

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No.AAU0091 of 2011
High Court Case No. HAC 02 of 201

BETWEEN : **PENI LOTAWA**

Appellant

AND : **STATE**

Coram : **Calanchini P**
Gamalath JA
Madigan JA

Respondent

Counsel : **Mr. A. V. Rayawa for the Appellant**
Mr. S. Babitu for the Respondent

Date of Hearing : **18 November 2014**

Date of Judgment : **5 December 2014**

JUDGMENT

Calanchini P:

- [1] I have read the draft judgments of Gamalath and Madigan JJ A and agree that the appeal against conviction should be allowed for the reasons stated in both judgments and a re-trial ordered.

Madigan JA:

I have had the opportunity to read in draft the judgment of my brother Gamalath JA. I would agree with him that the appeal should be allowed and a retrial ordered, for the following different reasons:

- [1] On the 12th day of July 2011, at the High Court in Lautoka, the appellant was convicted of rape following a trial before a Judge and 3 assessors.
- [2] Having pleaded his grounds before the single Judge, the appellant was granted leave to appeal to this Court on the following two grounds relating to conviction only:

- (1) *that the learned Judge erred in law and in fact in allowing Dock Identification to be made by the complainant witness against the appellant through the Skype network when no evidence of Police Identification parade or evidence of prior knowledge was led as foundation.*
- (2) *that the learned trial Judge erred in law and in fact in failing to give the Appellant sufficient time to engage a legal counsel of his own choice or to engage legal aid assistance and has resulted in the trial being conducted by an unrepresented appellant leading to an apprehension of unfairness and denial of natural justice.*

- [3] The facts of the case are:-

The complainant, a 17 year old Australian tourist was staying with her family at an hotel on Denarau. On the 30th December 2010 she was walking alone on the beach when she came across a small group of two girls and a man. They greeted her, talked to her and invited her to share drinks with them. After some initial hesitation she joined them for drinks. She went to the sea to swim with one of the girls and a Fijian boy had followed them into the sea. She left the sea and went to a mangrove patch near a lake. The same boy followed her. He pushed her down and took off her swimming costume. He hit her on the cheek and tried to insert his penis into her vagina. In cross examination the victim said he had penetrated her when they were at the mangroves. In a record of interview admitted into evidence the accused had said

that he was the Fijian Boy that had invited the complainant for drinks on the beach. He went with her into the sea and he denied ever having had digital or penile sex with her.

The Trial

- [4] The complainant gave evidence at trial by means of “skype” a commonly known form of electronic video transmission. The State had first made an application to have her evidence adduced by skype on the first day of the trial (13 July 2011) relying on Sections.296 (i)(e) and s.295(4) of the Criminal Procedure Decree – an application to which the accused acceded. At the end of the complainant’s evidence, she was asked to identify the accused in the dock which she did when the camera was focused on him.

A second witness gave *viva voce* evidence that he knew the accused and in passing he saw him drinking on the beach with the victim and some other girls. He eventually stopped and drank with them on the way back, and then he saw the “European girl” running towards another boy, Apenisa. He didn’t see any rape.

A third witness told of having met the accused at about 4.30pm on a gravel road. The accused was very drunk, staggering with blood shot eyes. He told the witness that he had had sex with a European on the beach. The witness got the accused into a taxi. He identified the accused in Court.

- [5] The accused gave lengthy evidence at trial. He described how he had spent the night before drinking in Nadi night clubs, meeting girls and buying beer at dawn to take to the beach to drink with the girls. While drinking the “European girl” came along at about 11am. He greeted her and introduced himself as Ben. She sat and drank. She entered into conversation and then went into the sea. She asked him to go with her and in the sea got close to him and they played diving games in the water. She asked to go to his village and on coming out of the sea asked about the lake and the mangroves. She wanted to go there, she did and he followed. He denied raping her there. When he was away for a while, he looked back and saw her kissing Apenisa.

