SAHA DEO

v.

THE STATE

[HIGH COURT, 1989 (Fatiaki J) 10 November]

Appellate Jurisdiction

Evidence: criminal- sexual assault- recent complaint- corroboration- relevance of distressed condition of complainant.

On appeal to the High Court against his conviction for indecent assault in the Magistrates' Court it was argued that the magistrate had wrongly admitted evidence as being a recent complaint and had wrongly found corroboration of the complainant's evidence. The High Court, dismissing the appeal HELD: (i) that the complaint was, in all the circumstances, made at the first reasonable opportunity and was accordingly admissible (ii) that a torn dress afforded corroboration (iii) that the complainant's distressed condition, in the circumstances, did not and (iv) applying established principles the findings of fact reached in the Court below would not be disturbed.

Cases cited

DPP v. Kilbourne [1973] AC 729
Khoo Sit Hoh v. Lim Thean Tong [1912] AC 323
Michael Parma Nand v. R 12 FLR 45
Mohammed Safaraz Khan v. R 11 FLR 87
R v. Bond [1906] 2 KB 389
R v. Knight (1966) 50 Cr. App. R 122
R v. Moana [1979] NZLR 181
R v. Redpath (1962) 46 Cr. App. R 139
R v. Wilson (1974) 58 Cr. App. R 169

Appeal against conviction entered in the Magistrates' Court.

V. Parmanandam for the Appellant
Ms. A. Prasad for the Respondent

Fatiaki J:

The appellant appeals against his conviction by the Labasa Magistrates' Court for an offence of Indecently Assaulting a Female and Criminal Trespass. Upon his conviction the appellant was sentenced to concurrent terms of 12 months and 3 months imprisonment, respectively.

The appellant's petition of appeal (as amended at the hearing) contains the following grounds of appeal:

"(a) That the Learned Trial Magistrate erred in law in not ensuring that

the sentence imposed is consistent with sentences imposed for allied or kindered offences thus causing the appellant to feel that whilst justice may have been done, it does not appear to have been done.

(b) That the Learned Trial Magistrate:

(i) Erred in law in admitting evidence of the prosecutrix's complaint and details thereof which was four days old.

(ii) That the Learned Magistrate further erred in failing to consider the gap in time in so far as the torn frock was concerned.

(iii) That the Learned Trial Magistrate erred in accepting the evidence of the complainant.

(c) That the Learned Trial Magistrate erred in law in treating the evidence of both counts as one."

On the face of the petition there does not appear to have been an appeal against sentence, but with the agreement of counsel, I propose to treat ground (a) above as being one against severity of sentence.

However I shall deal with ground (c) first according to the order in which the appeal was argued. On this ground complaint was made against the statement by the learned trial magistrate in his judgment where he said :

> "Count one is in respect of a sex offence and count two is inextricably woven with it."

This statement it is argued amounts to a misdirection in law as indicating that the learned trial magistrate had failed to consider the evidence separately on each count. With this submission I cannot agree.

It might just be that the learned trial magistrate was referring to the factual context in which the incidents occurred when he said they were "inextricably woven". In any event State Counsel submits the evidence relating to Criminal Trespass was part of the res gestae and relevant and admissible [per. Kennedy, J. in R. v. Bond [1906] 2 KB 389, 400].

The particulars charged by the prosecution in respect of the offence of Criminal Trespass alleged that the appellant had ".....persistently remained in the compound of (the complainant) after being warned to depart from thereof".

The learned trial magistrate in his judgment set out the complainant's evidence and the appellant's denial in regard to this offence.

In particular, the complainant's evidence that the appellant had come on horseback up to her in her compound and had spoken to her in lewd terms, and when she chased him away instead of leaving the appellant alighted from his horse and

indecently assaulted her tearing her dress in the process.

It is true the offences (in which the parties are the same) are separated by a matter of minutes, and although they occurred during the course of the same incident nevertheless the evidence on each count must be considered separately. [see: R. v. Wilson (1974) 58 Cr. App. R 169.]

