief facts are that the complainant, Miss Lorie Anne Nelson, a U.S.A. citizen, 20 years of age, was a member of a group of young students visiting Fiji under the supervision of their teachers including Professor McKenzie, P.W. 7.

About 8.30 a.m. on 15th May 1976, they went to Lomolomo Beach between Lautoka and Nadi. Prior to 11.00 a.m. the complainant clad in a bikini left the group and walked along the beach to the river mouth and turned inland seeking among the undergrowth a secluded place where she could relieve herself and enjoy a little solitude.

After she had turned from the beach someone called her from behind and on turning she saw a man whom she later identified as the accused. He offered to show her an Indian graveyard and she followed him; then he took her further into the bush to show her a fruit called "selifa". He gave his name as "Achu" and asked if she were married. When she asked him to show her the way back to the beach he asked her if she liked sex and reached for her. There was a struggle in which she tried to jam her knee into his private parts and she screamed for help. He threatened to kill her with a cane knife he had. She tried to get hold of it and cut her finger. He forced her to the ground, struck her in the chest and removed her bikini pants saying he would kill her if she did not stop screaming. He had intercourse with her and she said she was afraid of being killed if she resisted too strongly or called out. He completed the sexual act by ejaculating.

She then realised that she had received an injury to her right foot. Her watch said 11.05 a.m.

Wanting to return to her friends she said she succeeded in humouring the accused to the extent of his showing her the way back to the beach. The accused combed his hair and in an attempt to strike a natural attitude she borrowed his comb describing it as red and 5″ or 6″ long.

She described her assailant as being barefoot, an Indian with a moustache, about her own height, wearing khaki shorts and a headband. On rejoining her group on the beach she then complained to a friend Wendy that she had been raped and pointed to the accused.

In her evidence she claimed that prior to the alleged rape she was a virgin.

A On the same day she was examined by P.W. 1, Dr Radha Krishna Setti Natasami at 2.30 p.m. at Lautoka Hospital. He found a semen like deposit in the vagina, a substantial cut 2" long and 1" deep on the right foot, a cut on the right index finger and a swollen right thumb joint.

The doctor's opinion was that there had been recent sexual intercourse and that the wounds were 1 or 2 hours old. In his opinion the complainant had been raped basing his opinion on the injuries which in his view resulted from a struggle. That B opinion has given rise to one ground of appeal.

On the same day i.e. 15th May (N.B. the typed record shows it erroneously as the 18th May but the original record shows 15th and her evidence says it was after her visit to the hospital which was on 15th May) at the police station she was shown 9 photographs and at once identified the accused's photograph. She also gave the name "Achu" to the police. When arrested on 16/5/76 the accused told the police C that he had been away from the area all day on the 15th. He said he had been at Votualevu since about 9 a.m. Therefore the question of identity was immediately in issue.

Then on 17th May, at Lautoka police station, she identified the accused at an identification parade.

D In cross-examination the accused suggested that the police had assisted her to select the accused from photographs, and that she saw him at the police station just before the parade. She denied these allegations and re-asserted that it was the accused who had raped her.

From the time the police first saw him and up to the completion of the trial the accused denied that he had been in the vicinity and claimed that on the day in question he had been at Votualevu, Nadi, from about 9.00 a.m.

E

Having been forewarned of the alibi the police produced witnesses to counter it.

The grounds of appeal are lettered from *(a)* to *(c)*.

Ground *(c)* is that there is nothing in the record to indicate that the accused had ever pleaded to the charge. It was argued that this nullified the whole proceedings. It F was dealt with before hearing the rest of the appeal and I ruled against the defendant. My ruling is attached to this judgment of which it must naturally form part.

Mr Koya, for the appellant then dealt with ground *(d)* onwards.

Ground *(d)* alleges that the accused was denied the right to be defended by counsel. When the accused first appeared in court on 17.5.76 he said he did not wish to be G defended by counsel, but on 20.5.76 he said he wished Mr Anand to defend him and the record shows that the magistrate said that Mr Anand would be contacted. Mr Koya complains that there is nothing in the record to show that this was done and that it the court had not promised to contact Mr Anand on behalf of the accused the latter could and would have done so himself. Mr Koya's complaint appears to be speculative being based on a presumption that the magistrate did not contact Mr H Anand. However, at no time did Mr Koya allege that the accused had not in fact seen Mr Anand, and I am not prepared to assume that the magistrate did not fulfill his promise to communicate the accused's wishes to Mr Anand. On 26.5.76, the hearing date, the accused asked for an adjournment for the purpose of contacting counsel. It

was a request which the trial magistrate did not ignore; in fact he adjourned to ascertain from the senior magistrate whether the latter had contacted Mr Anand. The trial magistrate's record on 26.5.76 reveals that the accused's chosen counsel Mr Anand was contacted but because of a lack of funds the accused did not engage him.