First Ground of Appeal

[6] The first ground relating as it does to dock identification by skype is in effect raising two grounds and they are:

- *Dock identification without a proper foundation should not be allowed.*
- *The taking of evidence in a Court room by the medium of skype is unsatisfactory.*

Mr. Rayawa agreed with the Court that in essence his ground of appeal can easily be distilled as:

Dock identification in itself is unreliable and when that identification is through skype, the unreliability and uncertainty of the identification is compounded.

Skype is a relatively new medium used extensively in social media and for personal contact between parties in place of telephones. It is noted that it has been used in Courts for the taking of evidence in Canada, Sri Lanka, Australia and in Fiji and as such it has been a very useful medium for the admission of evidence in 2 obvious circumstances. First, for the protection of a “vulnerable” witness, provided for in sections 295 and 296 of the Criminal Procedure Decree 2009 and secondly for the good administration of justice, to hear a witness from abroad pursuant to section 131(2) of that Decree. Evidence by “skype” although convenient and immediate, suffers of course from the vagaries of any other electronic medium in that it can crash, perform erratically or be deceptive as to colour, sound and light. The quality of its transmission will depend on the quality of the equipment being used at each station and in particular the cameras both at transmission and reception. It is impossible when receiving evidence by “skype” to properly observe the demeanour and reactions of a witness: in a case heavily dependent on credibility, the witness’ words are often no match for his or her reaction to questions or for his or her display of sincerity or insincerity in giving evidence. It is therefore a much inferior method of receiving evidence, inferior to live *viva voce* evidence and for these reasons alone, although allowed by s.131(2) and section 295, it should be used only rarely for vulnerable

witnesses and hardly ever for convenience reasons. In any event as Gamalath JA says care must be taken by the presiding Judge to comply with the procedure set out in s.295 and state judicially why he is allowing evidence to be adduced by that medium.

[7] Dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question. The answer is obvious to any witness -- the person to be identified is sitting in the dock. The Privy Council has examined the merits and demerits of such identification in the case of Holland v. HM Advocate (The Times June 1, 2005) where it was held that such an identification was not *per se* incompatible with a fair trial but other factors must too be considered such as whether the accused was legally represented, what directions the Judge gave to the finders of fact on this identification and how strong the prosecution case was in all other respects. It has been decided now in a line of English cases that it should be refused by a trial Judge except in situations where the accused has refused to participate in a formal identification parade or where he has otherwise avoided attempts at identification. Even then very strong directions must be given as to how little weight is to be placed on such identification.

[8] In this instant case the witness giving evidence from Australia by unreliable "skype" was asked by the prosecutor to make a dock identification of the accused in Court. The receiving camera immediately swung to the dock and she identified the accused who sat there. The prosecutor should have known better to ask, the Judge should have never allowed it and he should have devoted care and attention to its unreliability in his summing up. Instead he said this (at para 24(v)) "*She identified the accused as the one who did all to her*". Nothing more.

[9] We agree with counsel for the appellant that no appellate court would allow such an identification to stand and nor do we. It is completely unreliable – a dock

identification by camera directed “skype” and it provides a warning to all tribunals to prevent a recurrence of same in any future trial.

- [10] However despite this gross procedural error, the case for the prosecution is saved by the fact that identification was not an issue in the trial. It is odd therefore that the prosecutor would jeopardise his case by asking for a dock identification. The accused had admitted that he was the engaging party on the beach that day, admitted he had gone into the mangroves with the girl,, and there was evidence that he had told a third party that he had had sex with a foreign girl on the beach that day.

The identification ground as strong as it be, cannot in itself defeat the conviction. The ground is not made out.

The Second Ground of Appeal

- [11] The accused was tried in the High Court without the assistance of counsel. There was never an occasion, neither in the Magistrate’s Court nor at any time in the High Court that he was advised as to right to counsel. He should have been told of his options. As Gamalth J.A. says it is now a constitutional right by s.14(2)(a) of the 2016 Constitution. This provision was not operative at the time of trial but as a fundamental right of an accused person, he should have been told at some stage before the trial commenced of his right to Legal Aid and/or advised that for a serious crime such as rape he might well benefit from legal advice and from assistance at trial.

