IN THE HIGH COURT OF FIJIAT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

ROM DUTT NARAYAN

Appellant

CASE NO: HAA. 014 of 2018
[MC Suva Criminal Case No. 1325 of 2016]

Vs.

STATE

Respondent

Counsel	:	Mr. J. Reddy for Appellant
		Ms. S. Tivao for Respondent
Hearing on	:	20 June 2018
Judgment on	:	24 August 2018

JUDGMENT

1. The appellant was charged before the Magistrate Court with the following offences;

COUNT ONE
Statement of Offence
INDECENT ASSAULT: *contrary to section 212 of the Crimes Decree Number 44 of 2009.*

Particulars of Offence
ROM DUTT NARAYAN, *on the 19th day of July 2016 at Lami in the Central Division, unlawfully and indecently assaulted Jessica Bereta by caressing her hand and trying to fondle her breast.*

COUNT TWO

Statement of Offence

INDECENT ASSAULT: *contrary to section 212 of the Crimes Decree Number 44 of 2009.*

Particulars of Offence

ROM DUTT NARAYAN, *on the 19th day of July 2016 at Lami in the Central Division, unlawfully and indecently assaulted Jessica Bereta by fondling her breast.*

2. After trial, the Learned Magistrate found the appellant guilty of the second count but found him not guilty of the first count on the basis that there was no evidence led by the prosecution on the first count. The appellant was convicted accordingly on 30/01/2018 and was sentenced on 15/02/18 to 18 months imprisonment and was also ordered to pay the complainant $1000 as compensation.

3. Consequently, the appellant had filed a timely appeal against his conviction and sentence. However, the appeal against the sentence was withdrawn on 20/06/18 when this matter was taken up for hearing.

4. The grounds of appeal against the conviction are as follows;

   a) *That the learned magistrate erred in law and fact when he stopped the defence counsel from asking the complainant the following question during cross examination; "Can you please step by step inform/advise what the Accused did to you in the afternoon"?*
   b) *That the learned magistrate erred in law and fact when he stated that the question such as; "Can you please step by step inform/advise what the Accused did you in the afternoon?" can only be asked in examination in chief and not during cross examination.*
   c) *That the learned magistrate erred in law and fact in not allowing the complainant during cross examination directly answer a question put to her by the counsel for the accused but instead allowed himself to draw inference from her answer of "How do you know, were you there?" as an acceptable answer to mean "No".*
   d) *That the learned magistrate erred in law and in fact when he allowed the counsel of the accused to ask the complainant questions pertaining to a handwritten statement of the alleged incident on 11th August 2017 during cross examination and disallowing use of the same hand written statement during continuation of hearing on 28th August 2017 as it was not the original but a photocopy.*
   e) *That the learned magistrate erred in law and in fact in disallowing the counsel for the accused to ask the complainant questions pertaining to a*

handwritten statement of the incident by the complainant; which was given to Chauhan Memorial school on the 22nd day of July, 2016.

f) *That the learned magistrate erred in law and in fact in allowing the prosecution witness to refer to the photocopied handwritten statement of the complainant which was received by Chauhan Memorial school on 22nd July 2016 in Court and disallowing the counsel for the accused use the statement during cross examination of the complainant.*

g) *That the learned magistrate erred in law and in fact in not properly entertaining the procedural protest raised by the defence counsel for the sake of the interest of justice for the accused and in not entertaining this protest was therefore biased towards the accused.*

h) *That the learned magistrate erred in law and in fact when failed to properly weigh the inconsistencies in the complainant's handwritten statement given to Chauhan Memorial School on 22nd July 2016, the police and to the court.*

Additional grounds

1. *That the learned trial Magistrate erred in law and in fact when he failed to believe the testimonies of the defence witnesses who told the court in no uncertain terms that they saw the complainant when she went out of the accused's office and she appeared normal in contradiction to the version by the complainant that she was crying and ran out of his office.*
2. *That the learned trial Magistrate erred in law and in fact in not giving reasons for his findings as to why he believed the prosecution witnesses and not the accused and his witnesses.*
3. *That the learned trial Magistrate erred in law and in fact when he made so many assumptions in his judgment which assumptions prejudiced the appellant.*