Mr Koya then submitted that it was the magistrate's duty to inform the accused of his right to apply for legal aid and to give him an opportunity to do so. It is clear that when he first mentioned engaging counsel the accused did not raise the question of legal aid. Legal aid is not granted in Fiji with the extreme liberality enjoyed in the U.K. where it is granted to all and sundry as of right in proportion to their means. Mr Koya gained nothing by referring to utterances from the English bench that legal aid should always be granted in all serious cases and even in misdemeanours. No doubt it is highly desirable all round for accuseds to be represented. Unfortunately, as Mr Koya well knows, the slender Fiji purse could not extend to such extremes. For the magistrate to invite an accused to apply for legal aid would raise his hopes of getting it, and it may not have been granted. I do not know of a case where legal aid has been granted in a magistrate's court.

Ground *(d)* fails.

Ground *(e)* alleges that the evidence of the complainant's identification of the accused by means of photographs was wrongly received. The complainant, as I have mentioned, saw 9 photographs on 15.5.76 the day of the alleged rape and picked out the accused's photograph. Mr Koya submitted that there should have been evidence that the police possessed a true photograph of the accused and that the photograph identified was in fact that of the accused.

There is nothing in the cases referred to by Mr Koya which states that the police have to give evidence that they had a true photograph of accused. The photograph selected by the complainant was a sufficient likeness to immediately send the police in search of the accused. Had it not been the accused's photograph, the magistrate, who had the exhibits before him, would not have said in his judgment (41 typescript) that the victim had identified a photograph of the accused. The photograph was there; it speaks for itself as to whether it is a likeness of the accused or not.

There was nothing unfair in the way in which a photograph of the accused was selected by the victim from those of different persons presented to her. P.W. 17, S.P.C. 395 Sera, Saro, in-my view, conducted the photograph identification quite properly if her evidence is to be believed and the magistrate clearly believed it.

Ground *(e)* fails.

Ground *(f)* complains that the identification parade at Lautoka police station on 17th May was unfair in that the complainant had previously seen a photograph of the accused. I was referred to *R. v. Ferguson* 18 Cr. App. R. 145. But in that case it transpired that "prison photographs" were used showing prison number of the two accused. They were shown to the jury, which was tantamount to revealing that the accused had a criminal record. The convictions were naturally quashed. The witness in that case has been shown the photographs of the accused before being asked to identify them on a parade. It is not suggested in the judgment in *Ferguson's* case that the witnesses were asked to identify any suspects from a number of different photograghs. I was referred to *Haslam's* case 19 Cr. App. R. 59. However the facts revealed that the accused, unlike the instant case, was already in custody when the

witness was shown his photograph and later identified him on a parade. This was
A held to be improper and the appeal was allowed. Subsequently the Court of Appeal discovered that they had been misinformed and that their decision on the question of identification was consequently erroneous. It transpired that when the photographs had been shown to the identifying witnesses the accused was *not* in custody; moreover it was not simply a photograph of the accused which was shown but a dozen photographs of different persons from which the accused's photograph was
B selected. The identification parade was held about 4 months after his photograph had been identified and the Court of Appeal observed that, in those circumstances, there could be no criticism of the police in using at the parade the same witnesses who had identified the accused's photograph.

In *Frederick Seiga v. R.* (1961) 45 Cr. App. R. 26, the accused was in custody when an identifying witness was shown 9 photographs and immediately identified the
C accused's photograph. She then attended an identification parade. The court condemned this conduct because the witness could have attended the identification parade without seeing any photographs. They had not been used for the purpose of giving the police a clue as to who the suspect was.

In *Ferguson's* appeal (supra) at p. 148 the learned Chief Justice pointed out that where a witness picks out an accused's photograph from several others to help the
D police in making an arrest it is not improper to call that same witness to an identification parade but his evidence is then to be taken subject to the fact that he has seen a photograph.