Gates J (as he then was) said in **Takiveikata Ruling No. 2** HAC 0005.2004S:

“The right to counsel of choice is part of the concept of fair trial also enshrined in the Constitution (at that time s.29(i) of the 1997 Constitution). If a step in the proceeding effectively and unreasonably denies the accused person’s rights to counsel of choice it could cause the ensuing trial to miscarry. This would lead to much wastage of time and resources to all concerned.”

- [12] Although not an absolute right, it is a right that must be extended to the accused and neither the Magistrate, nor the trial Judge did this. If it did indeed lead to injustice, then the trial would have to be deemed to miscarry.

Did absence of Counsel lead to injustice?

- [13] It is helpful to rehearse here some of the evidence of the complainant as recorded by trial Judge in his notes.

“One of the girls and I went for a swim in the ocean. The boy followed us. He was medium, tall, dark. He was Fijian. I can recognize him. The girl got out of the water. The boy came over to me and started chasing me and he tried to get his fingers (sic). He tried to put them inside my vagina. I pushed his hands away. I got out of the water. I went up the beach. There was a lake. I went to look at the lake. The boy followed me. (The same boy). He grabbed my hands and pushed me towards the mangroves. He pushed me down and around my neck (sic). There was nobody inside. I tried to escape....(fighting)..... He took my whole swim suit off and tried to push his penis in my vagina. It hurts so. I tried to get up. At that time he left me go I got up, put my swim suit on and ran back to where the girls were.”

- [14] It can be seen immediately that there is no evidence of rape either digital or penile in this evidence. Both instances describe “tried to push his fingers in, tried to put his penis in my vagina.” Without evidence of penetration there is an essential element of the crime missing and the offence is not proved.
- [15] On that evidence, an aware counsel would recognize that the elements of the offence had not been made out and would do nothing to disturb that position. He certainly would not cross-examine the complainant. However this is what the unrepresented accused did do with the inevitable result that he succeeded in having the witness say that he had penetrated her “instantly” in the sea and in the mangrove patch.
- [16] If the witness was not cross-examined thereby cementing her evidence of rape, then a no case submission would have almost certainly succeeded.

- [17] To this (very large) extent the unrepresented accused was prejudiced by his lack of access to good legal advice. He had never been given a chance to get advice or representation and being prejudiced by that the trial below miscarries.
- [18] The second ground of appeal is made out and on this basis alone, I would allow the appeal and support an order for a retrial

Gamalath JA:

- [19] In the trial against the appellant, the evidence of Emili Grace, the victim of the alleged rape had been received from Sydney, Australia, via Skype. The procedure that had been followed by the learned trial judge in admitting evidence via Skype requires a close scrutiny, for it would disclose, whether the learned trial judge had adhered to the proper procedure laid down in Chapter XX of the Criminal Procedure Decree, 2009. This is a matter of paramount importance for if the proceedings of the trial disclosed a failure on the part of the learned High Court Judge to follow the proper procedure in receiving evidence via Skype, would that amount to a denial of “fair trial”, due process which is safeguarded under Sections 295 and 296 of the Criminal Procedures Decree, 2009?

The Trial

- [20] The trial of the appellant commenced on 13 July 2011 in the High Court of Fiji at Lautoka.
- [21] According to the journal entry of that day, the victim, a resident in Sydney, Australia, was to testify via Skype, from “some location in Sydney”; the details of the place are unavailable in the court record.

[22] Before commencing the trial, the learned trial Judge inquired from the appellant, whether he had any objections to the proposed manner of receiving evidence via Skype and the appellant, who was appearing in person, without having the benefit of counsel throughout the trial, had consented to the receiving of evidence from the victim via Skype from Sydney. There is absolutely nothing on record to demonstrate that the proposed procedure was ever explained to the appellant by the learned trial judge.