Having said that however, even accepting that the learned trial magistrate's phraseology could have been more cautiously worded, nevertheless, there is nothing to demonstrate that he had not considered the evidence on each count separately or had improperly relied on the evidence on one count to support the evidence on another or vice versa.

Needless to say having believed the complainant's evidence and disbelieved the appellant's as "palpably false", the learned trial magistrate was inevitably driven to the conclusion that the appellant was guilty of Criminal Trespass.

This ground of appeal accordingly fails.

In so far as grounds (b)(i); (ii) and (iii) are concerned learned counsel for the appellant glossed over grounds (b)(i) and (ii) and devoted most of his submissions to ground (b)(iii).

Firstly, learned counsel complains that the complainant's torn dress cannot amount to corroboration and secondly, that her complaint to her husband upon his return some 3 days after the event could not amount to recent complaint so as to confirm or support her allegations against the appellant.

As to the question of recent complaint, I cannot agree with the submissions of learned counsel. The learned trial magistrate in his judgment merely mentioned it in the course of narrating the complainant's and her husband's evidence. He nowhere treats it as a recent complaint and there is no basis for counsel's complaint.

In any event, in her evidence the complainant explained that she did not complain to her Fijian neighhours on the day of the incident when she had gone to their house because this was the first time such a thing had happened to her, she was ashamed and shy and had wanted to tell her husband first, which she did the following day after he had returned.

Needless to say the learned trial magistrate noted that "the complainant is a Muslim woman married with 4 children. Her husband had left the farm on the 15th (of June 1988)" and "the area is a remote village area."

In Mohammed Safaraz Khan v. R. 11 F.L.R. 87 involved a charge of buggery against a young boy where no complaint was made until some 9 hours after the incident when the boy went to 3 older men of his race. The Court of Appeal agreed with the expressed opinion of the learned trial Judge that the complainant's conduct was not out of keeping with what might be expected of such a boy in the

circumstances disclosed, nor did the Court think that any inference unfavourable to the credibility of the boy's evidence could be drawn from the fact of his remaining in the accused's house thereafter.

Additionally, the Court observed at p. 90 :

> " ..... that he took the first opportunity of making a complaint to the persons who would be the proper recipients of such a complaint, that is elderly persons of his own race and speaking his own language. In any event no submission was made by counsel that the evidence should not have been admitted."

In my view a similar observation could be made in the circumstances of the present case. This ground of appeal is accordingly dismissed.

As for corroboration, in at least two passages in the learned trial magistrate's judgment he has referred to the complainant's torn dress as "going a long way to corroborate her story" and as " eloquent testimony to corroborate her tale of woe".

The dress was properly identified by the complainant and produced in the trial as prosecution Exhibit 1. It was before the learned trial magistrate as an item of real evidence.

In respect of it the learned trial magistrate said :

> "According to the complainant the accused had come and molested her. Her dress is torn. It is before the Court. The defence alleges that the dress had been torn by her."

In the circumstances of this case where the accused denied ever going into the complainant's compound or indecently assaulting her, what was required by way of corroboration was some independent evidence that confirmed in some material particular not only that an indecent assault had occurred but also that it was the accused who committed it.

The learned trial magistrate properly directed himself as to corroboration when he said :

> "Although it is desirable that there should be corroboration in respect of sex offences, Court can act on the uncorroborated evidence of a complainant and a conviction in such instances is not illegal.
>
> It is extremely rare to find eye-witnesses or direct corroboration in sex offences. Hence corroboration in such cases has perforce to be indirect."

Furthermore Lord Reid in D.P.P. v. Kilbourne [1973] AC 729 at 758 said of the nature of corroborative evidence:

> " There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Needless to say to amount to corroboration evidence need not directly confirm that the accused committed the offence, nor need it confirm the complainant's entire story. So long as it corroborates the evidence in some respects material to the charge under consideration, it is sufficient.

In this case the learned magistrate's judgment records:

> "In Court the complainant identified her dress and showed the torn parts. She also demonstrated how it had been held and hand put inside. She further said that the accused had pressed both her breasts."