The reported cases do not show that it was improper for the complainant to identify the accused on a parade after having selected him prior to his arrest from a number of different photographs. She picked out the accused's photogrpah only a few hours after the alleged rape having seen him in bright daylight and having been in
E his company before he raped her and afterwards. It was not as if she had caught a glimpse of someone moving in a crowd or had been raped in the dark. In such a case her selection of a photograph could be dubious. It would be strange had she not been able to carry his likeness in her mind's eye for a few hours before seeing the photograph.

A Home Office Circular quoted in *Archbold* at 1351 relates to the use of photo-
F graphs for identification purposes. It states at para. 22 of the instructions,

> "Where there is no evidence implicating the suspect save identification by photo, the witness as to identification should be taken to an identification parade notwithstanding that they may already have made an identification by photograph.

The danger of using, on an identification parade, a witness who has selected a
G photograph of a suspect is obvious where he saw the suspect in circumstances which rendered a thorough view of him difficult; e.g. seen only in crowd for a few moments, or alone for only a few moments when visibility was poor, or at a distance which might make identification dubious. At the most such witness only receives general impressions. Selection of the photograph leads to an arrest and if the witness has selected a wrong photograph the impression it leaves on her mind may prompt her
H to select its likeness on a identification parade. A jury may give undue weight to the identification by way of parade.

Doubts of that nature do not arise in this case. There was every possible opportunity and reason for the victim to have her assailant's likeness impressed upon her. She had to identify her assailant to help the police make an arrest. Her attendance at the identification parade on 17.5.76 does not clash with the dicta in *Furguson's* case and is acceptable under the Home Office Circular (supra). A

Ground *(f)* also alleges that there was a distinct possibility that the accused may have been seen by the complainant at the police station before the parade. The complainant denied this in evidence. P.W. 8, Constable S. P. Singh said the "parade room" was situated where the complainant could not have seen it from where she waited before being conducted to the parade room. P.W. 20 said the accused was in a police cell until he took him to the "parade room". The accused was on the ground floor and the complainant who was in an upper floor room which could not have seen the accused's movements. The magistrate expressly found that the parade was conducted fairly and in my view he was justified in so holding. Although he cross-examined witnesses in relation to the parade, the accused did not mention it in his unsworn evidence. B C

Ground *(f)* fails.

Ground *(g)* alleges that the evidence of similar facts given by Constable Mohammed Janif Khan, P.W. 11 was wrongly admitted, and highly prejudicial and that the magistrate ought not to have acted on it. The witness and his girl friend on 14/5/76 (the day preceeding the alleged rape) went to Lomolomo beach. He said the accused, carrying a cane knife, approached them near the river mouth, alleged they were in restricted area near a cemetery and would be detained until the police arrived; he says the accused raised the cane knife threateningly trying to drive P.W. 11 away leaving his girl friend behind and saying that he, the accused would take her to her parents. On 15th May on hearing of the alleged rape he mentioned this incident to his superiors. He also identified a photo as that of the accused. D E

In R. v. Reading, 50 Cr. App. R. at 107, Edmund Davies J. in his judgment said,

> "Evidence of the accused's misconduct on other occasions may be relevant as tending to negative mistaken identification on the part of one of the Crown witnesses and the "same is true of the accused's possession of incriminating materials"." F

In *Thompson v. R.* [1918] A.C. 221, the House of Lords considered charges of indecency committed on small boys on March 16. Evidence showed that the accused was in the company of the same boys on March 19 and gave them money and that at the time he had indecent photos and powder puffs on him. Lord Sumner at p. 233 said,

G

> "..... it was said that the fact that the man whom the boys identified was a person who had in his possession these incriminating objects tended to confirm their accuracy and to show that they had made no mistake. As it seems to me this is only another way of suggesting that the possession itself goes to prove identity. That the boys should pick out as the guilty person someone who, unknown to them, possessed these objects confirms their accuracy, for if such possession is one of the personal indicia of the guilty man, it shows that they selected a man who so far corresponds to the man who was wanted." H

Lord Parmoor in his judgment at p. 237 made it quite clear that similar fact
A evidence is admissible where the defence is, as in the instant case, one of mistaken identity.

Following the line of reasoning of Lord Summer (supra) the complainant had identified an Indian male who on the previous day of the same beach, at the river mouth, used a cane knife threateningly in an endeavour to drive away a young woman's male companion and leave her alone with the accused, and also made
B reference to a cemetery. The complainant could not have known of that incident which tends to confirm her identification of the accused as one who would by threats with a cane knife try to secure the sole companionship of a young woman. I do not regard it as unfairly admitted.