[23] The relevant journal entry dated 13 July 2011, begins as follows:-
 “Section 296, 296(1), (e) relied upon – 295(4) relied upon”
 “Victim to give evidence on ‘skype’. Application put to accused,
 No objection to application”

[24] Since it baffles me to a considerable length as to what the learned trial Judge had meant by that he “relied on Sections 296, 296(1) (e), 295 (4)”, I perused the original court record for clarification; the court record does not contain any details as to the procedure adopted by the learned trial Judge in relying on the relevant sections of the Criminal Procedure Decree, 2009.”

[25] The next significant event in the case was the commencement of the trial. At the trial, as stated earlier, the victim had testified via Skype from Sydney, Australia.

Was the Procedure Followed?

[26] Receiving evidence *via* Skype is a special procedural mechanism contained in Part XX of the Criminal Procedure Decree, 2009.

- [27] This is special in many ways. The main purpose of adopting the procedure is to protect the interest of witnesses, who are perceived to be vulnerable and it gives directions as to the manner in which a vulnerable witness's evidence should be obtained at a trial.
- [28] Sections 295 and 296 of the Criminal Procedure Decree 2009 set out the procedure that a Magistrate or a Judge should follow in obtaining evidence of a vulnerable witness via Skype.
- [29] Before embarking on receiving evidence via Skype a judge should comply with certain mandatory procedural steps to satisfy himself as to the legality and justification for receiving evidence via Skype.
- [30] At the pre-trial stage, it is only the prosecutor, who can make an application to treat a witness under this chapter; see sec. 295 (1).
- [31] However, according to Section 295(5), during the course of any trial, a Judge/Magistrate may entertain an application by 'either party to the trial', seeking an order prescribing the procedure by which the evidence of a vulnerable complainant or witness can be obtained; see, section 295(5) of the Criminal Procedure Decree, 2009.
- [32] The application is to be heard as a chambers application; see section 295 (2) of the Criminal Procedure Decree 2009.
- [33] Each party to the trial shall be given an opportunity to make submissions in respect of the application; see section 295 (2).

[34] Before making an order prescribing the procedure through which evidence of a vulnerable witness would be received, the ‘judge may call for and receive any reports from any persons, whom the judge or magistrate considers to be qualified to advise on the effect on the complainant or the vulnerable witness of giving evidence in person in the ordinary way or in any particular mode provided for in section 296’; see section 295 (3).

[35] Accordingly, the efficacy of the procedure laid down in section 295 of the Criminal Procedures Decree, 2009 can be summarized as follows:-

1. *In the context of a criminal trial, first the judge should decide whether a witness or complainant should be considered as a vulnerable person. This is to be done not on ad hoc basis, but with judicial circumspection.*
2. *The judge should ensure that the level of stress of such vulnerable witness is minimized so that they can testify in an atmosphere which is free of fear, stress or any other extraneous negative factors.*
3. *In doing so, balance should be maintained on one hand to protect the interest of the vulnerable complainant witness and on the other hand to safeguard the rights of accused who is entitled to a fair trial.*
4. *In the context of fair trial a judge is required to be mindful of granting every legal protection that an accused should be accorded within law and in practice.*
5. *At the conclusion of holding a chambers hearing, where all parties to the trial including the accused are present, the judge/Magistrate may give an order prescribing the procedures to follow in obtaining evidence of a vulnerable witness complainant.*

6. *Once these steps are followed, the Judge may act in accordance with the procedure laid down in Section 296 of the Criminal Procedure Decree 2009.*

[36] In my opinion, since this entails a special procedure relating to admission of evidence of vulnerable witnesses/complainants, at its conclusion the Judge/Magistrate should adduce reasons in writing to explain how he arrived at a decision. This in my view is a mandatory requirement.

[37] As can be understood, Section 295 of the Criminal Procedure Decree, 2009 sets out a mandatory procedure to follow by a Court, before a decision is made under Section 296 of the Criminal Procedure Decree 2009.

[38] The pre-requisite that should be satisfied under Section 295 should be carefully followed by a Court before moving into act under Section 296 of the Criminal Procedure Decree 2009.

