RSN v STATE (AAU0079 of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

MARSHALL JA

31 January, 2 February 2012

Criminal law — appeals — leave to appeal against conviction and sentence — rape — whether verdict was unreasonable — recent complaint — proof of consistency of complaint — other complaints — bias — sentencing — Court of Appeal Act s 35(2) — Criminal Appeal Act 1907 (UK)

The appellant sought leave to appeal against conviction and sentence. The appellant, under the false pretence of giving a lift to the victims, took them to a hired room and raped them. He was sentenced to a total of 14 years" imprisonment, with a 12 year non-parole period.

Held –

(1) In order to prove the charge, the prosecution may establish that a complaint of a sexual offence was made closely following the alleged event, without adducing evidence of detail. That will only go to countering any suggestion of recent fabrication. It cannot be evidence of consistency or that that the accused committed the offence. In the present case, the prosecution called witnesses to prove in general terms that both girls had complained of the matters against a man unknown to them who had abducted them by the false pretence that he would give them a lift to the airport.

(2) The argument of apparent bias on the part of the trial judge is unarguable and has no chance of success.

Applications for leave to appeal against conviction and sentence dismissed.

Cases referred to

Hancox 8 Crim App R 193, applied.

Josua Natakuru v The State [2006] FJCA 36, not followed.

Peniasi Senikarawa v The State [2006] FJCA 25; *R v Coulthread* (1933) Crim App R 44, considered.

R v Ogden [1985] 1 NZLR 344; *R v Lillyman* [1896] 2 QB 167, cited.

F Khan instructed by *Faiz Khan Lawyers* for the Appellant.

I Whippy instructed by *Office of the Director of Public Prosecutions* for the Respondent.

[1] Marshall JA. The day of Sunday 10th October 2010 was a public holiday. It was Fiji Day. At about 7.30 am Miss KK and Miss MP were waiting at a bus stop at Saweni, Lautoka seeking travel to work at Nadi Airport. Miss KK a sales assistant aged 22 at the time was talking on her mobile phone. Along came a new black saloon car and the driver's window wound down. Miss MP also a sales assistant who was 19 at the time was addressed by a professional looking Indian man. He was unknown to either Miss KK or Miss MP. He asked whether the girls were travelling to Nadi Airport. When they said that they were, the man said that he was also going to Nadi Airport and he was willing to drop them there. The girls in the face of transport disruption on the public holiday, accepted the lift and got into the back seat. The man and the girls are Indo-Fijians.

[2] Shortly thereafter the car was stopped. The driver took out a kitchen knife and threatened Miss KK so that, as he directed, she moved to the front passenger seat. He resumed driving with the knife in his right hand which was also on the

wheel. He then required Miss KK to unbutton her clothes and with his left hand fondled her breasts. He passed by the entrance to Nadi Airport and went to an apartment building where rooms can be hired for short periods. He entered and procured and paid for a room. He then went to the car and under threat made the girls enter the building and into the bedroom. Miss KK was asked under threat to dance topless which she did. He then required Miss MP to take off her top. He then took off Miss MP's bra and pushed her on the bed. He then undressed Miss MP. Then the man turned his attention to Miss KK. Under knife threat she took off her pants. She said she was menstruating and he checked on this. He asked her to suck his penis with her mouth. At this point he had undressed. Under knife threat Miss KK sucked his penis and continued when she was once again threatened with the knife. He then under knife threat told Miss MP to lie on her front while he inserted his penis into her vagina from the back. When after two or three minutes he withdrew, she immediately noticed sperm on her right thigh. He then told the girls to attend to their dress and hair so that they would not attract attention. With threats of killing them if they reported anything he dropped them off at the *"departure"* area of Nadi Airport. In addition to the knife threats the man continually reinforced the knife threats with death threats.

[3] A trial took place in the High Court at Lautoka between 27th July 2011 and 29th July 2011 before Justice Nawana and three assessors. The defendant was Mr RSN. On the first count of raping Miss MP *per vaginam* the assessors gave a unanimous opinion of guilty. On the second count of penetrating Miss KK in her mouth a majority of (2 out of 3) of the assessors gave an opinion of *"guilty"*. It is accepted that Justice Nawana then convicted RSN as is required by statute in writing saying that after directing himself in accord with his summing up he agreed with the unanimous opinion of the assessors on Count 1 and with the majority opinion on Count 2. He sentenced RSN on 1st August 2011 to fourteen years on each count to be served concurrently. He fixed a period that RSN be not released on parole until he had served a minimum term of twelve years imprisonment.

