



## Appeal Against Conviction:

### **Ground 1:**

*The Learned Magistrate erred in law and in fact to allow the prosecution to amend the charge after conclusion of the complainant's evidence, causing substantial prejudice to occur to the Appellant.*

### **Ground 2:**

*The Learned Magistrate erred in law and in fact to allow the prosecution to conduct further examination in chief of the complainant after amending the charges, causing substantial prejudice to occur to the Appellant.*

### **Ground 3:**

*The Learned Magistrate erred in law and in fact by failing to adjourn the matter when the charges were amended to allow adequate time for the Appellant's counsel to prepare for the amended charges, causing substantial prejudice to occur to the Appellant.*

### **Ground 4:**

*The Learned Magistrate erred in law and in fact when she failed to give reasons as to why she did not believe the Appellant's evidence to be credible.*

### **Ground 5:**

*The Learned Magistrate erred in law and in fact when she failed to analyze the prosecution evidence against each elements of the offence of indecent assault:*

- (i) Any person - whether there was evidence to suggest the accused was Ramendra Prasad;*
- (ii) Unlawfully and indecently - whether there was evidence that the alleged act of touching the vagina area over her skirt could amount unlawful and indecent act – objective test;*

- (iii) *Assault – whether there was evidence of an assault if so was it committed in circumstances of decency or contravenes standard of decent behavior with regards to modesty or privacy;*
- (iv) *The victim – whether the victim was truthful and credible as a witness.*

**Ground 6:**

*The Learned Magistrate erred in law and in fact when she failed to consider that the delay in reporting must benefit the Appellant's case theory because the victim had more than enough time to make an early complaint, however, she opted to complain after a lapse of four days.*

**Ground 7:**

*The Learned Magistrate erred in law and in fact when she failed to consider that the inconsistencies in the victim's evidence in regard to:-*

- (i) *the clothes she was wearing during the alleged incident;*
- (ii) *body part which was allegedly touched during the incident;*

*touched the heart of the matter and that prosecution evidence fails to adequately explain the inconsistencies in that regard.*

**Ground 8:**

*The Learned Magistrate erred in law and in fact when she convicted the Appellant for indecent assault despite the failure by prosecution to adduce any prima facie evidence to prove assault.*

**Ground 9:**

*That the Learned Magistrate erred in law and in fact by not taking into consideration that the next evening (3/2/14 – 7 pm to 10 pm) the victim was on duty and again travelled in the vehicle with the Appellant, which was evident*

*from the vehicle running sheet tendered as defence exhibit, as such her evidence that she was afraid of the Appellant was unreliable.*

**Ground 10:**

*That the Learned Magistrate erred in law and in fact by not taking into consideration that it would be extremely impossible for the Appellant to touch the side of the thigh and slide his hand up to the private parts to touch the private part of the victims as:-*

- (i) he was driving and his concentration is on the road as it is dark and raining;*
- (ii) the victim was sitting with both her legs close to each other.*

**Ground 11:**

*That the Learned Magistrate erred in law and in fact by taking into consideration that by listening to the word "MARO" the complainant got alarmed or frightened whereas there was no evidence before the court to suggest that the use of particular word had alarmed or frightened the complainant.*

**Ground 12:**

*That the Learned Magistrate fell into error in law and in fact by inferring that the use of the word "chalao" meant to have "sex" when there was no evidence adduced by prosecution to suggest that the word "chalao" meant to have "sex".*

**Ground 13:**

*That the Learned Magistrate erred in law and in fact by not taking into consideration the evidence of WPC Tirisa, that the withdrawal statement of the victim was recorded in her presence and not in her absence as asserted by*

*victim, which created reasonable doubt as to the creditability of victim's testimony in Court.*

2. The Appellant decided to withdraw the grounds 2, 5, 8, 11, and 12 during the hearing. Hence, the hearing of the appeal only proceeded in respect of the remaining grounds of appeal. The Appellant and the Respondent filed their written submissions and informed the Court that they wish to reply on their respective written submissions.

