ROSHAN ALI (f/n KURBAN ALI) v STATE

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

6, 14 March 2003

[2003] FJHC 67

Criminal Law — appeals — appeal against conviction and sentence — whether there was no direct evidence to prove charges — whether the evidence of reconciliation is corroborative — whether sentence was harsh and excessive — Penal Code (Cap 17) ss 149, 150, 153.

Roshan Ali (Appellant) was convicted for the offences of Abduction of a girl under the age of 18 years with intent to have carnal knowledge and Rape. He was sentenced to a total of 7 years' imprisonment. He appealed against the conviction and sentence on the grounds that there was no direct evidence to prove the charges, the evidence of reconciliation and medical report must not have been accepted and the sentence was harsh and excessive.

Held — (1) There was compelling evidence from the Complainant, her parents, the doctor and the Appellant himself to support the charges. The evidence against the Appellant was compelling because she had been with him just before she was dropped home. This evidence together with the recent Complainants and the medical evidence established a strong prosecution case. There was ample evidence to support the Complainant's evidence as to the rape.

(2) It was clear from the facts that the Complainant's parents knew the Appellant and might have agreed to the Complainant accepting a lift in his car. They did not consent to the 2–hour ride, the smoking of marijuana or the sexual intercourse with their daughter. This is so despite the absence of direct oral evidence from the Complainant's mother in this regard.

(3) Evidence must be capable of being corroborative and independent of the complaint. It must implicate the accused in a material way in respect of the offence charge. The evidence of reconciliation was independent of the Complainant but there was no evidence led as to any admissions made by the accused (or with his consent) during the exchange between the Appellant's wife and employer and the Complainant's father. The evidence of reconciliation does not provide corroboration.

(4) The betrayal of trust and the use of marijuana would justify a starting point of 18 months' imprisonment. The rape and abduction are factually closely linked and are separate offences. A total of 7 years' imprisonment is a sentence which reflects the totality of the offending in this case. The court did not err in the imposition of the sentence.

Appeal dismissed.

Cases referred to

Maika Soqonaivi v State Crim App No AAU 8 of 1997; *Mark Mutch v State* Crim App No AAU 60 of 1999; *Mohammed Kasim v Reg* (1976) 22 FLR 120, considered.

R v Jones [1973] Crim LR 621; *R v Manktelow* (1853) 6 Cox CC 143; *R v Mycock* (1871)12 Cox CC 28; *R v Timmins* (1860) 8 Cox CC 401; *R v Trigg* (1963) 47 Crim App Rep 94; *R v Redpath* (1962) 46 Crim App Rep 319, cited.

The Appellant appeared in person.

J. Waqaivolavola for the Respondent.

Shameem J. The Appellant was convicted in the Nadi Magistrates' Court on the 20th of December 2001 of the following offences:

FIRST COUNT

Statement of Offence

ABDUCTION OF A GIRL UNDER THE AGE OF 18 YEARS WITH INTENT TO HAVE CARNAL KNOWLEDGE: Contrary to section 153 of the Penal Code Cap 17.

Particulars of Offence

ROSHAN ALI f/n KURBAN ALI on the 30th day of October 1997 at Meigunyah, Nadi in the Western Division with intent to unlawfully and carnally know an unmarried girl aged 16 years 2 days namely MATELITA LEWADUA DERENALAGI took the said MATELITA LEWADUA DERENALAGI out of the possession and against the will of her mother namely RAIJIELI LEWATU.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 149 and 150 of the Penal Code Cap 17.

Particulars of Offence

ROSHAN ALI s/o KURBAN ALI on the 30th day of October 1997 at Meigunyah, Nadi in the Western Division had unlawful carnal knowledge of MATELITA LEWADUA DERENALAGI without her consent.

He was sentenced to a total of 7 years' imprisonment. He now appeals against conviction and sentence.

