IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 15 of 2018

RAVNEET KUMAR

v

STATE

Counsels: Mr. A. Sen for the Appellant
Mrs. D. Kumar for the State

Date of Hearing: 10 August 2018

Date of Judgment: 24 August 2018

JUDGMENT

1. On the 9th March 2018, the accused was found guilty in the Magistrates' Court at Labasa of one count of Indecent Assault in which he was charged with holding and touching the breasts of LS. He was sentenced to a term of imprisonment of 2 years 6 months, with a minimum to be served of one year and eight months.

2. The Appellant appeals against conviction and sentence.

Grounds of Appeal

3. The grounds of appeal against conviction are as follows. (reproduced verbatim)

1. That the learned Magistrate erred in law in failing to give an option to the accused to remain silent upon close of prosecution case in accordance with section 179(1) of the Criminal Procedure Act.
2. That the learned Magistrate erred in law in convicting the accused for indecent assault when there was no such evidence.
3. That the learned Magistrate erred in law in failing to properly evaluate the evidence in the case including that of the defence.
4. That the learned Magistrate erred in law and in fact in taking into consideration the answers given by the prosecution witnesses in cross-examination.
5. That the trial was not conducted fairly and the Magistrate failed to analyse the evidence and give reasons for accepting or rejecting the evidence of the witnesses.
6. That the learned Magistrate erred in law in holding that the complainant had to go through an ordeal when there was no evidence supporting the same.
7. That the learned Magistrate erred in law in holding that the witnesses evidence were consistent with that of LS evidence when none of the witnesses had witnessed the alleged assault.
8. That the learned Magistrate imposed a sentence which was harsh, excessive and unconscionable and further took into consideration irrelevant matters and failed to take into consideration relevant matters.

9. That the learned Magistrate erred in law in failing to correctly apply the principles of sentencing before setting a minimum term to be served before pardon may be considered.

Facts

4. The facts as set out in the Judgment of the Magistrate are that on 3 July 2011,the victim ("LS")was in the kitchen lighting a fire when the accused (appellant) approached her from behind and grabbed her breasts, telling her he wanted to have sex with her. She shouted because she did not like what the accused did to her and she pushed his hands away, went outside and called her father-in-law. She told her father-in-law what the accused had done. The accused reacted by saying; "why did you call your father-in-law you bitch." Her father-in-law lent her his phone to call her husband to tell him what had happened. He returned home and a report was made to the Police. LS knew the appellant as he was renting in her house.

Ground One

5. Counsel submits that in not following the **mandatory** provisions of s.179 (1) of the Criminal Procedure Act 2009, the conviction must be quashed. He submits that by not following this stipulation, an accused's Constitutional right to silence (under s.4 (j)) is prejudiced. The section reads:

*"**179**-(1) At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused person sufficiently to require the making of a defence, the court **shall**-*

(a) again explain the substance of the charge to the accused; and

(b) inform the accused of the right to-

(i) give evidence on oath from the witness box and that, if evidence is given , the accused will be liable to cross-examination

(c) ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence : and

(d) the court shall then hear the accused and his witnesses, and any other evidence (if any)"

(2) (irrelevant to this appeal)

(Emphasis of the word "shall" has been made by me)

6. State Counsel responds by relying on the fact that the accused was represented by experienced counsel at trial and he must have been advised of his rights in defence.

7. This matter has been dealt with previously by the Court of Appeal in **Ovini Tuitoga** [2007] AAU63/06 (25 June 2007) (Ward,P. Ellis J.A. and Penlington JA) in discussing the same section (s.211) in the then Criminal Procedure Code. The Court held:

"we are of the opinion that a failure to comply with s.211 does not of itself necessarily invalidate the trial. That would be so, however if the trial was otherwise unsatisfactory and that would result in the quashing of the conviction"

and later....." *While there was an error of law on the part of the Magistrate there has not been a substantial miscarriage of justice"*

8. In following that case therefore this Court would say that it would be prudent for Magistrates to follow the directions of s. 179 of the Criminal Procedure Act, but a failure to do so is not in itself fatal to any conviction. Failure to comply however can be a factor to consider when other matters might suggest that there has been a miscarriage of justice.