[4] In the above narrative *"the man driving the new black car"* has become *"Mr RSN"*. I will explain how that came about.

[5] Mr RSN is a recently married school teacher with a degree in accounting conferred by USP, who taught computer studies for Forms 5, 6 and 7 at a Lautoka College. At this time he was 26 years of age. He has no previous convictions.

[6] It is not clear why Mr RSN came to be interviewed on 27th October 2010. Initially apart from admitting that he owned a black private car which he had possessed for two years Mr RSN said *"No comment"* to every question asked about the events allegedly occurring between 7.00 to 9.00 am on 10th October 2010. The interview was suspended at 7.15 pm for a search of Mr RSN's home and an ID parade to take place on 28th October 2010. After the home search, the following was seized and were the subject of questioning starting at 10.35 am on 28th October 2010 *"four dark blue T-shirts, one blue jeans and a blue shorts with two brown handle knife"*. The jeans and the blue shorts had been identified by Miss MP and Miss KK.

[7] Mr RSN admitted wearing the blue jeans on the Saturday 10th October 2010 but denied wearing the blue shorts. He was then asked again about what he was doing on the morning and day of 10th October 2010. This time instead of *"No comment"* he said he was sleeping at home and then he was watching movies with his wife. This was summed up in the following question and answer:

"Q.138: Where were you between 7.20 am to 9.00 am on 10/10/10.
A. I was at home sleeping with my wife."

[8] Since this raised the defence that he was not guilty because he was in another place, then an ID parade was held in which he was picked out by both Miss KK and Miss MP.

[9] At the trial the alibi defence was abandoned, the incident was admitted but possession of the knife was denied and the sexual events that took place were all consented to by Miss KK and Miss MP. The abandoning of his claim of alibi meant that he accepted that he had lied to the police on a material matter. It may be that this diminished his credibility before the assessors.

[10] The only issue being consent, the issue of fact for the tribunal of fact was whether Mr RSN had used a knife and death threats to initiate and continue the girls' compliance with his requests. Did the knife and the many threats to use it and the holding of it in various ways including on one occasion to one of the girls throat negative their consent to the *fellatio* which Miss KK was forced to perform and the sexual intercourse *per vaginam* which Miss MP was forced to endure? In addition there was reinforcement by death threats. The alternative version is a pick up of two girls at 7.30 am by a stranger and an almost immediate realisation that all three would enjoy a threesome at a local *"love"* hotel. In my opinion given that the two girls gave their evidence fully and were not shaken in cross-examination, the evidence of rapes rather than consensual sex was overwhelming.

[11] When it comes to matters of fact the criteria on appeal is whether or not the appeal court is satisfied that the verdict or verdicts were unreasonable. The case of **Hancox** 8 Crim App R 193 states that this limits appeal court intervention to where they are of the view that the verdict was *"obviously and palpably wrong"*. This is a rigorous test but it has been maintained in the criminal appeal legislation of Fiji since it was introduced shortly after the Criminal Appeal Act in England of 1907.

[12] But since the evidence of non-consent was overwhelming in this case it is unarguable that either of the verdicts in this case were *"obviously and palpably wrong"*.

[13] There was an overwhelming case to answer at the end of the prosecution case. There is no *"point of law only"* arising in this case. So Mr Faiz Khan who represents Mr RSN in this Court urges upon me a number of grounds criticizing Mr Justice Nawana's summing up to the assessors in the Court below. He submits that they are questions of mixed law and fact and that individually or taken together they amount to a miscarriage of justice so that Mr RSN ought to be found *"not guilty"* on appeal. Mr Khan did not represent Mr RSN in the Court below.

[14] Let me take the summing up as a whole. It takes up 31 pages and has 47 paragraphs. It is extremely thorough and deals with the respective responsibilities of judge and assessors in exemplary fashion. In paragraphs 6 and 7 his direction in relation to facts and the extent to which the assessors must decide the facts and not be influenced or accept opinions of fact, whether originating from himself as judge or from Counsel, unless they truly coincide with their own opinions on the facts.