Viewed in that light I am satisfied that the complainant's torn dress (Exhibit 1) does tend to confirm, strengthen and support her evidence of the assault upon her although it does not *per se* identify her assailant.

I cannot agree therefore with counsel for the appellant that the complainant's torn dress cannot amount to corroboration in law. That ground of appeal accordingly fails, but that was not the only item of evidence that was relied upon by the learned trial magistrate as corroborative of the complainant's story.

In the two passages complained of the learned trial magistrate, besides the torn dress also mentions the complainant's unusually depressed state or mood as being corroborative of her story and although this item was not the subject matter of a specific complaint, nevertheless, it bears analysis.

The evidence in this regard is to the effect that the incident occurred at about 8.00 a.m. and the complainant went to her neighbour's house at 1.00 p.m. (some 5 hours later). There, she was observed by Lite Vuivura (P.W.3) to have looked sick, pale and sad neither did she joke to her nor did she appear to be her usual jovial self. The complainant neither complained of or mentioned the assault to her at the time on that day.

The headnote to R. v. Redpath (1962) 46 Cr. App. R 319 reads :

> "In a sexual offence the distressed condition of the complainant is capable of amounting to corroboration of the complainant's evidence, but the weight of such evidence as corroboration will vary according to the circumstances of the case. "

The facts in Redpath were that the girl emerged from a moor - seconds after the

man alleged to be concerned had left. She was not going to make a complaint at that moment, and she had no idea she was being observed. In fact an independent bystander saw her emerge in an extremely distressed condition.

The circumstances in which a complainant's emotional state and appearance can afford corroboration must therefore of necessity be very limited. This was the view expressed by Lord Parker C.J. in R. v. Knight (1966) 50 Cr. App. R 122, 124 and by Edmund Davies L.J. in R. v. Wilson (1973) 58 Or. App. R. 304, 309.

As was observed by Woodhouse J, in R. v. Moana [1979] 1 NZLR 181 (C.A) at p. 185:

> " ..... a period of nearly an hour passed before independent witnesses were able to observe the distressed condition of the complainant ..... at best this was a borderline example of distress being capable of corroborating complaints of sexual assault. After all where there is a lapse of time the validity and significance of the signs of distress must depend entirely on the jury's evaluation of the woman concerned as an honest person who would not stoop to mere pretence in order to shore up her allegation. If that sort of assessment has to be made ..... it must usually be sufficient to leave it to the judgment of the jury to accept her evidence without reference to a possible item of corroboration which might or might not fairly seem to be an involuntary manifestation of her feelings."

In that case the Court quashed the conviction and ordered a new trial.

I am satisfied that the evidence in this case of the complainant's distressed condition (if it can be called that) falls far short of that which could or would amount to corroboration and ought not to have been relied upon by the learned trial magistrate. Interestingly enough, the witness had at the time attributed the complainant's appearance to her husband's prolonged absence.

As to the identity of the assailant, in my view there is some circumstantial evidence implicating the appellant. That he had the opportunity there can be no question.

The appellant himself admitted in his sworn evidence that he had ridden past the complainant's house on horseback, had seen the complainant filling water into a bucket and had shouted to her. And although he denied in cross-examination knowing that the complainant's husband was not at home that day the 4th and 5th answers in his uncontested caution interview record (Prosecution Exhibit 3), speak otherwise.

He was also independently seen by Lite Vuivura going towards Gafoor's (the complainant's husband) house between 7.30 and 8.00 on the day in question around about the time when the incident is said to have occurred.

Then learned counsel for the appellant raised 2 matters that he submits so fundamentally affected the complainant's evidence that she ought not herself to have been believed whether or not her story was corroborated.

A

These were, firstly, that the complainant had in counsels own words "attempted to fabricate evidence by bribing a potential witness"and secondly, in not telling a defence witness Sekove Tuitoga that her dress was torn when questioned about the incident.