Factual Matrix

5. Briefly, the appellant was the head teacher of the school where the complainant was a student in Form 3 during the time material to this offence. On the day in question, the complainant was told by the appellant to come and see him in his office in the afternoon to collect a Universal Serial Bus storage device which is referred to as a 'USB' in evidence. This 'USB' belonged to the complainant and it finally reached the appellant through another teacher after the complainant misplaced it. When the complainant went to the appellant's office after school, the appellant told her to come closer to him in order to give her the 'USB'. When she went near him, he put his hand across her shoulder and started to touch her breasts. Then the appellant had moved his hand down towards the complainant's stomach.

At this moment the complainant had got hold of the flash drive and had run away from the appellant's office.

Grounds (a), (b) and (c)

6. On grounds (a) and (b) the appellant challenges the decision of the Learned Magistrate not to allow the counsel for the appellant at that time to ask the question *"Can you please step by step inform/ advise what the accused did to you in the afternoon"* during cross-examination and on ground (c) it is alleged that the Learned Magistrate erred by not allowing the defence to obtain a direct answer to a question which the complainant answered by saying *"How did you know, [were] you there?"*

7. Counsel for the appellant made extensive submissions orally and through written submissions to the effect that though there are rules to limit examination in chief, there are no such rules relevant to cross-examination.

8. The assertion that there are no limitations for cross-examination is a misconception. At times the courts come across defence counsel who would regard cross-examination as a license to intimidate, harass and ridicule witnesses until a witness admits that he/she is lying.

9. Regarding the issue of restraining unnecessary cross-examination ***Archbold*** [2013 Edition, 8-216] states thus;

> *Judge's duty to restrain unnecessary cross-examination*
>
> *A* ***judge should do his utmost to restrain unnecessary cross-examination****. Although counsel must not be deterred from doing his duty, counsel for the defence should exercise a proper discretion not to prolong the case unnecessarily.* ***It is no part of his duty to embark on lengthy cross-examination on matters which are not really in issue****: R. v. Kalia,60 Cr.App.R. 200, CA (approving dicta in R. v. Simmonds[1969] 1 Q.B. 685,51 Cr.App.R. 316 , CA; and Mechanical and General Inventions Co. Ltd v. Austin[1935] A.C. 346 at359 , HL). The observations in Kalia were reiterated in R. v. Maynard,69 Cr.App.R. 309, CA.*

It is erroneous for a judge to take the view that cross-examination cannot be stopped merely because there is some tenuous legal reason for it: R. v. Flynn[1972] Crim.L.R. 428,CA. Counsel should not forget that a trial takes place in public and that therefore names of ***third parties should not be bandied about unless it is necessary*** *for the proper conduct of the trial: ibid.* ***Judges were entitled to impose time limits on cross-examination where it was repetitious and time was being wasted****; such a course did not render the trial unfair: R. v. B (Ejaz)[2006] Crim.L.R. 54, CA (where transcript showed 24 pages of intense, detailed cross-examination of the complainant, during which time the judge intervened on 24 occasions with gentle pleas for counsel to close, his eventual imposition of a 10-minute limit for the cross-examination to conclude, had been justified).*

In R. v. Brown (Milton)[1998] 2 Cr.App.R. 364, the Court of Appeal reminded judges (obiter) that a trial is not fair if an unrepresented defendant gains an advantage he would not otherwise have had by abusing the rules in relation to relevance and repetition when cross-examining; it would often be desirable, before cross-examination for the judge to discuss the course of proceedings with the defendant in the jury's absence; the general nature of the defence could then be elicited and specific aspects of the witness's evidence with which the defendant took issue identified; the substance of any evidence to be given by defence witnesses could be elicited with a view to obtaining the witness's observations; the defendant should be allowed to begin the questioning but it should be made clear in advance that repetition would not be permitted; if it occurred, the judge should intervene; ***if the defendant proved unable or unwilling to comply with the instructions, the judge should stop the questioning and take over; if the defendant sought by his dress, bearing, manner or questions to dominate, intimidate or humiliate the witness****, or if it were reasonably apprehended that he would seek to do so, the judge should order the erection of a screen as well as controlling the questioning; if a judge took such steps, the Court of Appeal would be slow to intervene, in the absence of clear evidence of injustice.* [Emphasis added]

