

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO: HAA 022 OF 2009

BETWEEN:

MESULAME TAVURUNAQIWA

Appellant

AND:

THE STATE

Respondent

Date of Hearing: 30th July 2009

Date of Judgment: 10th September 2009

Counsel: Appellant in person
Mr. L. Savou for State

JUDGMENT

[1] On 6 June 2005, the appellant appeared in the Magistrates' Court and pleaded guilty to a charge of rape.

[2] The charge was framed as follows:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

MESULAME TAVURUNAQIWA on the 3rd day of June 2005 at Loqi, Nadi in the Western Division, had unlawful carnal knowledge of M.M.

- [3] He was sentenced to 10 years imprisonment. On an appeal against sentence alone, on 1 June 2007, Govind J reduced the sentence to 8 years imprisonment.
- [4] After successfully appealing against sentence, the appellant filed an untimely appeal against conviction. On 4 June 2009, I granted leave to appeal against conviction.
- [5] On the date of the hearing, the appellant sought leave to withdraw his appeal. Counsel for the State quite properly brought to the attention of the Court that the charge may be defective. Since a defective charge can render a proceeding invalid, I refused leave to withdraw the appeal and considered the issue of the validity of the charge.
- [6] The rules of framing charges are contained in the Criminal Procedure Code. The essential components of a charge are provided by section 119:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may

be necessary for giving reasonable information as to the nature of the offence charged.”

[7] The manner in which offences are to be charged is provided by section 122(a):

“ (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require any more particulars to be given than those so required;

(iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;

(v) where a charge or information contains more than one count, the counts shall be numbered consecutively;”

[8] In ***Shekar & Shankar v. State*** Criminal Appeal No. AAU0056 of 2004, the Court of Appeal made the following observations about the purpose of a charge:

"The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the section in the Act."

- [9] In **State v. Singh** *Criminal Appeal No. AAU0097 of 2005S*, the Court of Appeal made similar observations about the purpose of the particulars of offence:

".....The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the State intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the prosecution adduces."

- [10] Similarly in **Mudaliar v. State** *Criminal Appeal No. AAU0032 of 2006* the Court of Appeal said:

"The purpose of providing particulars is to ensure an accused person knows the nature of the allegation against him. Slavishly following the forms in the second schedule may fail to achieve that purpose....."

- [11] In **Skipper v. R** [1979] *FJCA* 6, the Court of Appeal considered the circumstances in which a conviction based on a defective charge will be set aside. The Court said:

"A line of cases has now established that, if it is clear that no embarrassment or prejudice was caused by an omission to state the required particulars correctly, the proviso would be applied and the appeal would be dismissed. It is sufficient to cite instances in *R v. McVitie* 44 *CAR* 201; *R v. Power* 66 *CAR* 159; *R v. Yule* 47 *CAR* 229

and R v. Miller and Hanomer (1959) Crim. L.R. 50. Clifford Nelson 65 CAR 119 in another case and further reference will be made to it."

- [12] ***Skipper*** is a case where the accused was convicted on a charge that specified a wrong section of the statute creating the offence. The Court of Appeal held that the defect was not a basic defect in the proceedings but was an irregularity. The Court applied the proviso that no substantial miscarriage of justice has occurred and dismissed the ground of appeal.
- [13] A more relevant authority on the point of law is the decision of the English Court of Criminal Appeal in ***McVitie*** (1960) 44 Cr. Ap. R. 201. ***McVitie*** was followed by the Court of Appeal in ***Skipper***. In ***McVitie*** the indictment charging the accused with possession of explosives omitted the word "knowingly" from the particulars of offence, which was an essential ingredient of the offence in the statute creating the offence. On appeal the Court of Criminal Appeal said:

"It is conceded that the appellant was in no way embarrassed by the omission in question. He admitted that he knew he had explosives in his possession, and he certainly did not prove, even on a balance of probabilities, that he had them for any lawful purpose. But he says that he was tried on an indictment which was not merely defective but bad, since it disclosed no offence, and this must be a substantial miscarriage of justice precluding the application of the proviso.