I will return to this ground.

Ground Two

9. This ground, that there was no evidence of indecent assault, is difficult to understand and it was not a matter addressed by Counsel in his written submissions. The victim gave evidence that the accused grabbed her breasts from behind, which without the consent of the victim **is** indecent assault in law. This ground fails.

Ground Three

10. In his judgment the learned Magistrate says of the defence case; - *"I find the accused not to be a credible witness. His evidence is self-serving ".*

11. Counsel for the accused submits that this is an inadequate manner in which to deal with the accused's evidence, after he has analysed and accepted the prosecution evidence in detail. The Court would tend to agree. Any accused person who is denying an allegation of crime made against him will give evidence that is "self-serving". That is his constitutional right under s.14 (2)(d) to defend himself .

12. This Court appreciates the pressure that Magistrates work under, writing many judgments every week and it is not

expected that a Magistrate would give a detailed analysis of the accused's evidence, detail that one would expect from a higher appellate Court. What must be shown however are words that show that the Magistrate has turned his/her mind to the evidence of the accused and taken it into account. The Magistrate has done that in this case and as a result the ground fails

Ground Four

13. Complaint is made that the learned Magistrate took into account the answers of prosecution witnesses in cross-examination.

14. It is trite law that all evidence given before any court is evidence and answers to questions in cross-examination in the affirmative are to be accorded the same weight as evidence given in chief.

15. Cross-examination of prosecution witnesses is in the hands of an unrepresented accused or usually in the hands of defence counsel. If answers are elicited that defence counsel doesn't want considered, then it is entirely the result of an incompetent cross-examination.

16. Unsurprisingly, this ground has not been developed in Counsel's written submissions and it is rejected.

17. It is a pity that such an unarguable ground is filed, wasting the Court's time.

Ground Five

18. This ground is that the trial was unfair and that the Magistrate failed to properly analyse the evidence of the witnesses.

19. Counsel fails to submit in what way he thought that this trial was unfair and the Court has already dealt with the analysis of the Accused's evidence in para 12 above.

20. After rehearsing the evidence of all four prosecution witnesses in paras.8 to 11 of his judgment, the Magistrate then in para 14 analyses that evidence.

21. This is yet another meritless ground and it is dismissed.

Ground Six

22. In his judgment, the Magistrate said this of the victim's evidence

"The fact that LS has to go through the ordeal of this case up to trial shows the truth in her story".

23. It is rather difficult to determine what the Magistrate actually meant by this phrase, but suffering an ordeal is certainly not a pre-requisite for telling the truth.

24. A witness' evidence must be assessed on credibility and perhaps demeanour but not on what the Magistrate perceives to have been her ordeal leading up to and in the trial.

25. Such an astonishing declaration suggests that the learned Magistrate has come to his finding of guilt not by factual analysis but through sympathy and bias.

26. This ground of appeal succeeds.

Ground Seven

27. In analyzing the evidence of the prosecution witnesses, the learned Magistrate states that apart from the victim, the three other witnesses support her testimony. None of those three saw the indecent assault; all they can do is to confirm that the victim ran out onto the verandah shouting. There is nobody who can confirm the actual element of sexual contact.

28. This ground too succeeds.

Discussion

29. Given that two of the grounds succeed, I return to the first ground and would find that that now too would succeed. As discussed in that ground, with other factors leading to an unsatisfactory trial, that ground now succeeds.

30. With three grounds now succeeding, the conviction against the accused cannot stand. The analysis of the evidence is unfair and conclusions have been reached on irrelevant principles.

31. Although it is not a ground of appeal, the Court notes that the evidence was heard and completed on the 18th August 2016 and the judgment as delivered on 9th March 2018, more than 18 months later. This delay in itself would lead to the presumption of unfairness and a miscarriage of justice.

32. The conviction is quashed and the sentence set aside.

Orders

1. The appeal succeeds and the conviction is quashed
2. The appeal against sentence falls away
3. The sentence passed below is set aside.

P. K. Madigan

Judge

At Labasa

24 August 2018