10. From the above paragraphs the following key points can be deduced *inter alia;*

a) *A judge should do his utmost to restrain unnecessary cross-examination;*

b) *It is no part of a defence counsel's duty to embark on lengthy cross-examination on matters which are not really in issue;*

c) *Third parties should not be bandied about by defence counsel unless it is necessary;*

d) *Judges were entitled to impose time limits on cross-examination where it was repetitious and time was being wasted;*

e) *If the defendant (appearing in person) proved unable or unwilling to comply with the instructions, the judge should stop the questioning and take over; if the defendant sought by his dress, bearing, manner or questions to dominate, intimidate or humiliate the witness . . . the judge should order the erection of a screen as well as controlling the questioning.*

11. Given the final point above which relates to a situation where an accused is appearing in person, it is clear that it is certainly not expected from a defence counsel to dominate, intimidate or humiliate a witness through questions.

12. There is clear difference between questioning on a particular fact a witness alluded to in the examination in chief and requesting the witness to simply repeat his/her evidence. On the face of it, I could see two reasons a defence counsel would ask a prosecution witness to simply repeat his/her evidence. First, based on the anticipation that the witness would come out with facts different to the previous account given by him/her and the secondly, due to lack of proper preparation to cross-examine the witness.

13. On the first point above, I would add that, a defence counsel may expect a witness to come out with different facts based on either the instructions given by the accused that the complainant is lying or on the counsel's own belief that memory is fallible and therefore to take an undue advantage from that human weakness.

14. It is not difficult to understand how stressful it is for anyone to come to a court, get on to a box and relate about some incident which took place in the past in front of individuals who are alien to that person, and especially if the incident is of a sexual nature. Needless to say, the situation would be worse during cross-examination for a victim of a sexual assault as it is the perpetrators lawyer who will be asking questions and the term 'cross-examination' itself could be regarded as intimidating by such witness.

15. In the text ***Advanced Educational Psychology*** (second edition) by S.k. Mangal it is stated at page 275 that;

"A sudden excessive disturbance of emotions may completely block the process of recall. ***When one is under the influence of emotions like fear, anger, or love, one may forget all one has experienced, learned or believed earlier.*** *When in the grip of these emotions one becomes so self-conscious that one's thinking becomes paralysed.* ***For instance, a child fails to recall the answer to a question in the presence of a teacher whom he fears or dislikes.*** *Similarly, many of us fail to do well before the interview board or in an examination because of interview or test-phobia."* [Emphasis added]

16. The author explains;

"Memory is a special faculty of the mind to conserve or retain what has been previously experienced or acquired through learning and, then, at some later stage, to revive or reproduce it in the form of recall or recognition to enable us to utilise such learning in different situations of daily life.

. . .

Forgetting is the temporary or long-term loss of the ability to reproduce things that have been previously learned.

. . .

Natural forgetting can be properly explained through the ***theory of trace decay*** *which holds that we forget on account of decay of the memory traces with the lapse of time. The* ***repression theory*** *is held to be more applicable to explaining morbid forgetting. According to this theory, we forget the things we do not want to remember by burying them in our unconscious. The* ***theory of interference*** *is able to explain all types of forgetting. According to this theory, we forget things because of the interference of other things.* ***Proactive inhibition*** *occurs when earlier learning interferes with later learning.* ***Retroactive inhibition*** *is the result of later learning coming in the way of earlier learning."* [Emphasis added]

