

**ELIKI MOTOTABUA v STATE (AAU0025 of 2004S)**

COURT OF APPEAL — CRIMINAL JURISDICTION

5 WARD P, TOMPKINS and SMELLIE JJA

15, 18 March 2005

10 **Evidence — corroboration — Appellant stood trial in High Court on seven charges — assessors found Appellant guilty on all counts — trial judge agreed and entered convictions — whether conviction should not stand since evidence did not establish guilt beyond reasonable doubt — whether convictions entered on rape charges without corroboration — whether lack of corroboration on abduction charge — whether alleged offending not reported to police until 4 days after complainant left Appellant’s house — Penal Code ss 149, 150, 152, 251.**

15 **Legal practitioners — legal aid — Appellant unrepresented throughout trial — Appellant not denied right to counsel — right to representation not absolute — record clearly showed High Court granted Appellant repeated indulgences to apply for legal aid — Constitution (Amendment) Act 1997 s 28(1)(d).**

20 The Appellant stood trial in the High Court on seven charges. The first for abduction, the second for wrongful confinement and five counts of rape. The trial lasted 6 days and at the conclusion of which, the assessors after a short adjournment found the Appellant guilty on all counts. The trial judge agreed and entered convictions. Throughout the trial, the Appellant was unrepresented.

25 The Appellant, again unrepresented, appealed the convictions upon the following grounds:

- (i) that the Appellant was not accorded representation;
- (ii) that the conviction should not stand since the evidence did not establish guilt beyond reasonable doubt;
- (iii) that the convictions were entered on the rape charges without corroboration;
- 30 (iv) that there was lack of corroboration on the abduction charge; and
- (v) that the alleged offending was not reported to the police until 13 April 2002 which was 4 days after the complainant left the Appellant’s house.

35 **Held** — (1) The record clearly showed that the High Court granted the Appellant repeated indulgences to apply for legal aid. It was of the Appellant’s own making that the trial proceeded without counsel. Evidence established that the court had delayed the proceedings for over a year to enable the Appellant to qualify for legal aid.

(2) The assessors were unanimous that all charges had been proved. The evidence established that the prosecution case was a very strong one especially as the Appellant, although he made an unsworn statement, called no evidence.

40 (3) There is no statutory requirement for corroboration in a rape case. Thus, there was no basis for the contention that convictions cannot be entered unless there was corroboration present. The rule of practice required a warning that it was dangerous to convict on the uncorroborated evidence of the complainant. The trial judge gave the Appellant the benefit of the doubt when she directed there was no corroboration on the rape charges, whereas the medical evidence could be said to provide it in respect of

45 consent.

(4) Corroboration was not required for the charge of abduction yet was present in the form of compelling evidence from the Appellant’s mother. Her testimony was that she saw her son dragging the complainant from the taxi and forcing her up the hill to his house despite her screams and physical resistance.

50 (5) The evidence established that the complainant did complain to her sister-in-law on 9 April 2002. The delay was understandable considering the complainant’s distressed condition and her family’s decision to confront the Appellant.

Appeal dismissed.

**Cases referred to**

*Ratu Jope Seniloli v State* [2004] FJCA 46; *Serupepeli Cerevakawalu v State* [2001] FJCA 25, cited.

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*Seremaia Balelala v State* [2004] FJCA 49, not followed.

Appellant in person

10 *D. Goundar* for the Respondent

[1] **Ward P, Tompkins and Smellie JJA.** On 29 March 2004 the Appellant stood trial in the High Court on 7 charges. The first for abduction on 5 April 2002 (s 152 of the Penal Code) the second for wrongful confinement between 5 April 2002 and 9 April 2002 (s 251 of the Penal Code) and 5 counts of rape (ss 149 and 150 of the Penal Code) committed between 5 and 8 of April 2002. The trial lasted 6 days at the conclusion of which the assessors after a short adjournment found the Appellant guilty on all counts, the trial judge agreed and entered convictions. Throughout the trial the Appellant was unrepresented.