### **First Ground**

3. The first ground of appeal is founded on the contention that the learned Magistrate had erred in law and, in fact, in allowing the Prosecution to amend the charge after the conclusion of the Complainant's evidence.
4. The Prosecution had only presented evidence of the Complainant. In her evidence, the Complainant had stated that she was dressed in a police uniform shirt and side pocket pants when the Appellant had allegedly touched her private parts. She had then explained that she meant her vagina as her private parts. During the cross-examination, the Complainant had been extensively cross-examined by the Appellant regarding the inconsistent nature of her evidence and the statement she had made to the Police during the investigation.
5. As mentioned above, the Complainant had stated in her evidence that she was dressed in her police uniform shirt and the side pocket pants. On the contrary, the statement made to the Police states that she was dressed in a skirt. However, she had made another statement subsequent to the first statement, saying that she was dressed in side pocket pants. At the conclusion of the evidence of the Complainant, the Court had given an adjournment. After the adjournment, the learned counsel for the Prosecution had informed the Court that the Prosecution was not going to present any other witnesses, but made an application to amend the charge. The Appellant opposed the application to amend the charge on the ground that the amendment was brought based on the cross-examination. Nevertheless, the learned Magistrate had granted the application, allowing the Prosecution to amend the charge.

6. The first ground of the appeal encompasses two components. The first component is the procedural correctness of the amendment. The second component is whether the amendment had caused prejudice to the Appellant.
7. Section 182 (1) of the Criminal Procedure Act deals with amending the charge during the hearing in the Magistrates' Court. It states that:

*"Where, at any stage of the trial before the close of the case for the Prosecution, it appears to the court that the charge is defective (either in substance or in form), the court may make such order for the alteration of the charge, either by-*

- i) amendment of the charge; or*
- ii) by the substitution or addition of a new charge,*
- iii) as the court thinks necessary to meet the circumstances of the case.*

8. Accordingly, the Court is allowed to make any amendment to the charge at any stage of the trial but before the close of the Prosecution case. The Appellant's counsel submitted that the learned Magistrate had allowed the amendment after the conclusion of the evidence of the Complainant. He further argues that the Complainant was the only evidence adduced by the Prosecution; hence, the conclusion of the Complainant's evidence must be considered as the close of the prosecution case.
9. Section 177 of the Criminal Procedure Act states that if the accused does not admit the charge, the Court must proceed to hear the witnesses of the Prosecution. At the conclusion of the Prosecution evidence, the learned Magistrate must determine whether a case is made out against the accused, requiring him to make a defence. (*vide Section 178 of the Criminal Procedure Act*). If the learned Magistrate found that there is a case made out against the accused, he must then explain to the accused the substance of the charges again and the accused's rights in his defence.

10. Accordingly, the Prosecution case ends with the determination of the no case to answer. Hence, the close of the evidence of the Complainant cannot be considered as the close of the Prosecution's case. In this matter, the learned Magistrate had granted the Prosecution leave to amend the charge after the Complainant's evidence but before the close of the case of the Prosecution. Hence, I do not find any merit in the first component of the first ground of appeal.
11. The second component of the first ground of appeal is based upon the contention that the said amendment had caused prejudice to the Appellant.
12. Section 182 (1) of the Criminal Procedure Act has given the Magistrate power to amend the charge at any stage of the trial but before the close of the prosecution case. The Appellant's main contention is that the above amendment to the charge prejudicially affected the Defence's case as the Defence focused on the inconsistent nature of the Complainant's evidence.
13. The Fiji Court of Appeal in **State v Singh (Criminal Appeal No AAU0097 of 2005S)** has outlined the purpose of the particulars of offence, where it observed that:

*"The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the state intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the Prosecution adduces."*

14. The Appellant was entitled to know the basis upon which the State had presented the case against him; and, that basis had not been anything else other than on the basis disclosed and explained in the charge. (*vide*; [Yang Xieng Jiong v State \[2019\] FJCA 17; AAU0077.2015 \(7 March 2019\)](#)).

15. Lord Justice Auld in R v Gleeson (2004) 1 Cr App. R 29 has expounded an applicable approach in deciding whether to allow an amendment at a late stage of the hearing, which I find it as a helpful guideline. Auld LJ had stated that:

*"First, in deciding whether to permit the sought amendment at such a late state of the trial, the judge had to consider how it chimed with the way in which the Prosecution had opened the case, the evidence that it had called and the approach of the defence to that evidence. That is just what he did. This is how he dealt with and answered those questions in a number of passages his ruling. He said:*

*"It seems to me that I have to ask myself three questions. The first is this, if the proposed count had been the original count, would the Crown have opened the case to the jury any differently? In my Judgment, the answer to this is a resounding no. Their case is and always has been, that this was an agreement to obtain \$35,000 by telling lies. The second question I have to ask myself is; would the Crown have conducted their case any differently? Again, in my Judgment a resounding no, I cannot see how their case as presented to the jury would have differed one iota. Thus the third question must be; have the defence been prejudiced or would they be prejudiced by this late amendment? It seems to me obvious that the answers that I have given to questions one and two, that is a resounding no, are highly pertinent to this third question"*

16. According to the R v Gleeson's guidelines, I propose that the Court considers the following matters when it contemplates allowing an amendment to the charges at a later stage of the trial, though the list is not exhaustive.