17. The point I wish to make by citing the above is that the only reason a witness may give a version different to a previous one or forget a particular fact will not be because the incident in question did not take place and the witness is lying. More importantly, given the above, it is clear that it would be unrealistic to expect consistency from a victim after a traumatic event. On one hand, the influence of the

emotions like fear, hatred or disgust at the time a person is being sexually assaulted will prevent a person from remembering precise details as to the colour of the clothes, the surrounding objects, the exact time of the incident, how long the incident take place etc. as the thinking of a person who faces such a traumatic event may become paralised at that moment. On the other hand, memories of a sexual assault is not something a victim would want to cherish. Therefore, it is highly likely for victims of sexual assault to forget minute details after sometime due to their attempts to repress those memories. With the lapse of time, there will be a decay of the memory traces and the memory of a particular event may be interfered with by things a person would perceive overtime until the date the evidence is given.

18. All in all, as far as testing the credibility of a witness is concerned, getting that witness during cross-examination to repeat the account given by the witness during the examination in chief will have little or no effect on the credibility even if that witness fails to come out with the exact version the second time.

19. In the case of ***Nadim v State*** [2015] FJCA 130; AAU0080.2011 (2 October 2015) Prematilaka J said thus;

> *[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

20. The discussion in ***Nadim*** (supra) is relevant to witnesses in general. However, in the case at hand the issues raised are relevant to cross-examination of a 14 year old child witness. In the case of ***R v W.(R.)*** 2 S.C.R. 122 where the change s in the attitude of law towards the evidence of children were extensively discussed, the

court held thus;

> *The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that* ***it may be wrong to apply adult tests for credibility to the evidence of children****. One finds emerging a new sensitivity to the peculiar perspectives of children.* ***Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.*** *Wilson J. recognized this in R. v. B. (G.), [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that*
>
> > *... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate.* ***While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.*** *In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking an d corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.*

As Wilson J. emphasized in B. (G.), these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject

to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. ***What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.*** [Emphasis added]

21. Coming back to the reasons a defence counsel may want a prosecution witness to repeat the account given during examination in chief, the second reason I have identified above is the lack of preparation for the cross-examination. This would be where the counsel had either failed to properly study the brief or failed to take down notes during examination in chief. Employing this tactic would allow a counsel who had failed to properly prepare for cross-examination to take time with the witness and to simply pick points from what would come out from the witness' mouth. Needless to say, such practice is unfair by the relevant witness as well as the accused the counsel is representing, in addition to the wasting of time and the resources of the court. Experience has shown that a counsel who is properly prepared and focused would rarely engage in lengthy cross-examination.

22. In the case of ***R v B*** [2010] EWCA Crim 4 at paragraph 42 the court held thus;

At the same time the right of the defendant to a fair trial must be undiminished. ***When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate*** *before the jury* ***the areas of evidence which bear on the child's credibility.*** *Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and* ***the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources.*** *Notwithstanding some of the difficulties, when all is said and*

*done, **the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source.** Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.* [Emphasis added]

23. Turning to the issue raised on ground (c), according to page 40 of the record of the magistrate court, after extensive cross-examination, the counsel for the appellant had suggested that the complainant is lying. The complainant has responded by saying: *"Sir how do you know that? Were you there with me?"* It is also noted that the complainant was crying when she gave this answer. Then the counsel for the appellant had wanted the Learned Magistrate to remind (inform) the complainant that she cannot ask questions and the Learned Magistrate had responded that he is accepting the complainant's aforementioned answer as a denial.

24. I am unable to comprehend the rationale for the argument of the counsel for the appellant that the Learned Magistrate applied a wrong principle by his decision to regard the aforementioned answer of the complainant as a denial. It was the defence case that the complainant was lying and the alleged incident did not take place. If the objective of the counsel for the appellant at that time was to observe the principles laid down in the case of ***Browne v Dunn*** (1894) 6 R. 67, H.L. what was required is to put the case to the complainant and the response of the complainant was immaterial. The above answer given by the complainant and the fact she was crying suggests that the complainant was quite disturbed when this question was put to her. I do not find that the Learned Magistrate erred by taking the approach stated above.