The facts

The trial commenced on 15 January 2001. The Appellant was represented by counsel. Prosecution witness 1 (PW1) was Dr Prem Chand, Medical Assistant Rakiraki. He said that on 31 October 1997 he attended to Matelita Derenalagi who was brought in to Nadi Hospital by the police. She told him that she had been raped by an Indian man at 9 pm. She looked drowsy. Her physical condition was good but she had injuries. There was a small bruise on the right thigh, and abrasions at the opening of the vagina. There was a white discharge on the vaginal opening. There was bleeding under the skin on the inner right thigh and the right upper inner thigh was bruised with bleeding under the skin. There were redness and abrasions on both sides of the vaginal opening and there was a bruise on the posterior of the vagina. He found that the injuries were caused by the forceful entry of the vagina. He said that the Complainant was unsteady in her gait because she was drowsy. He said that the injuries could have been caused by rape or by the forceful entry of a finger into the vagina.

The Complainant gave evidence that she was born on the 28 October 1981 and was in Form Five in 1997. She said that on the 30 October 1997 at 7 pm she was on her way to the bus stop from the Food for Less Supermarket. She saw the accused. She knew him because he was married to a Fijian woman. He offered to drop her home in his carrier. There was a Fijian boy in the vehicle and the Appellant told him to sit at the back so the Complainant could sit in the front passenger seat. The Complainant then sat in the front. The Appellant was driving. The Appellant then drove to Votualevu Roundabout where he dropped the Fijian boy. He then drove to the back road. He asked the Complainant if she smoked marijuana. She said she had only tried it once. He then dropped her on the road to his house so he could buy marijuana. She waited for him. He picked her up again and followed the back road to a place where a tram line crossed the road. He then asked the Complainant to smoke the marijuana.

The Complainant said she would only smoke a little because she was sick. She did so. She said her head was spinning and that the Appellant wanted her to inhale his smoke. She was coughing and felt weak. The Appellant then said that he wanted her. She said she did not want him, and wanted to go home.

The record then reads as follows:

> He wanted to have sex with me. Accused stood up and forced me to kiss him. He did not stand up but shifted towards me. He also kissed me. He grabbed me I pushed him away. I was weak at the time. He took off his shirt. I was in my school uniform — grey with button in front.
>
> The accused shifted to where I sat, locked the door of the van, opened the button of my uniform. I struggled but he managed to open it. He is bigger than I. He forced me to lie down on the seat. He pulled my panty and pulled up my brassier. Panty was pulled down my legs. He sucked my breasts. I tried to push him. He was heavy and big. I was weak. I felt the pain and became unconscious. I was sick. This was the first time I had sex. I became conscious after 5 minutes. Accused forced me to wake up. I was not fully conscious. My private part was wet. I was shivering. I was lying back. Accused was on the driver's seat. The accused had put my uniform on and asked me to button it.

The Complainant asked the Appellant to take her home. He dropped her about 500 m from her house. She went home and called for her mother. She collapsed inside the house. When she regained consciousness, her mother questioned her. She told her mother what had happened. Her mother called her father. He came and they went in a carrier to Nadi Police Station. She then went to hospital where she was examined by a doctor.

Under cross-examination she said she had refreshed her memory before coming to court, that she had eaten food in the van with the Appellant, that she had sat in the Appellant's van willingly in order that he drop her home, that she did not run away from the Appellant although she could have. She said that she could not have escaped while being raped because the Appellant had locked the van. She said she did not have a bath before the medical examination. She was in all, cross-examined over 3 days of trial.

Under re-examination the Complainant said that although she could have run away before the rape, she did not because she trusted the Appellant. She did not expect him to rape her. She said she did not consent to sexual intercourse.

Prosecution witness (PW3) was the Complainant's mother, Raijieli Dere. She gave evidence that on 30 October 1997, she was asleep when her daughter knocked on the door at about 11 pm. When the witness opened the door the Complainant fell inside and had to be carried to the settee. She was unconscious. When she became conscious she said "Ali Bilisi", the name of the Appellant's wife. She said that the Appellant had raped her and had held her forcibly in a van. She was distressed. The witness called the Complainant's father and he and the Complainant went to Nadi Police Station. She said that she would not allow her daughter to take a shower. She said that the Complainant was wearing school uniform with the belt loose and some buttons unbuttoned.