- i) Whether the proposed amendment changes the basis of the prosecution case?



- ii) Would the Prosecution have presented the evidence differently, if the proposed amendment had been the original charge?
- iii) Would the Defence approach have different in respect of the evidence presented by the Prosecution, if the proposed amendment had been the original charge?

17. The allegation against the Appellant was founded on the basis that he had touched the private parts of the Complainant while they were traveling in a Police Vehicle. The particulars of the offence as charged are that:

*"Ramendra Prasad on the 2nd day of February 2014, at Nausori in the Eastern Division unlawfully and indecently assaulted Susan Betty Radinisau by touching her private part."*

18. At the end of the Complainant's evidence, the Prosecution made an application to amend the charge to replace "by touching her private part" with "by touching her vaginal area over her clothes." The Prosecution made this application because it was revealed during the evidence in chief that the Complainant was dressed in side pocket pants and not in a skirt. In her evidence, the Complainant had stated that she was dressed in pants when this alleged incident took place. The Complainant had made two statements to the Police. It has been recorded in the first statement that she was dressed in a skirt. However, the Complainant stated that she was dressed in pants, and it was wrongly stated in the statement. The Complainant had then made another statement saying that she was dressed in pants when the alleged incident took place. The Appellant cross-examined the Complainant regarding the inconsistency between her evidence in Court and the first statement made to the Police.
19. The said amendment has further particularized the alleged incident. It has not altered or changed the basis of the Prosecution case. The amendment had not affected the Defence's contention of the inconsistent nature of the Complainant's evidence. The evidence of the Complainant, stating that she was dressed in pants and the two statements she made to the Police, in one of them, she had said that she was dressed in a skirt, still need to be taken

into consideration by the learned Magistrate when she determines the credibility and reliability of the Complainant's evidence. In view of these reasons, I do not find the amendment to the charge has caused any prejudice to the Appellant. Therefore, I do not find any merits in the first ground of appeal.

### **Third Ground**

20. The third ground of appeal is based upon the contention that the learned Magistrate had erroneously failed to adjourn the hearing after the amendment to allow the Defence to prepare adequately and thus caused prejudice to the Appellant.
21. Having carefully perused the record of the proceedings in the Magistrate's Court, the learned counsel who represented the Appellant in the hearing had not made any application for an adjournment. Actually, it was the learned Magistrate, on her own motion, had granted an adjournment of 30 minutes, allowing the Defence to prepare for the hearing's continuation. Neither the Appellant nor his lawyer made any objection to the 30-minute adjournment, seeking more time. As a result of these reasons, I do not find any merits in the third ground of appeal.

### **Fourth and Thirteenth Grounds**

22. For the convenience of determination, I shall deal with the fourth and thirteenth grounds of appeal together. The Appellant argues under these two grounds that the learned Magistrate had failed to give reasons in her Judgment for not believing the evidence of the Defence, especially the evidence of WPC Tirisa.
23. Section 142 of the Criminal Procedure Act states that:

*"Subject to subsection (2), every such Judgment shall, except as otherwise expressly provided by this Act, be written by the Judge or Magistrate in English, and shall contain:*

- i) *the point or points for determination;*
- ii) *the decision and the reasons for the decision; and*
- iii) *shall be dated and signed by the Judge or Magistrate in open court at the time of pronouncing it.*

24. Accordingly, the Judgment must contain the issues for the determination, the decision, and the reasons for the decision.
25. The Prosecution had alleged the Appellant had indecently and unlawfully touched the vagina of the Complainant over her clothes. The Appellant denied the allegation. Hence, the main dispute in the matter was to determine whether this alleged incident had actually happened. In her Judgment, the learned Magistrate had briefly outlined the evidence presented by the Prosecution and the Defence. She had then proceeded to determine whether the evidence of the Complainant was reliable, credible, and truthful. Having discussed the inconstancies and the delay of reporting the matter, the learned Magistrate had found the evidence of the Complainant as truthful and credible. The learned Magistrate had further found the evidence of the Complainant was not discredited. Accordingly, the learned Magistrate had accepted the evidence of the Complainant.
26. It is desirable if the learned Magistrates discuss all the issues highlighted in the trial. However, the Magistrates have to handle large numbers of cases per day, which they must deal with expeditiously. Hence, it would prevent the Magistrates from writing lengthy judgments, but they have to outline the reasons for their decisions in their Judgment with brevity and concisely. In this Judgment, the learned Magistrate had given the reasons for her decision to accept the evidence of the Complainant as truthful and credible evidence. Hence, it appears that she has decided that the evidence of the Defence has failed to create any reasonable doubt about the prosecution case. Accordingly, I do not find any merits in ground four and thirteen.