25. Given the above, I find that the Learned Magistrate had not erred by not allowing the defence counsel to have the complainant simply repeat her evidence given

during examination in chief and by deciding to regard the answer of the complainant referred to in ground (c) as a denial. The Learned Magistrate had clearly acted within his powers when he restrained the counsel for the appellant in that regard.

26. Grounds (a), (b) and (c) should fail.

Grounds (d), (e), (f), (g) and (h)

27. Central to the above grounds is a statement made by the complainant in writing to the Assistant Head Teacher of the school regarding the alleged incident.

28. According to the submissions made by parties and the relevant court record, the Learned Magistrate had first allowed the aforementioned document to be used by the counsel for the appellant at that time to cross-examine the complainant where the complainant had admitted making that statement, but on the next day when the cross-examination continued, the Learned Magistrate had refused to allow the said document to be used on the basis that it is a photocopy. Then again however, the Learned Magistrate had allowed the same document to be tendered through a police witness. The complaint made on behalf of the appellant based on the above grounds is that the appellant's counsel at that time was deprived of the opportunity to point out to the inconsistencies arising out of that document due to the reason that he was unable to cross-examine the complainant on the said document.

29. Even though I would disapprove the manner in which the Learned Magistrate had dealt with the aforementioned document, I note that the Learned Magistrate had in fact considered the contents of that document in his judgment at paragraph 9 and had also considered the inconsistencies in the complainant's evidence given the contents of that document. After examining the inconsistencies highlighted on behalf of the appellant, the Learned Magistrate had concluded that none of the inconsistencies goes to the root of the matter. Considering the inconsistencies that were highlighted in the instant case, I find that it was open for the Learned

Magistrate to come to that conclusion.

30. In the case of ***Lulu v State*** [2016] FJCA 154; AAU0043.2011 (per Prematilaka J) the Court of Appeal had quoted from a judgment by the Supreme Court of India as follows;

> *[14] The Indian Supreme Court in* ***Bharwada Bhoginbhai Hirjibhai v State of Gujarat*** *[1983] AIR 753, 1983 SCR (3) 280) (an appeal from a conviction for rape) demonstrated vividly the behaviour of witnesses in similar circumstances as follows.*
>
> > *"**Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance**. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another; (4) It is unrealistic to expect a witness to be a human tape recorder;(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the 'time sense' of individuals which varies from person to person. (6) ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on; (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts; get confused regarding sequence of events, or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment."* [Emphasis added]

31. Given the reasons above and the manner in which the grounds are drafted, grounds (d), (e), (f), (g) and (h) should fail.

32. With regard to the submissions filed on the additional grounds of appeal, the

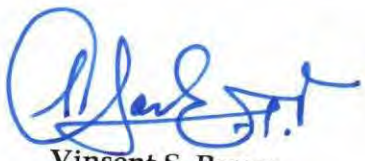
counsel for the appellant had simply reproduced extracts from certain judgments but had failed to provide particulars pertaining to the instant case. By way of the said additional grounds the appellant alleges that the Learned Magistrate failed to give reasons for him not believing the defence witnesses and that the Learned Magistrate had arrived at many assumptions prejudicial to the appellant. Paragraphs 5, 13 and 14 of the impugned judgment clearly indicate that the Learned Magistrate had sufficiently analysed the evidence of the defence witnesses and I do not find any assumption which is prejudicial to the appellant that would give rise to an error of law or fact in the said judgment. There is no merit in the further grounds of appeal.

33. In the result, I would dismiss this appeal and affirm the impugned judgment.

Orders;

a) Appeal against the conviction is dismissed;

b) The judgment of the Learned Magistrate in Magistrate Court of Suva Criminal Case No. 1325 of 2016 is affirmed.



Vinsent S. Perera
JUDGE

Solicitors;

Jiten Reddy Lawyers, Nakasi for the Appellant
Office of the Director of Public Prosecutions for the State