Section 3 of the Indictments Act, 1915, provides as follows:

(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

Rule 4(3) of the rules contained in the First Schedule to the Act provides that "The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence" and rule 4(4) of the same rules provides: "After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary."

The indictment in the present case conformed to these provisions, save only in one respect. If the words in section 3, "necessary for giving reasonable information," import an objective test (which we think they do) then the word "knowingly" should have been included in the particulars. In our opinion this did not make the indictment a bad indictment, but simply a defective or imperfect one. A bad indictment would be one disclosing no offence known to the law, for example, where it was laid under a statute which had been repealed and not re-enacted. In the present case the indictment described the offence with complete accuracy in the "Statement of Offence." Only the particulars, which merely elaborate the "Statement of Offence" were incomplete. The question of applying the proviso is to be considered, therefore, not upon the basis that the indictment disclosed no known offence but that it described a known offence with incomplete particulars."

[14] Later in the judgment, the Court of Criminal Appeal said:

"In the present case it is clear that no embarrassment or prejudice was caused to the appellant by the omission of the word "knowingly" from the particulars, or from the arraignment. He had been properly charged in the first place, and properly committed for trial, and the Attorney-General's fiat was in proper form. If the word "knowingly" had been in the particulars and the chairman had said to the jury: "You must be satisfied that McVitie knew that there were explosive substances in the paper bag in the car," he would

inevitably have gone on to say – as, indeed, he did – “but McVitie admits he had this knowledge.” This essential ingredient of the offence was therefore established, despite the omission of the word in question. The present case is, therefore, a clear case where no substantial miscarriage of justice has occurred, and the court accordingly applied the proviso and dismissed the appeal.”

[15] **McVitie** establishes the principle that an omission to particularize an essential ingredient of the offence in the charge makes it defective but not bad. The question to be asked on an appeal against conviction arising from a defective charge is whether the accused was embarrassed or prejudiced by the defect. On appeal, while a defective charge cannot be cured, the court, however, can apply the proviso to dismiss the appeal if the accused was not embarrassed or prejudiced by the defect. However, the proviso cannot be applied if the defect is a fundamental error rendering the entire proceeding a nullity (**Serupepeli Cerevakawalu v. State** *Criminal Appeal No.AAU0024 of 2001S*).

[16] The offence of rape is created by section 149 and the penalty for it is prescribed by section 150 of the Penal Code. Section 149 provides:

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.”

[17] Rape is proved if a man has unlawful sexual intercourse with a girl or woman without her consent. Thus lack of consent from the complainant is an essential ingredient of the offence of rape.

- [18] In the present case, the charge described the offence of rape with complete accuracy in the "Statement of Offence." Only the particulars, which supplement the "Statement of Offence" were incomplete. The particulars omitted the element of lack of consent by the complainant. Applying *McVitie*, the charge was defective, but not bad. The question of applying the proviso is to be considered upon the basis that the charge disclosed a known offence of rape with incomplete particulars.
- [19] The question is whether the appellant was embarrassed or prejudiced by the defect in the charge?
- [20] After the appellant pleaded guilty to the charge, the court record states that the learned Magistrate advised him that rape is unlawful sexual intercourse with a woman without her consent. The appellant advised the court that he was freely and voluntarily pleading guilty. Facts were then tendered by the prosecution. The facts admitted by the appellant clearly established that the complainant did not consent to the sexual intercourse. Before recording the conviction, the learned Magistrate asked twice whether the complainant consented to sexual intercourse, to which the appellant answered "no".
- [21] It is clear that the appellant was not embarrassed or prejudiced by the omission of the essential ingredient of lack of consent in the particulars of the offence. Lack of consent from the complainant was established when the appellant admitted the facts tendered in support of the charge by the prosecution. I am

satisfied no substantial miscarriage of justice has occurred, and the court accordingly apply the proviso under section 319(1) of the Criminal Procedure Code and dismiss the appeal.

[22] The conviction is confirmed and the appeal is dismissed.

Daniel Goundar
JUDGE

At Lautoka
10th September 2009

Solicitors:

Appellant in person
Office of the DPP for State