### Ground Six

27. The ground six of the appeal is based upon the contention that the learned Magistrate had erred in law and fact when she failed to consider the delay in reporting has benefited the Defence.
28. The learned Magistrate has considered the issue of delay in paragraphs 11, 12, 13, and 14 of the Judgment in an inclusive manner. Having considered the reasons for the delay, the learned Magistrate had concluded the delay had not discredited the evidence of the Complainant. Hence, I do not find any merits in ground six as well.

### Ground Seven.

29. The Appellant argues the learned Magistrate has failed to consider the inconsistencies in the Complainant's evidence, especially regarding the clothes that she was wearing and the place where the Appellant had allegedly touched.
30. The Complainant said she was dressed in her uniform shirt and side pocket pants when this alleged incident happened. However, the Complainant had made two statements to the Police. It has been recorded in the first statement that she was dressed in a skirt. However, the Complainant stated that she was dressed in pants, and it was wrongly stated in the statement. The Complainant had then made another statement saying that she was dressed in pants when the alleged incident happened. The Appellant cross-examined the Complainant regarding the inconsistency between her evidence in court and the first statement made to the Police.
31. The Supreme Court of Fiji in Ram v State [2012] FJSC 12; CAV0001.2011 (9 May 2012) has discussed the evidential value of the inconsistency between the evidence given in the court and a previously made statement, where Marsoof JA held that:

*"We find that the above quoted direction is proper and fair. It is also consistent with the principle of the common law as expressed by Lord Parker CJ in Regina v Golder [1960] 1 WLR 1169 at page 1172 that "when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should.....be directed that the evidence given at that trial should be regarded as unreliable." There may be exceptional circumstances in which the testimony of such a witness may be regarded as reliable notwithstanding the prior inconsistent statement , such as where the witness is able to give a convincing explanation for the inconsistency, and it is also noteworthy that in Regina v Governor of Pentonville Prison, ex p. Alves [1993]284 AC 284, Lord Goff of Chieveley, with whom the other law Lords agreed, stressed that "the credibility of evidence given by a witness inconsistent with a statement previously made was a matter for the jury to consider, subject to a proper warning by the judge as to the weight to be attached to the evidence."*

32. Accordingly, the inconsistent nature of the evidence with the previously made statement generally affect the reliability of the evidence. However, if the witness could provide a reasonable explanation for the inconsistency, the Court can take them as reliable. In this case, the Complainant had explained in her evidence that she made another statement rectifying the mistake made by the police officer who wrote the first statement. In the second statement, she had stated that she was dressed in side pocket pants. The learned Magistrate had considered these inconsistencies in paragraph 10 of the Judgment. She then found the said inconsistency had not affected the credibility of the Complainant's evidence.
33. Having carefully perused the record of the proceedings in the Magistrate's Court, I do not find any inconsistent nature of the evidence of the Complainant in respect of the place that the Appellant had allegedly touched. She had been persistent and coherent in her evidence, saying that he touched her vaginal area, which she explained earlier as her private parts. Hence, I do not find any merits in ground seven of the appeal.

## Grounds Nine and Ten

34. These two grounds are founded on the contentions that the learned Magistrate had failed to consider some evidence adduced in the hearing. The Appellant says the learned Magistrate had failed to consider that the Complainant had gone with the same accused on the following day after the incident. Moreover, the learned Magistrate had failed to consider that it was highly improbable for the Appellant to reach to the Complainant while he was driving a vehicle in a dark evening. I do not wish to discuss these two grounds, as it appears the learned Magistrate had considered these issues when she had concluded the evidence of the Complainant as reliable and truthful. Accordingly, I do not find any merits in these two grounds.

35. The order of the Court is:

i) Appeal is dismissed.

36. Thirty (30) days to appeal to the Fiji Court of Appeal.



  
R.D.R.T. Rajasinghe  
Judge

At Suva

16<sup>th</sup> October 2020

Solicitors

M.Y. LAW for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.