In any event there was other corroborative evidence which rendered the similar fact evidence unnecessary. It was tendered in rebuttal of the accused's alibi that he
C was at Votualevu at the time of the alleged rape. The magistrate mentioned it in his judgment. Thus one Kandi Sami P.W. 13 stated that about 8.30 a.m.—9.00 a.m. on 15.5.76 he saw the students on the beach and he saw the accused with a cane knife up an almond tree and wearing a headband; he again saw the accused in the same locality between 11.30 a.m. and 12 mid-day. The accused was then outside his house which is only ¼ mile from the beach.

D Permal Naidu, P.W. 15, has known the accused since the latter was a child. About 11.30 a.m. on 15.5.76 he was proceeding to the watergate (i.e. in the vicinity of the cemetery already referred to) and the beach when he saw P.W. 13 and a little further on he saw the accused with a headband and carrying a cane knife.

At 12.30 p.m. P.W. 16, Kupanna Reddy (P.W. 15's wife) who was going to Nadi, received a lift in a car driven by the accused's brother and the accused was in it. She
E boarded the car about 3 minutes walk from her home which is 40 chains from accused's home. P.W. 13, 15 & 16 did not need to identify the accused. They recognised him and their evidence showed accused to be in the locality of the crime from 9.00 a.m. to 2.30 p.m. The accused in an unsworn statement said he was at Votualevu at the material time. In support of his alibi he called D.W. 2 who said she had not seen the accused until 6.30 p.m. and consequently her evidence was valueless.

F D.W. 3, Ibrahim, is the accused's brother. It was he who gave a lift to P.W. 16 (above). D.W. 3 agreed the accused was in the car when he gave a lift to P.W. 16 but alleged it was 9.00 a.m. However, on 17.5.76 he had signed a statement saying that on 15.5.76 he had not left home until 11.30 a.m. In cross-examination he denied giving that time to the police. The magistrate believed P.W. 13, 15 & 16 and made it very clear that he did not believe D.W. 3 and he rejected the accused's alibi.

G The magistrate obviously accepted that the accused was in the vicinity of the alleged crime from about 9.30 a.m. to 11.30 a.m., a period of 2½ hours, and whilst he had the opportunity to commit it. The descriptions given by the prosecution witnesses as to the accused's dress and his carrying a cane knife tallied with the description given by the complainant. The tendering of an alibi which proves to be false can corroborate the complainant as can the lie which he told to the police as to his
H whereabouts, and the evidence of distressed condition as will be mentioned later.

Ground *(g)* fails.

Ground *(h)* alleges that the opinion of Dr R. K.S. Natasami, P.W. 1 that the complainant had been raped, was wrongly received and was highly prejudicial. It could be prejudicial if the magistrate showed that he had placed any reliance upon it. In deciding the issue of consent he made no reference to Dr Natasami's P.W. 1's opinion, except that the complainant was not a virgin at the time. The magistrate compared P.W. 1's reasons for saying she was not a virgin with the evidence of Dr Sutton an experienced gynaecologist who stated that P.W. 1's reasons for not regarding the complainant as a virgin were far from conclusive. The magistrate accepted Dr Sutton's evidence that the absence of a hymen could be due to many factors other than sexual intercourse, and rejected Dr Natasami's evidence. He made no other reference to Dr Natasami's evidence. There is nothing in his judgment which shows that he relied upon Dr Natasami's opinion that the complainant had been raped. However in *R. v. L.D. Trigg* (post) the Court of Appeal said in a case of rape "She was picked up in a distressed condition and examined shortly afterwards by a doctor who came to the conclusion that she had undoubtedly been raped." That was a forthright opinion and the Court of Appeal saw nothing wrong in its being received. Dr Natasami based his opinion on the complainant's injuries which in themselves would only be meagre evidence of lack of consent. However, as I have already said there was corroborative evidence which would outweigh any possible prejudice which the doctor's opinion may have caused.

A B C

Ground *(h)* fails.

D

Ground *(i)* alleges that the circumstances point to the complainant being a consenting party and that the magistrate erred in not considering the evidence in that light. Mr Koya submitted that it was highly improbable that a young woman clad only in a bikini would wonder so far from her party and into the undergrowth. He stressed that clad as she was one could expect that she was consenting party in as much as she had accepted the company of the man and gone further into the undergrowth with him. Then having had intercourse with him and realising possible consequences she fabricated this allegation of rape. Why when she only wanted to relieve herself had she accompanied the man? He pointed out that it was only in cross-examination that she said she had relieved herself before meeting the accused.