[15] At paragraph 10, through 16 Justice Nawana deals with the presumption of innocence, the burden of proof being upon the prosecution throughout, and the standard of proof being beyond reasonable doubt in a meticulous way. The way

in which the importance of the standard of proof must bear upon the verdict was so clear that it was fairer to the defence case than is required by law.

[16] At paragraph 27 Justice Nawana dealt with consistency of the testimony of witnesses and its relevance. This was a wholly appropriate direction.

Recent Complaint

[17] Then Justice Nawana dealt with recent complaint. He said:

> *"(d) Belatedness: That is whether there is a delay in making a prompt complaint to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to makeup a story which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication and you may also consider it as a factor to dissociate with the act/acts complained of."*

[18] The court has two powers in relation to recent complaints in sexual assault cases. They both derive from common law. The earlier common law power was concerned with the chances of complainants in sexual cases making a false accusation. The second common law power derives from the decision of the Court in *R v Lillyman* [1896] 2 QB 167. It is a power to prove the complainant's consistency of allegation. In the Court of Crown Cases Reserved Hawkins J with whom Lord Russell of Killowen CJ, who presided, Pollock B, Cave J and Willis J agreed gave the judgment of the Court.

[19] Dealing with recent complaint without delay to counter a possible conclusion of false accusation, Hawkins J at pages 170 and 171 said:

> *"In every one of the old text-books proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge. In Hawkins' Pleas of the Crown, bk. ic 41, s 9, it is said:*
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> *"It is a strong, but not a conclusive presumption against a woman that she made no complaint in a reasonable time after the fact";*
>
> *and in Blackstone's Commentaries, vol iv, c 15, p 211, referring to the time when Bracton wrote (in the reign of Henry III), it is said:*
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> *"But in order to prevent malicious accusations it was then the law that the woman should immediately after, dum recens fuerit maleficium, go to the next town and there make discovery to some credible persons of the injury she has suffered."*
>
> *Later on, at p 213, it is said:*
>
> *"And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender … these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned."*
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> *It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected."*

[20] Justice Hawkins then considered whether or not a recent statement could be used to establish the complainant's consistency. He contrasted an immediate allegation that a man had raped her to a witness who established from the complainant the fact of the allegation, when it occurred, and the name or

description of the assailant, with a detailed account given soon after the event by the complainant to a witness. He had presided at the jury trial in the Court below. His ruling was that the girls mistress could, after the girl had given sworn testimony of the events, be called to give all the details of the recent complaint. The purpose of this is to prove consistency; it could not be used as evidence of the commission of the offences by the accused.

[21] The Court of Crown Cases Reserved agreed with Justice Hawkins that his rulings as presiding judge had been correct. But if the detailed statement was admitted to prove consistency of the complainant, the court must not direct the jury that it was confirmatory testimony that the accused had committed the offence.

[22] Unfortunately, time and again, the rules about consistency were not followed by trial judges. In *R v Coulthread* (1933) Crim App R 44 a judge advised the jury that the recent complaint could amount to corroboration of a boy's allegation of indecency against a scout master. Avory J for the Court said at page 48:

> *"The next complaint is that the Judge, having warned the jury that they should look for corroboration, said:*
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> *'Members of the jury, you may find corroboration there in these things that were said, the immediate answer of the boy in the morning, and the things that were said to have been overheard – these questions in the night and in the morning and this answer in the morning.'*
>
> *Undoubtedly that statement that the things which were said in the morning might be treated as corroboration of the boy's story is in direct conflict with the view of this Court, expressed in more than one case, that a complaint of this sort, though it may be evidence of the consistency of the complainant's story is not corroboration in the proper sense in which that word is understood in cases of this kind. We think that it was incorrect of the Judge to say that anything said on the following morning might be corroboration. On the other hand, it is not disputed by counsel for the appellant that all the boy said on the next day was evidence which showed the consistency of his story."*

[23] In the New Zealand case of *R v Ogden* [1985] 1 NZLR 344 the same mistake occurred and the Court of Appeal found misdirection. Then in Fiji, in the case *Peniasi Senikarawa v The State* [2006] FJCA 25, the Court of Appeal said of the trial judge's direction:

> *"In any event, the direction given to the assessors on recent complaint was itself defective. It spoke of 'strengthening' the complainant's evidence. This was a misdirection. The direction could have spoken of strengthening the credibility of the complainant but not strengthening her evidence. Again, this was a misdirection which amounted to a miscarriage of justice."*

[24] It is abundantly clear that in order to prove the charge the prosecution may do any one of three things. Firstly it may after the complainant has given evidence call evidence of recent complaint and establish the consistency of the complainant and that it was made in circumstances that discount significant chance of it being a false allegation.