At the Trial of this Case

[39] Unfortunately, in this case, there is conspicuous absence of any material pointing to the fact that the learned trial judge had followed the procedure discussed above and it indeed is a serious transgression of the cardinal principles involved in fair trial concept and thus, it had caused a serious miscarriage of justice to the appellant.

On The Evidence of Identification

[40] The learned counsel for the appellant, in his submissions had placed a heavy reliance on this ground of appeal relating to the manner in which the identification of the

appellant was allowed to be made at trial, via Skype and therefore this ground must be considered as well.

[41] It is my understanding of the evidence of the case that the identity of the appellant had never been an issue and in fact in his testimony at the trial, the appellant admitted the fact that he and the victim were drinking with their friends on the beach.

[42] Despite having this unequivocal evidence of identity, in his submissions, the learned Counsel referred to “Turnbull guidelines” and invited the courts’ attention to apply the guidelines to the facts of this case, particularly to the dock identification of the appellant by the victim via Skype.

[43] In reality, in this case, it is not the identity that was in issue rather it was the veracity of the victim’s evidence with regard to the commission of the offence of rape that came under scrutiny.

[44] There is a well settled line of authorities which clearly demonstrate that where the defense is likely to be that the witnesses are lying for whatever the reason the identification evidence is not an issue.

[45] The leading case in **R v Courtneil** [1990] Crim. LR 115, in which the prosecution case depended wholly on evidence of a manager of a public house. The defense was one of alibi, and it was held at the outset by the defendant that the complainant was ‘stitching me up’. The Court of Appeal stated “The sole issue was the veracity of the witness; the defense did not allege he was mistaken. A “*Turnbull direction*” ([1977] QB 224), in those circumstances would only have confused the jury.”

The facts in brief are as follows;

"The appellant had been drinking after hours at a public house. As the manager, S, was removing the till trays, and about to lock up, the appellant grasped his throat, caused a wound to his forehead and stole the money and stock. S, who had known the appellant for one week as a visitor to the public house, identified the appellant the following day at a confrontation. In response to being identified, the appellant said; "You had better check if he is drunk. He is stitching me up." The defense was one of alibi; the appellant said that he had been at another public house with someone else, and had spoken to a neighbor as he was approaching his flat at 10 p.m. on the relevant night. Both confirmed his evidence. He also called another witness, C, who testified that a few days before the offence, S had told him of a burglary at his previous public house and had asked C whether he was interested in faking a robbery. Another witness, M said that he had called at the public house on the morning following the robbery and seeing S pocketing some pound coins and 20 pound note which the cleaner had found on the floor.

Following conviction of robbery and wounding, he appealed principally on the ground that the judge wrongly withdrew the issue of mistaken identification from the jury.

"Held, dismissing the appeal, it was true that mistaken identification was withdrawn from the jury. That would have been a serious, possibly fatal, misdirection if mistaken identification had been an issue at the trial. It clearly was not; the defense at trial was run on the basis that the identification was fabricated. Counsel for the appellant who was not trial counsel, had conceded that this was so. It was a point which he had already accepted in his advice on appeal, which had been included with the papers. The concession was rightly made because the whole thrust of the defense was that S was lying, not that he was mistaken. That was borne out by the appellant's own comment at the confrontation. It was also borne out by the evidence called for the defense, in particular that given by C. Counsel had submitted that where the substantial issue in the case turned on the accuracy of any identification, a judge should direct the jury in accordance with Turnbull guidelines, whether or not that identification as alleged, by the defense, to be fabricated. But that principle seemed to beg the question in the present case because there was no substantial issue as to the accuracy of the identification. The sole issue was the veracity of S, the defense did not allege that he was mistaken."