E

That ground is linked with ground *(j)* that there was corroboration on the issue of consent and that in regarding evidence of the complanant's distressed condition as corroboration the magistrate erred in law. Consequently he had failed to warn himself of the danger of acting on uncorroborated evidence.

F

Contrary to Mr Koya's submissions there is no doubt that evidence of the complainant's distress can corroborate lack of consent. It is possible that a complainant may simulate distress in support of a false accusation. Females who like publicity have been known to falsely accuse males of indecency and rape; such accusations have also been based on malice and a desire for revenge. Distress evidence should be examined carefully.

G

In *Redpath v. R.* (1962) 46 Cr. App. R. 319 a little girl playing on the moors was indecently assaulted by a motorist who then drove away. A complete stranger has seen the accused walk towards the child; he did not see what happened. After the accused had gone the child emerged looking extremely distressed and on being approached she burst into tears. The Court of Appeal observed that the child was not aware she was being observed and distress could not have been simulated. The evidence of the child's distressed condition was accepted as corroborative of her complaint.

H

The appeal of *Tom Wilson,* (1974) 58 Cr. A. R. 304, indicates the kind of circumstances where evidence of distress will not corroborate the complaint. A woman in her early twenties said she had left home because her father occasionally had intercourse with her. She complained that he "phoned her at her flat and threatened to stab her mother if the girl would not let him have intercourse with her. Thereupon she rang Mrs Guy, a woman connected with "The Samaritans", complained to her and went to see her shortly after the threat. Mrs Guy said the girl sounded incoherent on the telephone and seemed extremely distressed when she saw her. The judge ruled that the evidence of distress was acceptable as corroboration of her complaint and that it was for the jury to decide whether or not they would accept it. The Court of Appeal held that this was a misdirection. The evidence of distress did not in the circumstances amount to corroboration. It would be absurd to say that any circumstances pointed to someone having the opportunity to make a telephone call. They pointed out that if there was a 'phone call' only the girl and her father took part in the alleged conversation. Her apparent distress could not be evidence of the fact there had been a 'phone call' or that it contained such a threat.

P.W. 6, Miss Allen, a member of the tourist party said they had arrived in Lautoka on 13.5.76 and went to Lomolomo on 15.5.76. They were entire strangers to that area. She noticed the absence of the complainant and on her return observed that she was pale, looked frightened, was weeping and her hands were trembling. The complainant said she had been raped. The complainant was obviously made at the first opportunity. P.W. 9, Kopke, a male member of the group saw the complainant return and she asked for Dan McKenzie (supervisor of the group). P.W. 9 observed she walked strangely, that her back was covered with dirt, and that she went to P.W. 6 put her arms round her and collapsed. P.W. 9 at once brought Professor McKenzie who was 500 yards away. The latter, P.W. 7 said that the complainant was staggering, appeared dazed, her lips trembled, her eyes seems glazed and she was very white. She told him she had been raped by an Indian who said his name was Archu.

The circumstances point to the complainant never having met the accused beforehand. From the time she left her group to the time she returned was about 45 minutes, and during that time she had walked half a mile or more. There was little time for her to have been wooed by and if she had consented it would mean that on being suddenly and unexpectedly accosted by a stranger she willingly removed her bikini pants and had intercourse with him. Such a picture is not consistent with injuries she received in those 45 minutes. Although she could simulate distress one may consider whether it is likely that she could deliberately assume "a pale" or "very white" face.

The magistrate, in my view, was justified, in the particular circumstances and in the light of other evidence and the alibi evidence to which I will refer presently in accepting the evidence of her distress as corroborating absence of consent.