As to the first, the learned trial magistrate dealt with it in the following passages in his judgment when he said at p.12 :

B

> "The learned counsel for the defence contended that the complainant had been looking for witness in that she had asked Eramasi's wife to tell the police that she had seen the accused in her compound to which the latter had responded that she had seen him on the road.
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> C
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> I do not view this factor as a sinister attempt on the part of the complainant to cook up a story : it is rather a pathetic step in her helpless state to find a witness to support her story. It is admitted even by the accused that he went that way and spoke to the complainant. So it is natural for the complainant to think when the accused came to her compound he would have been seen by some neighbout like Eramasi's wife."
>
> D

As to the second, learned State Counsel responded that the conversation with the defence witness was not in the nature of a complaint by the complainant to the witness but was merely a reply to a question "whether there was any marks" (presumably on her body as a result of the assault). Counsel further submitted that the complainant at that time had already complained in detail to her husband and it was very unlikely that she would, in her husband's presence, volunteer the additional information that learned counsel for the appellant suggests she ought to have to a Fijian man albeit that he was a neighbour.

E

Learned State counsel also referred to the absence of any complaint to another neighbour Lite Vuivura to whom the complainant had voluntarily gone after the incident and yet it was pointedly remarked she was a woman with whom the complainant had sometimes discussed sex matters!

F

In my view neither of these matters were singularly or collectively capable of undermining the complainant's credibility as a witness.

G

The learned trial magistrate in concluding his judgment said:

> "The defence also alleged that she has given different versions about the incident. I do not see any contradictions in what she had told her husband, what she had told Eramasi's wife and what she told in open court in testifying. Of course in court she has given a very

detailed account with all the lurid details where as what she had told her husband and Eramasi's wife is just the outline. There is nothing contradictory. Her torn dress tendered as a production and her unusual depressed state as spoken to by Eramasi's wife is eloquent testimony to corroborate her tale of woe.

I believe the complainant's evidence. I have observed her demeanour in the witness box and how she faced the cross-examination. I reject the accused's evidence as palpably false. "

It has been stated time and again that an appellate court will not as a rule interfere with the findings of fact of a trial court which has had the benefit of seeing and hearing the witnesses. To take but one example, Lord Robson in delivering the opinion of the Privy Council in Khoo Sit Hob v. Lim Thean Tong [1912] AC 323 said at p. 325 :

"The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

In this case the learned trial magistrate accepted the version of facts given by the complainant and rejected the appellant's version as palpably false.

Having myself carefully considered the learned trial magistrate's Judgment and the evidence produced before him I am satisfied that he was entitled to come to the conclusion that he did.

A

The appeal against conviction is accordingly dismissed.

As for the appeal against the sentence of 12 months imprisonment imposed in respect of the appellant's conviction for Indecent Assault, learned counsel drew the court's attention to two sentences passed by different magistrates in different courts in cases involving a school teacher and two students, and a church minister and his parishioner.

B

In neither instance it was submitted was the accused given an immediate custodial sentence and yet each accused was in a position of trust vis à vis his victim.

Counsel submits that this court should attempt to ensure some measure of uniformity in the sentences passed by the Magistrates' Court for similar offences.

C

If I may say so the learned magistrate noted that a similar relationship existed between the complainant and the appellant in this case and it was properly conceded by counsel that in each of the cases which he referred to, the accused had pleaded guilty thereby showing remorse and saved the victim from having to give evidence.

D

Furthermore there are aggravating features to this case including the foreknowledge of the appellant that the complainant's husband was not at home; the relative remoteness of the area; and the context and manner in which the assault occurred.

Needless to say uniformity of sentences is a desirable ideal but sentences vary as infinitely as the facts of the cases in which they are imposed.

E

In this case, unlike in Michael Parma Nand v R 12 FLR (cited by learned counsel for the appellant), Counsel for the State does not concede that the sentence imposed by the learned trial magistrate was excessive nor can it be claimed to be so by reference to the maximum sentence provided by the legislature.

The sentence in this case is neither harsh nor excessive. In the result the appellant's appeal against sentence is also dismissed.

F

(Appeal dismissed.)

G