[25] Secondly, it may establish that a complaint of a sexual offence was made closely following the alleged event, without adducing evidence of detail. That will only go to countering any suggestion of recent fabrication. It cannot be evidence of consistency or that the accused committed the offence.

[26] Thirdly the prosecution in a strong case may decide that it can prove the charge(s) without either general evidence of recent complaint to counter fabrication, or detailed evidence of recent complaint to prove the complainant's consistency. In such circumstances there is no duty to call evidence of recent complaint at all. The prosecution case stands or falls without it.

[27] In the present case the prosecution chose to go down the second route. It called Ranjit Kumar and Roshlin Lata to prove in general terms that both girls had complained of the matters in Counts 1 and 2 against a man unknown to them who had abducted them by the false pretence that he would give them a lift to Nadi Airport for their Sunday duties as sales assistants. They were then referred to police who were able to take full detailed witness statements from both Miss MP and Miss KK on 10th October 2010.

[28] If the prosecution thought it was necessary to establish the consistency of Miss MP or Miss KK they could have called the statement takers of these statements. Taken within a few hours and being the first detailed accounts of the events between 7.00 am and 9.00 am the statements or the contents thereof would have been admissible to prove consistency.

[29] It should also be noted that procedures have moved on since R v Lillyman was decided. Now the complainants' statements in detail are disclosed to the defendant and to the Court. They can establish material inconsistency in testimony and in such cases the defence, quite rightly, can destroy the credibility of the witness by cross-examination. I have looked at the cross-examinations in the record and the questions in cross-examination suggesting inconsistency are only one or two. Obviously the assessors in their opinions did not think that the credibility of the two complainants was materially impugned by these questions. The judge, as tribunal of fact convicted. He also must have been unimpressed by these few allegations of inconsistency.

[30] Mr Faiz Khan relied on *Josua Natakuru v The State* [2006] FJCA 36. There the facts were that the complainant became acquainted with the accused and agreed to accompany him and to spend the night at a dwelling house available to him. The next morning she walked home to her residence at about 6.00 am That evening she claimed to her boyfriend that she had twice been raped by the defendant when sleeping at his residence on the previous night. The boyfriend was called to prove consistency and he gave detailed evidence of the complaint. The trial judge did not commit the common error displayed by the judges in **Coulthread** and **O'Dowd**.

[31] Nevertheless the Court of Appeal ordered a retrial because an advisory warning recommended by the English Judicial Studies Board was not followed. The recommendation was that the judge should warn the jury that the consistency evidence if accepted goes only to consistency and cannot be supporting evidence to prove the commission of the offence.

[32] The more egregious error that the trial judge made in **Coulthread** and in **O'Dowd** was not fatal to their convictions on appeal. In each case the Court of Appeal applied the proviso and upheld the conviction. In **Josua Natakuru** it is clear that the appeal judges had a *"lurking doubt"* and would have found the conviction unsafe. But in Fiji this could not be done under the statutory appeal framework. So they made a decision to acquit and order a retrial on the ground above stated. If there had been overwhelming evidence against **Josua Natakuru** I have no doubt they would have followed the same course as the appeal judges did in **Coulthread** and **O'Dowd** and applied the proviso. There is no other

common law authority whereby a court where, in either a strong or weak case, the verdict has been set aside because of failure to advise jury or assessors in terms of the English Judicial Studies Board recommendation. **Josua Natakuru** is a very doubtful decision and should not be followed.

[33] The point here is that there was no attempt to prove a detailed recent account of the complainants in order to prove their consistency. Consequently what happened in **Natakuru** is irrelevant to the course of the trial in the present case.

[34] In paragraph 17 above I have set out the advice of Justice Nawana to the assessors under the head of belatedness. This is correct and it is the only direction required where recent complaint in general terms is relied on to counter any suggestion of fabrication on the part of Miss MP and Miss KK.