The conduct of an accused can amount to corroboration and it will be helpful to review the accused's conduct in that connection. When Detective Raju, P.W. 12 went to the accused's home at 5.20 p.m. on 15.5.72, he was not there. He was eventually located at the house of an old lady on 16.5.76 at 9.20 p.m. When the police party entered, the accused made for the window; he tried to escape but was restrained. Why react in this manner at the appearance of the police? When interrogated on his arrest he said (ex. 9A) that he went to Votualevu at 9.00 a.m. and was still there at 6.30

p.m. If that reply were true why did he attempt to fly when the police came to his bedroom? The magistrate clearly regarded that as a lie. When charged the accused repeated the same lie. Although lies do not necessarily amount to corroboration it was stated in *R. v. Chapman* [1973] 2 W.L.R. 876, that lies told out of court may amount to corroboration. The Court of Appeal indicated that where an accused tells lies in his evidence to the court that does not provide corroboration of the complainant's evidence, but is merely a reason for rejecting the accused's evidence. However, lies told out of court by an accused are viewed differently. The judgment at p. 883 E/F reads:—

> "Proof of a lie told out of court is capable of being direct evidence, admissible at the trial, amounting to affirmative proof of the untruth of the defendant's denial of guilt. This in turn may tend to confirm the evidence against him and to implicate him in the offence charged."

That statement of the law was approved in *R. v. Boardman* [1974] 2 All E.R. 958. In that case a headmaster charged with buggery of a pupil told a police inspector that the pupil was lying because accused had expelled him. The statement about expulsion was untrue. The Court of Appeal at 963 *(d)* stated:—

> "In relation to this evidence the judge directed the jury that if they were satisfied that the appellant had lied, either to the police before the trial or in the witness box, such lies were capable of amounting to corroboration. Counsel had attacked this direction on the grounds that if the appellant lied to the inspector it was only on a peripheral matter and that, on the authority of *R. v. Chapman,* lies told by the appellant in evidence cannot amount to corroboration. We are unable to accept the first of these arguments. In our view if the appellant had lied to the inspector in saying he had expelled, S, it was not a lie on a peripheral matter but of such a nature and made in such circumstances as to lead to an inference in support of (the complainant) (see *Credland v. Knowler* citing other authorities)."

They also said at p. 884,

> "If the defence is an alibi and the alibi breaks down the jury must not be told that they may convict merely because the alibi has broken down, but they are entitled to ask themselves the single question, 'Why has a false alibi been tendered?' If there is only one possible answer to that question they are entitled to give their answer by their verdict."

The case *Credland v. Knowler* (1951) 35 Cr. App. R. 48 (quoted above) referred to an allegation of indecent assaults on 2 little girls. They had entered the accused's garden and they alleged that he took them for a walk up the hill and committed the offences. To the police he denied having ever left his garden; soon after he agreed with the police that he did leave his garden and go up the hill with the girls. The Divisional Court of Appeal stated that that lie in conjunction with his later admission that he did go up the hill with the children (although he denied touching them) amounted to corroboration of the unsworn evidence of the two little girls.

In *R. v. James Henry Knight* (1966) 50 Cr. App. R., 122, the appellant was charged with indecently assaulting a little girl in a public lavatory in Parliament Street. Her father saw her in Parliament Street with the accused and the accused walked away. When seen by the police the accused denied that he had been in Parliament Street. The Court of Appeal referred to its judgment in *Redpath's* case (supra) and said at p. 126,

"In those circumstances this Court had no hesitation in saying that if the jury believed the father and found that the appellant was telling a lie, it was certainly very cogent evidence capable of amounting to corroboration." A

Following the ratio decidendi of those decisions it seems that if the accused lied to the police saying that he was at Votualevu all day on 15.5.76 when he had been recognised in the vicinity of the crime at the material time, that would be very cogent evidence capable of amounting to corroboration. As stated in *R. v. Chapman* (supra) it could amount to affirmative proof of the untruth of the accused's denial of guilt. It B would indicate that he was endeavouring to conceal the fact that he had been in the vicinity at the time of the alleged offence. The accused's defence was an alibi in which he maintained that he was at Votualevu at the time of the offence. The magistrate rejected the alibi. As was said in *R. v. Boardman* (supra) the magistrate was entitled to ask himself why a false alibi had been tendered, and if there was only one possible answer to that question, namely that the accused was concealing his true C movements then the magistrate was entitled to give his answer by his finding. That evidence when considered in the light of the distress evidence given by the complainant's companions supports their credibility, in that it can be regarded as corroborative of the complainant's evidence of absence of consent.

There was no need for the magistrate to warn himself of the danger of convicting on uncorroborated evidence. There was cogent corroborative evidence from more D than one source confirming the act of sexual intercourse, the absence of consent and implicating the accused. It would have been preferable for the magistrate to record his awareness of the need for corroboration on those points. However, he dealt with them separately and revealed that he accepted the distress evidence as corroborative of lack of consent. Although he did not use the word 'corroboration' he regarded such testimony as "further illustrations of lack of consent." He did say that he dismissed the accused's alibi as having been rebutted by the prosecution evidence and E indicated that as a consequence he regarded the accused as being guilty.