The next witness was Simione Dere, the Complainant's father. He gave evidence of the Complainant's distressed condition. He also said that after the incident the Appellant's wife and two other villagers, were sent by Tui Nawaka with kerosene and yaqona to ask him to withdraw the complaint of rape. He refused. Two months later, another man, named Lisala was sent with cash and two cows to ask the witness to withdraw the complaint. He refused.

The next witness was Sergeant 748 Seru Savu who arrested and charged the Appellant. The Appellant made no statement to the police.

Corporal 1224 Jese gave evidence that he was the investigating officer. He gave evidence of the crime scene, tendered the Complainant's clothes and the caution interview of the Appellant. He said he had checked the Appellant's statement about one "Aseri" but that no person by the name of Aseri was working for "Endless Town".

The caution interview was conducted in English. In that interview the Appellant said that on the 30 October 1997 he had been patrolling in a Nissan pick-up in Nadi Town in the course of his work at Paradise Mobile Security. One Aseri was with him. Aseri was working for "Adventure Endless". The Appellant said he met the Complainant in town. She wanted a lift and said she wanted to eat something. He then drove to the tram-line and they ate together. The Appellant said that he introduced her to Aseri. He then dropped Aseri at Votualevu and he went home to get some money. He said that the Complainant got off the vehicle 10 chains away from his house because she was afraid of his wife. He said he wanted $5 to buy "smokes". He then said that he went straight to the Complainant's home and dropped her there. He denied stopping at the tram lines first. He denied raping the Complainant, or having sexual intercourse with her. He denied smoking marijuana on that day or any day. He said that when he first met the Complainant she already looked drowsy.

On 7 September 2001, the Appellant gave sworn evidence. His evidence was materially the same as his interview to police. However he said that after he had parked the van near his home to get money, he saw some boys from Vatutu Village walking on the road. He dropped her near Taniela's house near the road at Vatutu after 11pm. He said that the attempts at reconciliation were made because it was Fijian custom. The purpose was to show that the offence had not been committed. He denied raping or abducting the Complainant.

Under cross-examination he said that his wife and the Complainant were on good terms and that his wife would not have got angry if he had taken the Complainant home. He agreed that he dropped the Complainant 2–3 chains from her house after 11 pm, and that he could have personally handed her over to her parents. In re-examination he said that he did not know if the passenger's door was locked or not and said that when he dropped the Complainant home, the main entrance was locked.

The Appellant called no further witnesses. Judgment was delivered on 20 December 2001. In summary the learned magistrate, after reviewing the evidence and the submissions, found that there was overwhelming evidence that at 11 pm, on 30 October 1997, the Complainant was in a state of distress. He said that distress however was only corroborative when it was genuine and not simulated and when it implicated the accused in the offence charged. However he said he needed first to consider the credibility of the Complainant. He then said:

> The Complainant told her mother what the accused did to her as soon as she reached home and became unconscious. Her father was also informed. Complainant was taken to the Police immediately. The accused dropped her near her house around 11.30 pm. The medical examination was at 1.55 am. The manner of her testimony, her demeanour and reporting the incident immediately leave no doubt about her credibility. The medical examination and the injuries on her genitals again reinforce her credibility.

He then considered the Appellant's sworn evidence. He found that because St Andrew's School is almost opposite the road to Vatutu village, the Appellant could have dropped her home within minutes when he stopped there to eat. The fact that he did not, showed he did not intend to take her home then. He said that the Appellant admitted being alone with the Complainant until he dropped her in

the village after 11 pm. The doctor found at 1.55 am that she had been raped. He found that the combination of the report and the Appellant's admission to be corroborative of the Complainant's evidence. He also found the attempts at reconciliation by the wife and employer of the Appellant to be a corroborative piece of evidence on the count of rape.

As for the count of abduction, he found that the Complainant was under the age of 18 at the time of the offence, that the Complainant had accepted a lift from the Appellant so he would take her home, that the Appellant intended to rape her when he took her in his van and that the Complainant's consent to the lift was immaterial. He said he found on the evidence, "some conduct amounting to a substantial interference with the possessory relationship of parent and child": *R v Jones* (1973) Crim LR 621. He convicted the Appellant on both counts.

