IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAA 04 OF 2016

BETWEEN : **NILESH AJENDRA PRASAD**

Appellant

AND : **STATE**

Respondent

Counsel : **Mr. W. Nainima for Appellant**
Mr. J. Niudamu for Respondent

Date of Hearing : **16th June, 2016**

Date of Judgment : **06th July, 2016**

JUDGMENT

1. The Appellant was charged before the Rakiraki Magistrates Court with one count of Indecent Assault contrary to section 212 (1) of the Crimes Decree, 2009.

2. The Appellant was convicted of the above charge on the 4th of November 2015 after a full trial. Upon conviction, he was sentenced, on the 5th November, 2015, to three years' imprisonment. The Court did not set a non-parole period.

3. On the 30th November 2015, the Appellant filed a timely appeal against the conviction and sentence in this Court.

Grounds of Appeal

Ground 1

That the learned trial Magistrate erred in law and in fact when he failed to remind himself on the value of fairness, thus, dangerous in convicting an accused person based on the evidence given by only one witness that transpired, other than the victim herself that did not give the evidence.

Ground 2:

That the Learned Trial Magistrate erred in law and in fact when he failed to evaluate and coherently analyze the credibility of the evidence adduced by the complainant – Dipika Kumari (PW1) and her uncle – Hazrat Ali (PW2).

Ground 3:

That the ,learned trial Magistrate erred in law and in fact when he failed to remind himself on the spontaneity of the report being lodged by the complainant 2 weeks after the alleged allegation, thus, raising a shadow of doubt that the claim may have been fabricated.

Ground 4:

That the learned trial Magistrate erred in law and in fact when he failed to safely evaluate the absence of a medical report to support the allegation of saliva being present on the victim's vagina or any indication to support the accused tongue licking or touching the vagina, additionally, if the vagina was examined at all by a Doctor.

Ground 5:

That the learned trial Magistrate erred in law and in fact to remind himself that the accused did not have any knowledge of the proceedings in Court, thus, failed to remind the accused his proper legal rights. The appellant was not legally represented.

Ground 6:

That the learned trial Magistrate erred in law and in fact in properly addressing the issue of inconsistency and contradiction in prosecution witness's evidence, that is, PW1 – Dipika Kumari and PW2 – Hazrat Ali.

Ground 7:

That the learned trial Magistrate erred in law and in fact to consider that the burden of proof is on prosecution to prove the elements and not on the accused.

Ground 8:

That the sentence is manifestly harsh and excessive

Analysis

Ground 1

That the learned trial Magistrate erred in law and in fact when he failed to remind himself on the value of fairness, thus, dangerous in convicting an accused person based on the evidence given by only one witness that transpired, other than the victim herself that did not give the evidence.

4. This ground is apparently based on the premise that it is dangerous to convict an accused person only on the strength of the Complainant's evidence not corroborated or supported by independent sources.

5. The charge Appellant faced in the Magistracy is of sexual nature. No corroboration is required in Fiji to bring about a conviction in a case of sexual nature. If the Complainant's evidence is believed by the Court on the strength of the evidence led in the trial that alone is sufficient to bring about a conviction.

6. Section 129 of the Criminal Procedure Decree provides:

Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration.

7. Appellant's case was fairly a rare case in that the Complainant was not the victim of the offence. Ms. Dipika Kumari (PW.1) called by the Prosecution herself was not the real victim in the case. She is the mother of the juvenile victim. Section 129, I believe, refers to the real victim when it speaks of 'Complainant'. However, in any criminal case whether it is of sexual nature or not, number of witnesses called is immaterial when it comes to evaluation and believing of evidence. It is not a question of quantity but of quality of evidence. What matters is the credibility and honesty of the witness or witnesses called.

8. The real victim had not been called by the Prosecution at the trial. That, I believe, for a valid reason. As a matter of policy, child victims of sexual offences should not be called to give evidence in a Court and re-traumatized in the trial process if sufficient other evidence is available to the Prosecution.

9. In the Appellant's case, PW1, mother of the victim, was called to adduce direct evidence as to what she saw. She was not called to give recent complaint evidence. Rather, she was an eye witness of a sexual offence rarely available to a Prosecutor. Generally, this type of offences happens in private and due to that reason Prosecutors face enormous difficulty in bringing about a conviction. Eye witness account carries much weight if it is believed by the Court.

10. In coming to the final conclusion, the learned Magistrate properly evaluated the evidence of the Complainant in light of other evidence led in the trial.
At paragraph 13 of his judgment, he stated the following:

"In this case I accept that the juvenile complainant didn't testify however there was direct evidence from PW1 as to the alleged incident. I will have to consider her evidence in light of all other evidence to see whether the prosecution case has been proved beyond a reasonable doubt".