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[2] The grounds of appeal lodged in support of the petition of appeal (the Appellant again acting for himself) may be summarised as follows:

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(i) The trial judge obliged the Appellant to proceed to trial unrepresented.

(ii) The evidence did not support the convictions and guilt beyond reasonable doubt was not proved.

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(iii) The trial judge directed there was no corroboration in respect of the rape charges yet convictions were entered.

(iv) The trial judge directed that corroboration was available on the abduction charge when there was none.

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(v) The alleged offending was not reported to the police until 13 April 2002 which was 4 days after the complainant left the Appellant's house.

[3] On the appeal without objection from the State counsel, the above grounds were somewhat expanded to include a complaint about the way the trial judge dealt with the issue of cross-examination by the Appellant relating to drugs and a further complaint that he was prevented from cross-examining in that regard. Also, the trial judge should have overruled the assessors because of inconsistencies in the evidence (an aspect of ground 2 above) and that after conviction and sentence the Appellant was not advised of his rights of appeal or assisted by the trial judge in preparation of grounds of appeal. There was also a complaint regarding the trial judge's ruling dismissing the Appellant's submission made at the end of the prosecution evidence that there was no case to answer.

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[4] Although not raised by the Appellant, State counsel fairly and properly drew the attention of both this court and the Appellant, to the fact that the information for count 2 did not state the specific mens rea required under s 251 of the Penal Code. Citing *Serupepeli Cerevakawalu v State* [2001] FJCA 25 counsel submitted the proceedings in respect of count 2 were a nullity and invited the court to quash the conviction and sentence in respect of it. The conviction and sentence in relation to count 2 are quashed. That makes no practical difference to the period the Appellant is to remain in prison because the sentence imposed in respect of count 2 was less than that imposed for the rape convictions and was to be served concurrently with them.

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We mention in passing that the Appellant sought to argue that the defect in count 2 should result in all the convictions in the other six charges being quashed also, but of course that is an untenable proposition. We return now to a consideration of the appeals in respect of the other counts.

5 [5] On the issue of representation, the record shows clearly that between  
30 January 2003 and 7 November 2003 the court granted the Appellant repeated  
indulgences to apply for legal aid and to challenge initial refusals. Finally, on  
7 November 2003 legal aid was granted but an adjournment was sought and  
10 granted to 23 February 2004 with a pre-trial conference on 19 February 2004.  
The Appellant did not appear on 19 February 2004 and the hearing was further  
adjourned to 22 March 2004. On 22 March 2004 the Appellant confirmed to the  
court that he had withdrawn instructions from the counsel assigned by the Legal  
Aid Commission. Counsel in those circumstances was given leave to withdraw  
15 and the trial was set for 29 March 2004. When the case was called on 29 March  
2004 the Appellant said he wanted a lawyer of his own choice to be paid by the  
Legal Aid Commission because he could not pay for counsel himself. By then the  
case was almost 2 years old. The trial judge considered the Appellant had had  
ample opportunity to engage counsel and the trial had been delayed long enough.  
20 The right to representation is governed by s 28(1)(d) of the Constitution  
(Amendment) Act of 1997 which provides.

28.(1) Every person charged with an offence has the right:

(d) To defend himself or herself in person or to be represented (at his own  
expense, by a legal practitioner of his or her choice or, if the interest of justice  
25 require, to be given the services of a legal practitioner under a scheme for  
legal aid.

But as pointed out by this court in *Ratu Jope Seniloli v State* [2004] FJCA 46 the  
right is not absolute. Here, the Appellant was accorded representation under the  
30 Republic's scheme of legal aid but then withdrew instructions from that counsel.  
The Appellant then wanted representation outside the provisions of the scheme in  
circumstances where he was not entitled to ask for it. It follows that the fact that  
he proceeded to trial without the services of counsel was a situation of his own  
making. The court had delayed for over a year to enable him to qualify for legal  
35 aid. There is no merit in this ground and it fails.