The Privy Council, In *Chin Nang Hong* [1961], 1 W.L.R. 1279, held that a judge sitting alone should, where there is no corroboration warn himself of the danger of convicting an uncorroborated evidence.

In *R. v. Trigg* (1963) 47 Cr. App. R. 94, it was held that where there is evidence, F which if accepted must amount to corroboration, the jury should still be informed of the danger of convicting on uncorroborated evidence. However a professional magistrate combining the functions of judge and jury is in a different position. A jury returning a verdict of guilty may have rejected corroborative evidence and accepted the evidence of the complainant alone, but juries to not give reasons for their verdicts and warning are necessary features of a summing up. On the other hand a magistrate or judge sitting alone gives his reasons for his verdict and they G may well reveal that he has borne the dangers in mind. The magistrate's reasons for conviction and acceptance of corroboration could have been more cogently expressed and indeed the evidence might usefully have been referred to in more detail. Nevertheless it is apparent that he realised what kind of corroboration was required by referring to it and accepting it in support of the complainant's evidence.

H

The Australian Law Journal Vol. 50 No. 4 p. 158 of April 1976 contains an interesting review of the approaches of English and Australian courts in regard to warning juries of the danger of convicting in sexual cases without corroboration, and of

whether to warn them where there is corroborative evidence. The learned author made an extensive review of the Australian authorities and pointed out that in Australia where there is corroboration of a complainant in sexual cases the absence of a warning does not amount to an error of law and not even to a miscarriage of justice. A

I conclude that in a trial conducted by a professional magistrate sitting alone, where there is corroboration in a sexual case he is not obliged to specifically direct himself as to the need for it provided it is apparent that he must have accepted it. B

Ground *(j)* fails.

Ground *(k)* is a mere quibble about use of the words bikini and panties and I dismiss it.

Ground *(l)* refers to the evidence of Professor Mckenzie, P.W. 7, alleging that the magistrate erred in accepting testimony from him as to the veracity and character of the complainant. The magistrate, on the accused's behalf, questioned P.W. 7 at the end of his evidence in chief by suggesting that there could be other explanations for the complainant's appearances and P.W. 7 agreed. The magistrate then tried to ascertain whether the complainant's make up had displayed any tendency which could prompt her to fabricate such a charge. P.W. 7 expressed the view that she was truthful and not a good actor. The judgment does not purport to accept P.W. 7's reply as supporting the prosecution case. Had P.W. 7 said anything which could have pointed to instability in the complainant's character the magistrate would no doubt have followed this up for the accused's benefit. C D

Ground *(l)* fails.

Ground *(m)* alleges that regarding the evidence as a whole and taking account of all the circumstances the magistrate should have acquitted the accused. E

The preceding numerous grounds of appeal have required me to review care fully the whole of the evidence and the law and practice relating thereto. If the magistrate believed it, there was ample evidence to up hold the conviction. I have referred to it already and it is unnecessary to go into it all again.

This ground fails. F

Ground *(n)* was dealt with first.

Ground *(o)* states that the magistrate failed to direct himself as to the need for caution in considering visual evidence of identification. Mr Koya referred to a Law Report in The Times dated 9/7/76 headed "Identification evidence guidance" contained in a judgment of the Court of Appeal in *R. v. Turnbull & Others.* It indicates how a judge should warn juries of the care required in assessing evidence of identification when the prosecution case rests entirely on its reliability. There was no jury and there was considerable evidence to corroborate the complainant's identification, as I have already pointed out. A jury, as I have said, gives no reasons for its judgment and it is essential that their minds should be directed to the dangers inherent in visual identification. When a magistrate sitting alone gives his reasons for accepting a visual identification, and refers to other evidence such as the lie to the police as to suspect's movements, the evidence of neighbours who recognised him and his false alibi, all of which amount to ample and cogent corroboration of the identification, then it displays no casual acceptance of the identification. The magistrate's omission to record that he was aware of the need for reliable identification evidence led to no miscarriage of justice. G H

The accused was recognised in the vicinity of the crime at material times by wit
A nesses who had known him for years. As stated in *R. v. Turnbull,* recognition has more probative value in establishing identity than a subsequent identification by an individual who did not know the accused prior to the crime.

