IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 18 of 2018

MOHAMMED JANIF

V

STATE

Counsels: Mr. S. Sharma for the Appellant
Mrs. D Kumar for the State

Date of Hearing: 16 August 2018
Date of Judgment: 24 August 2018

JUDGMENT

1. On the 14th October 2016, in the Magistrates Court at Savusavu the Appellant ("accused") was convicted of one count of indecent assault contrary to s212(1) of the Crimes Decree, 2009.

2. On the 25th May 2018 he was sentenced to a term of imprisonment of 2 years and 4 months, with a minimum term of 19 months.

3. The Appellant appeals that conviction.

4. The amended grounds of conviction are:-

1. That the learned Magistrate unfairly refused an adjournment to allow his Counsel of choice to represent him at the hearing
2. The learned Magistrate erred in convicting him of indecent assault when there was no such evidence
3. The learned Magistrate failed to properly evaluate the evidence.

5. There is no set of facts on file and the facts of the case will be as given by the first prosecution witness

6. From the first time this case was called in January 2014, the accused told the Court that he was represented by Mr. J. Reddy, on the 17th March 2014 he said he had applied to Legal Aid for representation and later that day he said that he had engaged Mr. Vakaloloma.

7. On the 5th August 2015, a hearing date for the trial was fixed for 5th November 2015.

8. On that date (05.11.15) the accused asked for an adjournment because he had now instructed Mr. Sen.

9. The Magistrate refused the adjournment and proceeded to trial.

10. *"The right to counsel is not absolute. The absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted"* ***Balelala*** [2004] FJCA49, approved by the Supreme Court in ***Balaggan*** [2016] FJSC47.

11. The accused with his often claimed change of counsel was aware of the importance of being represented and moreover he had three months' notice of the trial date to arrange representation, rather than asking for an adjournment of the case on the date of trial. The record shows that he was not prejudiced by lack of counsel; he was ready with his witnesses to give evidence.

12. The learned Magistrate quite properly refused the adjournment and this ground of appeal fails.

13. The remaining grounds of appeal concern the sufficiency of evidence and the Magistrate's analysis of the evidence.

14. The charge as laid particularized the indecent assault by alleging that the accused assaulted "PR" by inserting his penis into the mouth of "PR".

15. It is necessary to state that charge as background to the facts as the 12 year old boy, "PR" gave them. I quote verbatim from the Magistrates own note as set out in the Record:

"On 20 December 2013 I was at home. We went to sea to collect beachdemer and then we took it to Labasa by truck. Vehicle – Janif's vehicle, white vehicle driven by Janif. Janif is present in Court (pointing to the accused at Accused dock). We brought beachdemer and put it into the vehicle the Accused call me into the vehicle. He showed me bad movies and told me to suck his dick. The movies show a dick of a person. Accused showed me the movies. Accused asked me to suck his dick. One Verani came and pulled my collar. Accused forcefully closed the door he told me to suck his dick. This happens at (named village) on the road. This happens inside his vehicle. He told me to do something to his

dick. He told me to suck 5 times. After that I was outside when I was inside the vehicle Verani was on his way to the vehicle I saw his penis was big. He was wearing one long pants and one shorts".

16. The only question asked in cross-examination was who was the owner of the beachdemer. (Quaere: would an instructed Counsel have been sensible enough not to cross-examine this evidence?).

17. The second prosecution witness was the boy (Verani) referred to by the "victim". His evidence confirmed the presence of the accused and "PR" in the truck, identified the accused and then said:

"I saw them inside the vehicle. It was a twin cab vehicle white colour. I did not hear any words from them. I saw PR was sucking accused's dick. Accused was holding PR's head. I went and pull Paula outside and Accused left."

18. There was no cross-examination.

19. The accused gave evidence that he was at MH in Savusavu town from 9.30am to 12.30am on the day in question and called two alibi witnesses to confirm that. There was no alibi notice filed pursuant section 125 of the Criminal Procedure Act 2009, thereby prejudicing the Prosecution.

20. Counsel for the Appellant submits that there is **NO** evidence of indecent assault and that the contradictory evidence of the two prosecution witnesses was not evaluated.

Discussion

21. It can be seen from the evidence of "PR" that he never did say he performed oral sex on the accused. Many times he said "he asked me to" but he didn't say he did. To that extent the *actus reus* element of the offence has not been proved.

22. That evidence cries out for analysis by the Magistrate.

23. Counsel points to the contradiction between PR saying that the accused slammed the door shut and PW2 approaching the vehicle and **seeing** the sexual act. This contradiction should have been addressed. It is more than possible that PW2's evidence is based on what PW1 had told him.

24. The learned Magistrate said of the prosecution evidence:

> *"PR identified the accused as the person who told him to suck his dick. PW2 also identified the accused as the person whom PR was sucking his penis. The indecent contact in this case is the sucking of the accused's penis by PR. PR state that the accused forcefully closed the vehicle door and told him to suck his penis 5 times. PW2 state that the accused was holding PR's head and he pulled PR out from the vehicle when PR was sucking the accused's penis. The evidence of PR and PW2 was not discredited during cross-examination. The evidence of the prosecution has established all the elements of the offence.*

25. Nowhere in that "evaluation" of the prosecution evidence does the Magistrate deal with the apparent contradiction between the vehicle door being closed ad PW2 seeing the act. There is no evidence of PW2 getting into or being in the vehicle. These contradictions and lacunae in the evidence are obviously the

fault of a very poor prosecutor who should have been aware of these difficulties but that does not prevent the Magistrate from dealing with these difficulties in his judgment.

26. It is for the victim to tell the court that he was indecently assaulted by being forced to perform oral sex, not for the dubious evidence of an "eye-witness" to prove that to the Court.

27. A further difficulty in this case is that the defence case is alibi for the morning hours but neither of the young prosecution witnesses told the Court the time of the incident. This is another area that could have been dealt with in the judgment.

28. This appeal could have been decided in the appellant's favour on the basis of the unfortunate evaluation alone but there is more.

29. Most unfortunately the Magistrate said this in his concluding remarks.

"The willingness of these two children to give evidence and to go through the ordeal of the trial shows the truth in their story and evidence" (my emphasis)

30. This remark is breathtaking. The truth of evidence is not assessed by just turning up and giving it; it is assessed by credibility and demeanour and perhaps resistance to vigorous cross-examination. Nor should a child's evidence be judged any differently to that of an adult.

31. One final matter troubling this Court is this:

- The hearing was on 5th November 2015

- The judgment was delivered on 14th October 2016
- The sentence was handed down on the 25th May 2018.

32. It is the Constitutional right of an accused person to have his trial begin and conclude without unreasonable delay, as provided for in section 14 (2) (g) of the Constitution.

33. To have judgment delivered nearly two years after hearing and sentence delivered 19 months after that, not only is a breach of the accused's right to speedy conclusion but it's unnecessary cruelty to have the matter hanging over him unresolved for so long.

34. This Court has no hesitation in finding that this trial has miscarried, that the accused has been unfairly tried and his constitutional rights have been breached. It would be unsafe to allow the conviction to stand.

35. The appeal succeeds, the conviction quashed and the sentence set aside.

P. K. Madigan

Judge

At Labasa

24 August 2018