[6] The second ground contends that the conviction should not stand because  
the evidence did not establish guilt beyond reasonable doubt. This ground is also  
without substance. The assessors after a 15-minute retirement were unanimous  
40 that all charges had been proved. The summing up could have left them in no  
doubt that the criminal standard of proof was required. The trial judge  
immediately agreed and entered convictions. We have considered the evidence  
and are of the clear view that the prosecution case was a very strong one  
especially as the Appellant, although making an unsworn statement, called no  
45 evidence. The second ground fails.

[7] The third ground complains that the convictions were entered on the rape  
charges in the absence of corroboration. There is no statutory requirement for  
corroboration in a rape case. The rule of practice requires a warning that it was  
dangerous to convict on the uncorroborated evidence of the complainant but  
50 there is no basis for the contention that convictions cannot be entered unless  
corroboration is present.

Indeed in a comprehensive review of the subject this Court in *Seremaia Balelala v State* [2004] FJCA 49 declared at page 19 of the judgment that the rule of practice that a corroboration warning should be given need no longer be followed.

- 5 [8] In this case it may be said the trial judge gave the Appellant the benefit of the doubt when she directed there was no corroboration on the rape charges, whereas the medical evidence could be said to provide it in respect of consent. Be that as it may, this third ground provides no basis for interfering with the rape convictions.
- 10 [9] The fourth ground contends for a lack of corroboration in respect of the abduction charge. Again, none is required in law but in fact corroboration was present in the form of compelling evidence from the Appellant's mother. Her testimony was that she saw her son dragging the complainant from the taxi and forcing her up the hill to his house despite her screams and physical  
15 resistance.
- [10] The fifth ground challenges the convictions on the ground that although the complainant left the Appellant's home on 9 April 2002 she did not complain to the police until 13 April 2002. There is no substance in this. The complainant  
20 did complain to her sister-in-law on 9 April 2002. In view of her distressed condition and her family's decision that the Appellant should be confronted, the delay is understandable. The Appellant drew this delay of 4 days to the attention of the assessors in his closing address. Obviously, they did not find it significant. Neither did the trial judge nor do we.
- 25 [11] Turning now to the supplementary grounds advanced at the hearing. First the Appellant complained that the judge had sent the assessors out when he wanted to cross-examine regarding drugs in his home. Her Ladyship warned the Appellant of the possible prejudicial effect of opening up the subject. The Appellant apparently heeded that advice because when the assessors returned he  
30 did not pursue the point. Now, as we understand him, the Appellant seeks to elevate what happened to a position where he was prevented from cross-examining the complainant on the point. The record does not support him in that regard and in any event the proposition is preposterous. The trial judge was a very experienced and highly respected judicial officer. There is no  
35 possibility that she denied an unrepresented accused the right to cross-examine. Furthermore the assessors were firmly instructed in the summing up to ignore a brief reference to drugs which the complainant had made, contrary to an indication from prosecution counsel that she should avoid the topic.
- 40 [12] The penultimate point was that because of inconsistencies in the complainants evidence the judge should have overruled the assessors guilty verdicts. We have looked at the evidence. On the essential ingredients of the charges the Appellant faced, there are no inconsistencies in the complainant's evidence that could possibly justify the trial judge in taking the rather rare step  
45 of overruling the unanimous view of the assessors. We deal summarily with the final point that the Appellant was not advised of his appeal rights or assisted in framing the grounds of his appeal by the trial judge. First, the trial judge was under no obligation legal or moral to provide assistance in framing the appeal and second, the appeal was lodged in time so that there is no substance in the other  
50 point, quite apart from the fact that there was no obligation resting upon her Ladyship to advise the Appellant of his appeal rights.

[13] The Appellant also argued that his submission of no case to answer at the close of the prosecution evidence should have been accepted and the trial stopped at that point. All we can say is that at that point the case against the Appellant was extremely strong if not overwhelming. The trial judge applied the correct test and  
5 properly, indeed, inevitably, ruled the Appellant had a case to answer.

[14] In the result, all the Appellants arguments are rejected and the appeal is dismissed save for the quashing of count 2 as explained in para 4 above.

*Appeal dismissed.*

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