11. It is clear from the analysis of the learned Magistrate that he warned himself that he should consider the evidence of the eye witness in light of all other evidence before coming to the conclusion that prosecution proved the case beyond reasonable doubt.

12. The Appellant contends that the learned Magistrate failed to give any consideration to the fact that a medical analysis was not carried out on saliva found on the victim's genitalia to determine the Prosecution allegation.

13. Here again Section 129 of the Criminal Procedure Decree comes into play. To prove sexual related charges, complainant's evidence needs no corroboration. The learned Magistrate had stated this in his judgment at paragraph 13.

14. This ground has no merit and fails.

Ground 2:

That the Learned Trial Magistrate erred in law and in fact when he failed to evaluate and coherently analyze the credibility of the evidence adduced by the complainant – Dipika Kumari (PW1) and her uncle – Hazrat Ali (PW2).

15. The learned Magistrate evaluated the evidence of PW.1 and PW.2 in coming to his judgment. He found that PW1's evidence was consistent and coherent as to the events that transpired and not discredited at all in relation to the main issue in contention.

16. PW.1's evidence was established by evidence of PW.2, her uncle. Soon after the incident, PW.1 had informed PW. 2. When PW. 2 received the information; he arrived at her place

and saw PW.1 crying. On his arrival, PW.1 described the incident to PW 2. He accompanied PW.1 in his van and went in search of the Appellant who had just left.

17. The learned Magistrate properly evaluated the evidence of PW2. At paragraph 18 of his judgment he found PW.2's evidence sufficient to establish the truthfulness of Complaint's (PW.1) evidence.

18. This ground has no merit and fails.

Ground 3:

That the ,learned trial Magistrate erred in law and in fact when he failed to remind himself on the spontaneity of the report being lodged by the complainant 2 weeks after the alleged allegation, thus, raising a shadow of doubt that the claim may have been fabricated.

19. The learned Magistrate considered the fact that the complaint was made to the police two weeks after the alleged incident. He stated in paragraph 17 of his judgment that although the report was made two weeks late there was no evidence to show that PW.1 concocted the allegation against the Appellant. Appellant was residing at complainant's house as a family friend for quite some time. The learned Magistrate was justified in coming to the conclusion that PW.1 did not have any motive to fabricate this allegation against the Appellant.

20. Immediately after the incident, PW.1 reported the matter to her uncle, PW.2. PW.2 confirmed that he received the information and thereupon visited PW.1. Appellant admitted that he left PW.1's house on the day of the incident and met PW.1 and PW.2 on his way to Nausori. These pieces of evidence did strengthen the credibility and reliability of the complainant's evidence which the Court in this case analyzed before delivering the judgment.

21. It appears that there is a valid reason also for the belated complaint to police. Accused is a very good friend of complainant's husband from his school days. It was admitted fact that accused was residing in the complainant's house and moved to the Rakiraki house with them. Initially, PW.1 wanted the matter reported to police immediately when the accused was found near Parsu's garage. Then she thought twice and decided to consult her husband who was a good friend of the Appellant before going to the police station. Learned Magistrate's finding on the belated complaint to police is logical.

22. This ground has no merit and fails.

Ground 4:

That the learned trial Magistrate erred in law and in fact when he failed to safely evaluate the absence of a medical report to support the allegation of saliva being present on the victim's vagina or any indication to support the accused tongue licking or touching the vagina, additionally, if the vagina was examined at all by a Doctor.

23. The learned Magistrate had no legal obligation to look for corroboration in a case of sexual nature. He had stated at paragraph 13 of his judgment that corroboration is no longer required in sexual related offences.

24. At the closure of the prosecution case, Appellant exercised his rights and adduced evidence in his defence. He failed to create any doubt in the Prosecution case. Rather, his version supported the Prosecution case. He admitted in his evidence that complainant was swearing at him and asking him to pack up things and leave the house. He also admitted that he left the house immediately and met prosecution witnesses on his way to Nausori. Appellant could not give any reason why he was sworn at or why he was asked all of a sudden to leave the house. Conduct of the accused was also consistent with his guilt.

25. This ground has no merit and fails.

Ground 5:

That the learned trial Magistrate erred in law and in fact to remind himself that the accused did not have any knowledge of the proceedings in Court, thus, failed to remind the accused his proper legal rights. The appellant was not legally represented.

26. *'Right to a Counsel'* is not an absolute right. There was no prejudice caused to the Appellant because he waived his right. It was held in ***Eliki Mototabua v State*** *CV 004 of 2005* that right to a lawyer is not an absolute right.