The accused did not give evidence on oath and there was no evidence from him which challenged or contradicted his identification. This, according to *R. v. Turnbull,* was a factor which the magistrate could take into account in assessing the
B weight to be given to the complainant's evidence.

Ground *(o)* fails.

In opening the appeal Mr Koya said he was abandoning grounds *(a)* and *(b)* as being part of the other grounds. However, on closing he referred to ground *(a)* which states that the magistrate accepted evidence without first evaluating it and thus prevented himself from giving proper consideration to the defence. Mr Koya explained
C that that ground referred to the early portion of the judgment at the top of p. 40 which reads:—

> "I have no doubt but that in the circumstances if her testimony is to be believed, Miss Nelson had no option whatsoever than to submit and I believe her when she says she had no opportunity to escape or to reach for the cane knife lying behind her assailant on the floor."

D

That statement followed a precis of the complainant's description of the rape. However, the magistrate did not then say "therefore I am satisfied that she was raped and that it was the accused who did it." He went on to refer to her evidence in general including her claim to be a virgin. P.W. 1 Dr Radha Krishna, said the hymen was missing and she could not have been a virgin at the time. But Dr Sutton stated that there were many reasons, including the use of tampons when menstruating which
E could damage the hymen. The complainant had used tampons for several years and the magistrate took the view that this could account for the absence of the hymen. He was considering the possibility of her showing readiness to indulge in sexual intercourse, and the effect that this would have on her credibility. Likewise he was considering the probability that she had lied in saying she was a virgin which would further affect her credibility. Therefore in saying he believed she had no opportunity to escape he obviously could and should have added some such expression as "for
F the following reasons", because he then went on to explain why he accepted her evidence of no consent. He did not arrive at a conclusion without considering the evidence and giving it what weight he deemed it deserved. He then found that there had been a rape.

Thereafter he went on to consider the issue of identity and the evidence of both sides thereon. It would have been better if he had deferred his finding on the issue of
G rape until he had dealt with the evidence as to identity, because in the circumstances the accused's untruth to the police about his movements was acceptable corroborative evidence of the complainant's evidence of lack of consent apart from the false alibi.

It could not be said that he precluded himself from giving fair and full consideration to the evidence of the defence. In fact the accused gave no evidence apart from
H an unsworn statement denying the offence and claiming to have been in Votualevu at the time. The only evidence tendered was from the alibi witnesses. The magistrate considered the evidence of the alibi witnesses before rejecting it as unreliable. He had ample grounds for taking that course.

Ground *(a)* is rejected.

It follows that the accused's appeal against his conviction is dismissed. A

There is also an appeal against sentence which appears as ground *(c)*. Mr Koya pointed out that when the learned magistrate delivered his judgment on 28.5.76 he did not sentence the accused. He deferred sentence because there was a judgment pending concerning the accused on an earlier charge of rape which was not delievered until 7/6/76. On 9/6/76 the magistrate then sentenced the accused as a person with a previous conviction for rape and imposed a term of five years imprisonment B consecutive to the sentence already imposed and 7 strokes.

In my opinion the magistrate erred in adopting this procedure. What decision the other magistrate might come to was no concern of his in passing sentence. Had there been a finding of not guilty on the other charge, the magistrate would have been embarrassed by his knowledge that the accused had been tried for a similar offence. Moreover, what one takes into account is evidence of previous, not subse- C quent convictions. In the instant case the accused was convicted on 28th May and the magistrate accepted a conviction on 7th June as being previous.

He should have sentenced the accused without reference to the other case and the other magistrate could have taken account of the conviction on 28th May.

According to the magistrate's record the accused on 7/6/76 had received 4 years and 9 strokes for the rape and 15 months for some other offence. I have learned that D the 4 years and 15 months were consecutive making 5¼ years. The magistrate in the instant case imposed a sentence of 5 years consecutive to the foregoing and seven strokes. It amounts to a total of 10¼ years.

Had the magistrate passed sentence at once he would have treated the accused as of hitherto good character. In those circumstances I would have thought that a sentence of 3½ years imprisonment and 10 strokes would have been appropriate. E

Accordingly I vary the sentence imposed by the learned magistrate from one of 5 years and 7 strokes to one of 3½ years and 10 strokes.

I understand that there will be an appeal against the other conviction for rape. Should the appeal fail it would be open to the prosecution to inform the judge that the accused has one previous conviction for a like offence, namely the convic- F tion herein.

Appeal against conviction dismissed. Appeal against sentence allowed.