

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 63 OF 2019

BETWEEN : **GULSHER ALI**
APPELLANT

AND : **THE STATE**
RESPONDENT

Counsel : Ms. S. Sukanaivalu for the Appellant.
Mr. J.B. Niudamu for the Respondent.

Date of Hearing : 13 February, 2020
Date of Judgment : 21 February, 2020

JUDGMENT

(The name of the victim is suppressed, she will be referred to as "AS")

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Lautoka with one count of indecent assault contrary to section 212 (1) of the Crimes Act. It was alleged that on the 2nd day of February, 2018 at Lautoka, the appellant had unlawfully and indecently assaulted "AS" by squeezing her breast.
2. After numerous adjournments on 22nd November, 2018 the prosecution sought to withdraw the charge under section 169 (1) of the Criminal Procedure Act. On this date the Magistrate's Court discharged the accused under section 169 (2) (b) (ii) of the Criminal Procedure Act.

3. After a lapse of nearly three months the counsel for the appellant filed a Notice of Motion on 12th February, 2019 in the Magistrate's Court supported by the affidavit of the appellant sworn on 21st December, 2018.
4. In the Notice of Motion the appellant sought the following orders:
 1. *That the Applicant's Passport be released;*
 2. *That the Stop Departure Order made against the Applicant be revoked forthwith;*
 3. *That this Honorable Court acquits the Accused/Applicant from the charge of Indecent Assault after the State had withdrawn the charge against him;*
 4. *That the time of service of this Motion be abridged.*
5. The prosecution did not file any affidavit in response and neither party filed any submissions to assist the court. On 16th September, 2019 the learned Magistrate refused the application to acquit the appellant.

GROUND OF APPEAL

6. The appellant being dissatisfied with the ruling of the Magistrate's Court filed an appeal in this court upon the following grounds:
 1. *That the learned trial Magistrate erred in law and in fact in not acquitting the Appellant when it was brought to the attention of the learned Magistrate that the complaint against the Appellant was fabricated by the complainant.*
 2. *That the learned trial Magistrate erred in law and in fact when he stated at paragraph 12 of his ruling that the Appellant failed to*

tender the statement of the complainant in support of his affidavit and not relying in law that if the Appellant's affidavit is unchallenged then the contents of the Appellants affidavit has to be taken as the truth.

3. *That the learned trial Magistrate erred in law in misinterpreting the Appellant's affidavit in support of his application for acquittal and as such there has been a substantial miscarriage of justice.*
4. *That the learned trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when ruling on the Appellant's application for acquittal.*

DETERMINATION

7. The state counsel in his submissions raised an issue that this court does not have the jurisdiction to hear this appeal. Counsel relied on page 34 of copy record which mentions that the matter was called on 22nd November, 2018 before the learned Magistrate and the following had transpired:

Prosecution : Sgt. Arvind for DPP

Accused : Present [Mr. Khan]

Prosecution further seek to withdraw the case under Section 169 (1).

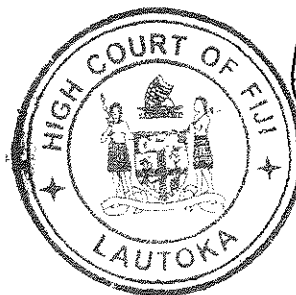
Accordingly I discharge the accused under section 169 (2) (b) (ii).


8. The above noting is crucial in deciding whether the appellant is properly before this court because once the Magistrate's Court had discharged the accused on 22nd November the proceedings before the Magistrate's Court came to an end hence the Magistrate's Court became "*functus officio*".

9. Bearing this in mind, the Notice of Motion filed in the Magistrate's Court asking the same court to acquit the accused when he had been discharged was incorrect and erroneous. The proceedings in the Magistrate's Court had ended on 22nd November and the avenue that was available to the accused was to appeal against the order for discharge made by the learned Magistrate (section 246 of the Criminal Procedure Act). This brings into question, whether this court has the jurisdiction to hear this appeal in its current form.
10. In law there is no appeal properly before this court because the time to appeal had started from the date the accused was discharged that is 22nd November 2018 and not 16th September, 2019. The learned Magistrate had erred in hearing the Notice of Motion when he had no jurisdiction to do so particularly in respect of order no. 3.
11. For the above reasons, this court has no jurisdiction to hear this matter.

ORDERS

- a) The Petition of Appeal is dismissed due to lack of jurisdiction.
- b) 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

21 February, 2020

Solicitors

Messrs. Iqbal Khan and Associates for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.