27. Section 165 of the Criminal Procedure Decree provides that;

> *"Any person accused of an offence before any criminal court, or against whom proceedings are instituted under this Decree in any court, may of right be defended by a lawyer".* It is to be noted that this section indicates "may" and not "shall".

If the Appellant wished to retain a lawyer of his own choice, he had sufficient opportunity to do so. Appellant exercised his right to cross examine. The learned Magistrate followed the procedure laid down in section 179 of the Criminal Procedure Decree when he explained to the Appellant of his legal rights at the closure of the prosecution case. Appellant opted to testify and didn't call any witness in his defence.

28. This ground has no merit and therefore fails.

Ground 6:

That the learned trial Magistrate erred in law and in fact in properly addressing the issue of inconsistency and contradiction in prosecution witness's evidence, that is, PW1 – Dipika Kumari and PW2 – Hazrat Ali.

29. Appellant has not highlighted the alleged inconsistencies and contradictions in the prosecution case. There is no noticeable contradiction between the evidence of two

prosecution witnesses. This ground was discussed in my analysis of ground 2 of this appeal.

Ground 7:

That the learned trial Magistrate erred in law and in fact to consider that the burden of proof is on prosecution to prove the elements and not on the accused.

30. The learned trial Magistrate considered that the burden of proof was on the prosecution and was satisfied that the prosecution proved the case beyond reasonable doubt. At paragraph 10 of his judgment he had stated the following:

> *"It is well established law that an accused is always presumed innocent until proven guilty. The onus of proving the guilt of the accused rests with prosecution and never shifts to the accused person at any time. Prosecution must prove all the elements of the offence beyond a reasonable doubt before an accused is found guilty for any criminal offence".*

31. The learned Magistrate had carefully evaluated all the evidence before forming the opinion that the accused is guilty of the offence with which he was charged.

32. The Fiji Court of Appeal in ***Shinodra f/n Enkanna and State*** *(Criminal App. No. 7/88)* stated:

> *"... we ought to draw attention to an important point of practice concerning the exercise by the High Court of its appellate jurisdiction. An appellate Court is primarily concerned to satisfy itself that the conclusion reached by the trial Court can reasonably be supported on the evidence adduced and upon the applicable law."*

33. And further, in a case which depends on credibility of witnesses it is stated in ***Shinodra*** *(supra)*:

"Where a case depends essentially, as the present case does, on the credibility of witnesses and findings of fact connected therewith, an appellate Court ought to be guided by the impression made on the Magistrate who saw and heard the witnesses and not by its own evaluation of the printed evidence which can be misleading."

34. Before the Appellant can succeed he has to show that there was no evidence on which the trial Magistrate could reach the conclusion which he did reach if he properly directed himself (***Kamchan Singh v The Police*** (1953) 4 F.L.R. 69); and as was said by Widgery L.J in ***R. v Cooper*** (1968) 53 Cr. App. R. 82 at pp 85-86 the circumstances in which the Court will interfere with the findings are as follows:

"However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the Court experiences it".

35. In short, an appellate court would be loath to interfere with a Magistrate's finding of credibility or finding of facts after having had the benefit of seeing each witness give evidence first-hand.

36. This ground has no merit and fails.

Ground 8:

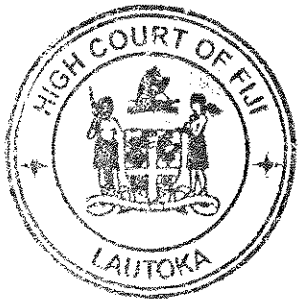
That the sentence is manifestly harsh and excessive

37. The learned sentencing Magistrate had correctly identified the maximum punishment for the offence in this case. He correctly applied the tariff for the offence of Indecent Assault as established by previous guideline judgment. The learned Magistrate had picked a starting point from the middle range of the tariff considering the circumstances of the case and he added another 2 years for the aggravating features and then reduce one year for his mitigation. Appellant's final sentence is well within the tariff.

38. In addition, Considering the Appellant's youth and his potential to rehabilitate, Court had not fixed a non-parole period. The Appellant may be released in conformity with the policy of the Prison Department.

Conclusion

39. For the reasons given in this judgment, conviction recorded and the sentence imposed by the learned Magistrate are affirmed. Appeal against conviction and sentence is dismissed.



Aruna Aluthge
Judge

At Lautoka
6th July, 2016

Solicitors: **Office of the Legal Aid Commission for the Appellant**
Office of the Director of Public Prosecution for the Respondent