The learned magistrate then proceeded to sentence. The Appellant was, at this stage, unrepresented. During the trial he had been represented by counsel. In mitigation he said he was 34 years old, married, and the sole breadwinner in the family. He has three children. He was a first offender. The learned magistrate said:

> This is a case of a brutal rape of a 16 year school girl in uniform. She was induced to inhale Indian hemp and raped when physically and mentally helpless. Her testimony was clear and precise in spite of suspicious investigation and prosecution. The sentences are made consecutive because the accused deserves a longer prison sentence.
> Count 1 — 2 years imprisonment;
> Count 2 — 5 years imprisonment
> to be served consecutively.

The appeal

The grounds of appeal, filed in person, may be summarised thus:

(1) there was no direct evidence to prove the charges;
(2) the learned magistrate erred in accepting evidence of reconciliation as corroboration;
(3) that the learned magistrate erred in putting any weight on the medical report;
(4) that the Appellant was not medically examined to show that he was the person who had raped the victim;
(5) that the sentence was harsh and excessive.

The first ground of appeal is that there was no evidence to prove the charges. Of course, there was compelling evidence from the Complainant, from her parents, from the doctor and from the Appellant himself, to support the charges. It was not in dispute that between 9 pm and 11 pm the Complainant was with the Appellant in his van. Nor was it in dispute that for much of that time, they were alone together. Nor was it in dispute that the Complainant was dropped near her home at 11 pm or shortly thereafter in a near-fainting condition. The doctor's evidence was that she had been raped. The evidence against the Appellant was compelling because she had been with him just before she was dropped home. This evidence together with the recent Complainants and the medical evidence established a strong prosecution case. There was ample evidence to support the Complainant's evidence as to the rape.

In respect of the charge of abduction, s 153 of the Penal Code provides as follows:

> Any person who, with intent that any unmarried girl under the age of eighteen years shall be unlawfully and carnally known by any man, whether such carnal knowledge is

> intended to be with any particular man or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother, guardian or any other person having the lawful care or charge of her, is guilty of a misdemeanour:
>
> Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of eighteen years.

This offence is similar to the offence of "Abduction of unmarried girl under eighteen" under the Sexual Offences Act 1956 in England. The offence is committed when a girl under the age of 18, is taken out of the possession of her parents against their will for the purpose of sexual intercourse. In *R v Manktelow* (1853) 6 Cox 143, it was held that the "taking" need not be by force, either actual or constructive and it is immaterial whether the girl consents or not. There must be some evidence (as the learned magistrate held) that there was a "substantial interference with the possessory relationship of parent and child": *Jones* above. In *R v Timmins* (1860) 8 Cox 401, the accused planned with the victim to meet and stay away from her home for several days. They did so meet and had sexual intercourse. The father did not consent, and the Accused knew he did not consent. It was held that Accused was rightly convicted of Abduction. It is a defence for the Accused to show that he did not know, and had no reason to know that the girl was under the lawful care of her parents, or that he had reasonable cause to believe that she was over the age of eighteen. And, it was held in *R v Mycock* (1871) 12 Cox CC 28 that where the girl has already left her father's house for a temporary purpose, intending to return to it, she is still in her father's care within the meaning of the offence, and if while out of the house the accused induces her to go away with him, he is guilty. The question of whether the girl was in the possession of her parents is a question of fact.

Much of the cross-examination of the victim, in respect of the offence of abduction, was aimed at her consent. In fact, as the authorities show, her consent, and any opportunities she may have had to leave the van, were irrelevant. The question was, as the learned magistrate rightly asked, whether the parents (in particular her mother) consented and whether the Appellant had interfered with their possessory rights. It was abundantly clear from the facts that while the Complainant's parents knew the Appellant, and might have agreed to the Complainant accepting a lift in his car, they did not consent to the two hour ride, the smoking of marijuana or the sexual intercourse with their daughter. This is so despite the absence of direct oral evidence from the Complainant's mother in this regard. This ground is dismissed.