[35] Out of the long summing up I have to consider the possible meaning of the words *"If the complainant is prompt you may consider it as a factor to dissociate with the act/acts complained of"*. Having considered the meaning of *"dissociate"* in the *'The New Oxford Dictionary of English'* (1998) I am of the view that these words are, in this context, both meaningless and incomprehensible. Since they are surplusage to the rest of the summing up which is impeccable, they do not have any impact upon this application for leave to appeal.

[36] I find that Mr Faiz Khan's argument on this point has no chance of success.

Other Complaints

[37] It is claimed that Justice Nawana showed apparent bias in his summing up in favour of the prosecution case. But the learned judge in fact directed the assessors that strong emotions they might have about rape must be discarded and they must only give an opinion in accordance with the evidence. His directions on what was evidence were correct.

[38] It is very clear that in a fair criminal trial under the common law the learned judge may express opinions directly or indirectly on the evidence. The learned judge must say that if he is perceived to be expressing opinions on the facts pro guilt or pro innocence the assessors must only consider such comments if they personally take the same view. In this case Mr Justice Nawana gave this direction to the assessors correctly.

[39] I have read the summing up and the evidence in the record. What is very clear to me is that Mr Justice Nawana refrained from making comments on the facts one way or the other. This was appropriate where there was a narrow issue and the evidence on each side of the issue was very clear.

[40] It is my opinion that the argument of apparent bias on the part of Justice Nawana is unarguable and has no chance of success.

[41] A further point taken by Mr Faiz Khan is that the summing up of the evidence was selective. I have read the evidence and the summary in the summing up. It is a summary and that means it is not word for word as is in the judge's note. All the material evidence adduced by the prosecution is mentioned and, in the same way, the defendants evidence is just as fully summarised. The learned judge remarked on the demeanor of the witnesses at certain points in the summary of his evidence. He is allowed to do that because demeanor is a factor that assessors must consider. But, as I have said above Justice Nawana also advised the assessors of the dangers of an emotional rather than a factual approach to their task of fact finding.

[42] This argument is also unarguable and has no chance of success.

[43] It was urged that the evidence of the male receptionist at the *"love hotel"* was not given particular emphasis by Justice Nawana in his summing up. But as with all the other evidence all these points with regard to the evidence given were summarised. The fact is that the assessors obviously found that from constant threats with a seven inch knife together with constant death threats, Miss MP and Miss KK were in a continuing state of fear so that they complied throughout with the programme of the Appellant Mr RSN.

[44] There is no arguable ground available on this issue and there is no chance of success.

[45] Since there are no arguable grounds in favour of this application I refuse Mr RSN leave to appeal against conviction.

[46] On the application for leave to appeal against sentence I agree with Justice Nawana that this was a calculated course of conduct by a stranger who abducted two young women by a false promise to take them to their place of work at Nadi Airport. Mr RSN then terrorised and raped (in different ways) two innocent and unconsenting young women. This traumatised them and its effects are no doubt with them, hopefully with diminishing intensity, for the rest of their lives. I agree with Justice Nawana and other cases cited that in our society a deterrent sentence for such behavior is imperative. There is no error of principle in either the total sentence of 14 years imprisonment or in the period of 12 years to be served before becoming eligible for parole. The application for leave to appeal sentence is unarguable and has no chance of success.

[47] I refer to the powers of a judge of the Court of Appeal put in place by the Fiji legislature in s 35(2) of the Court of Appeal Act. The legal policy of this legislation is to provide a power that where a proposed appeal is hopeless or beyond jurisdiction, it should not proceed further, so that the many appeals of sufficient merit may proceed to a timely and orderly hearing.

[48] In this case I propose to dismiss Mr RSN's appeal under s 35(2). I propose to do so because the applications for leave in respect of both conviction and sentence are unarguable and, having no chance of success, are vexatious and frivolous and an abuse of the process of the court.

ORDERS

[49] I order –

The applications for leave to appeal against conviction and sentence of Mr RSN are dismissed.

The appeal of Mr RSN against conviction and sentence is dismissed under s 35(2) of the Court of Appeal Act having no chance of success and being vexatious and frivolous.

Applications dismissed.