A Turnbull direction, in those circumstances, would only have confused the jury. However counsel submitted that the judge should not have confined herself to the way the trial had been conducted. It was her duty

to take any point which might have provided the appellant with a defense even if it had not been raised by way of defense (see Porritt (1961) 45 Cr. App. R.348). But before a judge was obliged to leave an issue to the jury, which the defense had not raised, there had to be evidence to support it. There was no evidence of mistaken identification here. The appellant himself had said that he had visited the public house on at least three occasions in the previous week, and on one occasion stayed for an hour and a half."

- [46] The commentary on this case is a condensation of the legal position on this issue and for the purpose of elucidation, it is reproduced herewith; vide; [1990] Crim.L.Rev 116.

The Turnbull Rules were primarily designed, as Lord Widgery so vividly put it in the latter case of Oakwell [1987] 1 All E.R. 1223, to deal with the "ghastly risk run in cases of fleeting encounters." Thus the rules are expressed to apply "wherever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defense alleges to be mistaken". If the defense alleges, not mistake, but a frame-up, no useful purpose would be served by giving the warning. It would be like giving a corroboration warning (suggesting that the victim may have made it all up) where it is common ground that the offence took place but the defense alleges mistaken identification. This used to be thought necessary, but Chance [1988] All E.R. 225 has now shown that the only warning that needs to be given in such a case is the Turnbull one. The jury have enough to think, about, without being confused by unnecessary warnings

- [47] There are several authorities that followed *R v Courtneil* and they are as follows: *R v Cape Jackson and Gardner*; [1996] 1 Cr. App. R. 191. Also *Shand v R*. [1996] Crim. L.R.422; and *R. v Beckles and Montagne* [1999] Crim. L.R. 148.

- [48] In the light of the above authorities, the issue of identity does not arise in this case.

The Non-availability of Legal Assistance to the Appellant at the Trial

- [49] Another serious issue in this case was the non-availability of legal counsel to the appellant, throughout the trial.

- [50] This is a right recognized in Section 14 (2) (a) of the Constitution dealing with “Rights of Accused Persons”

“Every person charged with an offence has the right to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right, or if she or he does not have sufficient means to engage a legal practitioner and the interest justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right.”

- [51] Even before the promulgation of the Constitution, since the International Covenant on Civil and Political Rights (ICCPR) had always been a part of Fiji’s domestic law, the Supreme Court had decided that due recognition should be accorded to the Right to fair trial of an accused person.

- [52] As right to counsel is an integral part of right to fair trial, failure on the part of a court to explain this right to any accused person, at the commencement of trial, would be a denial of his basic right. Tevita Nalawa v State; Crim.App. No. CAV 0002/09 – Supreme Court (13th August 2010).

- [53] In the trial in this case, the learned trial judge had failed to inform the appellant that he is entitled to receive legal advice and through the Legal Aid Commission, counsel can be retained *pro bono*.

- [54] In the trial, the victim in this case, in her examination in chief, explained the manner in which the appellant had violated her and stated as follows:-

“He took my swim suit off and tried to put his penis in my vagina.”

[55] This evidence, undoubtedly, did not disclose the complete consummation of the offence of rape, and had the appellant been represented by counsel “worth his salt” one could expect counsel to leave the answer intact, without probing it any further, in a manner that would be detrimental to the interest of the appellant.

[56] Unfortunately, the appellant, who was on his own at the trial, cross examined the victim strongly on that point and almost prompted the victim to give answers which were totally detrimental to his own interest.

[57] Had he been represented by counsel, the appellant could have been rescued from that predicament.

Conclusion

[58] In the light of the matters discussed above, this Court is of the opinion, that the conviction against the appellant was unreasonable.

[59] However, having regard to the evidence of this case and the seriousness of the alleged crime involved, whilst allowing the appeal against conviction, in the interest of justice this Court orders a new trial against the appellant, by virtue of powers vested in the Court under Section 23 (2) (a) of the Court of Appeal Act and Rules, Cap 12.

The Orders of the Court are:

1. Appeal is allowed.
2. Re-trial ordered.

W. Calanchini

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Hon. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL



S. Gamalath

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

P. Madigan

.....
Hon. Justice P. Madigan
JUSTICE OF APPEAL