The next ground is that the evidence of the Complainant was uncorroborated. It is a sad indictment on the justice system in Fiji, that our law continues to preserve the need for a corroboration warning in sexual cases. Frequent calls have been made for the abolition of this law, not only from the victims of crime, but also from the judiciary. In *Maika Soqonaivi v State* Crim App No AAU008 of 1997, the Court of Appeal said:

> Before parting with this case, we refer to the law in Fiji requiring a judge to direct assessors that, in a sexual case, it is dangerous to convict on the uncorroborated evidence of the Complainant. This requirement is based on the requirement of the common law. It has been regarded as unsatisfactory in many jurisdictions. This is because of its inflexibility, the apparent assumption that Complainants' evidence is inherently unreliable, and the direction may result in a guilty person being acquitted solely because of the effect of the direction … In New Zealand the law has been

> amended to remove the requirement, and leave the nature of any direction to the discretion of the trial judge … We suggest that consideration be given to a similar amendment to the law in Fiji.

And in *Mark Mutch v State* Crim App No AAU0060.1999, the court said:

> The common-law requirement for corroboration of the Complainant's evidence in sexual cases is a frequent source of confusion and was criticised by this Court in *Maika Soqonaivi v State* (13 Nov 1998). It has been abolished by statute in New Zealand. However it is still the law in Fiji Islands …

I would add that the law on corroboration has now been amended in all states of Australia, in Canada and in the United Kingdom. Clearly urgent reform is required to prevent injustice in this area of the criminal law, and to respond to criticisms that the law of corroboration in sexual cases, which has the greatest impact on women and children, is an example of an inequality before the law.

The law as it stands requires a judge to direct assessors (and a magistrate to direct himself or herself) that it is dangerous to convict without corroboration. Then the court must identify those pieces of evidence (if any) which are capable *in law* of constituting sources of corroboration.

The learned magistrate did not direct himself that it was dangerous to convict in the absence of corroboration. However, the danger was obviously a matter he had considered, because he went on to discuss pieces of evidence he found to be corroborative. The failure to give a corroboration warning is usually fatal especially where there is no possible corroboration on the facts, or where the court might decide that while there was evidence capable of corroborating the evidence of the Complainant, it did not in fact do so. However, in cases where a warning was not given but there was evidence which indisputably amounted to corroboration, it may be found that there was no substantial miscarriage of justice. Further, as Williams J said in *Mohammed Kasim v Reginam* (1976) 22 FLR 120, a magistrate hearing a rape/sexual assault case, does not need to warn himself/herself about the dangers of convicting in the absence of corroboration where he/she has found such corroboration. This is because he/she is judge of fact and law. At 130, his Lordship said:

> In *R v Trigg* (1963) 47 Crim App R 94, it was held that where there is evidence, 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 do not give reasons for their verdicts and warnings 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 may well reveal that he has borne the dangers in mind …
>
> 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.

In this case the learned magistrate identified four sources of corroboration, the medical evidence, the evidence of distress, the Appellant's own admissions that he was with the Complainant from 9 pm to 11 pm when he dropped her home, and the attempts at reconciliation.

Of course, evidence of distress must always be approached with care. As Williams J said in *Mohammed Kasim v R* (above) evidence of distress can be corroborative but it must, in all the circumstances, implicate the accused and must clearly be unsimulated. Thus in *R v Redpath* (1962) 46 Crim App Rep 319,

a little girl was indecently assaulted by a motorist who then drove away. However a stranger had seen the accused go towards the child, and immediately afterwards had seen the child emerge looking distressed. The child was not aware that she was being observed and the distress was closely linked to the accused's appearance near her. The evidence of distress was accepted as corroboration.

In *Mohammed Kasim* (above) the victim had been absent from the tourist party she was part of for 45 minutes. On her return she was pale, weeping and trembling. She said she had been raped by the Appellant. Williams J held that in the circumstances, the evidence of distress was unlikely to be simulated and that in the circumstances of that case, it was rightly treated as corroboration. Similarly, in this case, the Complainant collapsed when she reached home shortly after leaving the Appellant. He conceded that he had dropped her near her home, and despite references to "boys" walking around the area, there was no other person who could have been the source of her distress. Further her parents said she had fainted, and this was not disputed by the defence. Clearly the learned magistrate accepted that the distress was not simulated, and only then did he treat this piece of evidence as corroboration. I do not consider that he erred.

The medical evidence did not implicate the accused directly. However the Appellant does accept that he was with the Complainant until he dropped her home, although, he says he never had sexual intercourse with her at all. His admission, his denial about sexual intercourse, and the Complainant's medical condition found on the same night, together were capable of corroborating the Complainant's evidence. I find that the learned magistrate did not err in this regard.

The Appellant in his submissions in court said that he was not examined and that there ought to have been a nurse present during the examination. These matters were not put to Dr Prem Chand during examination. Of course, an efficient investigator would have ensured that the accused is medically examined, and would have asked the doctor to report on whether the white substance found on the Complainant's vagina was sperm from the accused. However, despite shortcomings in the investigation (about which the learned magistrate also complained) there was ample evidence to prove the Appellant's guilt beyond reasonable doubt.

The last source of corroboration found by the learned magistrate was the evidence of attempted reconciliation. He said at 51 of the record:

> P4 the Complainant's father said the accused's wife came to see him with yaqona to reconcile. Later the accused's employer sent a cow, a calf and promised $1000 to withdraw the complaint. The defence submission is that the accused was not personally involved. But the interference related to the rape complaints. The interference was by the wife of the accused and the employer of the accused — also a corroborative circumstance.

Evidence must, to be capable of being corroborative, be independent of the complaint, and must implicate the accused in a material way in respect of the offence charge. While the evidence of reconciliation was certainly independent of the Complainant, there was no evidence led as to any admissions made by the accused (or with his consent) during the exchange between the Appellant's wife and employer, and the Complainant's father. If there had been admissions made during a conversation between the parties, and if those admissions had come from the Appellant either directly or indirectly, then the attempted reconciliation might have provided corroboration.

However, reconciliation is often an attempt to keep the peace between two sets of disputing parties. Often, admissions may be made about which the accused may not be consulted. In this case, it is not known what admissions were made, and to what extent the Appellant himself was implicated by any such attempt at reconciliation. As such, I consider that the learned magistrate did err in accepting the attempted reconciliation as corroboration.

However, such error made no difference to the result. There was ample corroboration elsewhere in the case. Although the learned magistrate made an error, there was no miscarriage of justice. This ground of appeal fails. The appeal against conviction is unsuccessful.

Sentence

The final ground of appeal is in respect of sentence. The starting point for rape in Fiji is 7 years' imprisonment. For the rape of children, it is 10 years' imprisonment. Although the Complainant was not a child under the age of 16, she was just 16 and still at school. The learned magistrate was restricted by his sentencing powers and imposed 5 years' imprisonment. The High Court would have imposed a heavier sentence, perhaps in the region of 7–8 years' imprisonment.

As for the count of abduction, the circumstances of the abduction were not attractive. The inducements, the persuasion as to the use of marijuana and the fact that the Appellant was trusted as an older relative by the Complainant, all called for a deterrent sentence. The learned magistrate imposed the maximum possible under s 153 of the Penal Code.

Counsel for the state provided me with a number of English authorities for child abduction and kidnapping. The sentences ranged from 18 months' imprisonment to 6 years' imprisonment. However, the maximum sentence for kidnapping in England and Wales is 7 years' imprisonment and therefore comparisons with our laws in Fiji is not helpful.

I would consider this case to be one of the worst of its kind. The betrayal of trust and the use of marijuana would justify a starting point of 18 months' imprisonment. After reduction for good character, and enhancement for the age of the Complainant, and the reasons for the abduction, I would arrive at a sentence of 2 years' imprisonment. I do not consider that the learned magistrate erred in passing a 2-year term on count 1.

As for the consecutive sentences, separate offences normally lead to consecutive sentences. However where the total sentence is excessive and does not properly reflect the offending, concurrent sentences may be ordered.

In this case although the rape and abduction are factually closely linked they are separate offences. Further, a total of 7 years' imprisonment is a sentence which reflects the totality of the offending in this case.

For these reasons, the appeal against sentence also fails. This appeal is wholly dismissed.

Appeal dismissed.