IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 017 OF 2021S

BETWEEN **MOHAMMED NOUZAB FAREED**

Appellant

AND **THE STATE**

Respondent

Counsels : Mr. H. Nagin for Appellant
Ms. S. Shameem for State

Hearing : 24 October 2022.

Judgment : 11 November, 2022.

JUDGMENT

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1. On 14 August 2020, the appellant (accused) was brought before the Suva Magistrate Court, on the following charge:

Statement of Offence

INDECENT ASSAULT: *Contrary to section 212 (1) of the Crimes Act 2009.*

Particulars of Offence

MOHAMMED NOUZAB FAREED *on the 15th day of May 2019, at Suva in the Central Division, unlawfully and indecently assaulted* ***LUISA FATHA SAVOU*** *by hugging her and sniffing and kissing her neck whilst rubbing her back.*

2. Ms. K. Semisi appeared for the State, while Mr. H. Nagin appeared for the appellant. From the Magistrate Court record, it was not clear whether or not the charge was put to the appellant, as required by section 174 (1) of Criminal Procedure Act 2009. Anyway, the court record said "the accused will file a Not Guilty plea." Presumably, section 174 (3) of the Criminal Procedure Act 2009 had been compiled with. Section 174 (3) above-mentioned reads as follows:

> **(1).** **"*If the accused person does not admit the truth of the charge, the court shall proceed to hear the case provided in this Act."***

3. On 15 and 16 March 2021, the burden of proof been on the prosecution, they called the following three witnesses:

   (i) Detective Sergeant 3660 Gasio Rokodulu (PW1);
   (ii) The Complaint (PW2) and
   (iii) Mr. Penijamini Nawailulu (PW3).

4. At the end of the prosecution's case, the appellant submitted he had no case to answer. His reasons were spelt out in the court record, page 67 to 70 of the transcript of proceeding. The prosecution replied that the appellant had a case to answer, and they outlined their reasons from page 70 to 73 of the transcript of proceeding. On 23 March 2021, the court ruled that the appellant had a case to answer and called upon him to make a defence.

5. Through his counsel, the appellant said he will give sworn evidence and call two witnesses, in his defence. On 23 March 2021, the defence called the following witnesses:

   (i) The appellant (accused) (DW1);
   (ii) Ms. Mereti Cokanasiga (DW2); and
   (iii) Mr. Ilaitia Tuilawaki (DW3).

6. The following exhibits were submitted by the parties:

(i)	Prosecution Exhibit No. 1	-	Photos of Alleged Crime Scene
(ii)	Defence Exhibit No. 1	-	Ambassador of Brazil Program in Fiji from 25 to 27 March 2019.
(iii)	Defence Exhibit No. 2	-	Photos of Complainant, Brazil Ambassador and his driver.
(iv)	Defence Exhibit No. 3	-	Photos of Accused, Minister Reddy with Brazil Ambassador
(v)	Defence Exhibit No. 4	-	Selfie photo of Accused with Complainant
(vi)	Defence Exhibit No. 5	-	Complainant's Job Application to FHL, with CV and Qualification attached.
(vii)	Defence Exhibit No. 6	-	Ms. L. Tabuya's Facebook page.
(viii)	Defence Exhibit No. 7	-	Accused's Work Positions on 10th December 2019
(ix)	Defence Exhibit No. 8	-	Accused Hugging Staff/Shareholders at FHL AGM in 2019

7. At the end of the defence case, the parties' were given time to file their closing submissions. On 16 April 2021, the court confirmed receiving the parties closing submissions. On 1 November 2021, in fifteen pages, the court delivered its judgment. The court found the appellant guilty as charged. On 3 December 2021, the court convicted the appellant as charged and sentenced him to 14 months imprisonment, suspended for 2 years.

8. The appellant was not happy with the above conviction and sentence, and on 15 December 2021, filed a petition of appeal against conviction and sentence, on the following grounds:

"APPEAL AGAINST CONVICTION

1. *The learned trial Magistrate erred in law and in fact in when he failed to order that there was no case to answer at the end of the Prosecution case. The Learned Magistrate erred for the following reasons:*

   *(i) He failed to follow the principles laid down in **R v Jai Chand** (1972) 18 FLR 101 and other related authorities.*

   (ii) There was no reliable or credible evidence against the Appellant.

   (iii) The Complainant was the most evasive and untruthful witness with no credibility.

   (iv) The Complainant had become good friends with the Appellant and had pictures taken with him and also sent him emails and was previously hugged by the appellant without any complaint.

   (v) Her complaint was 7 months after the alleged incident and was in similar terms as reported by Lynda Tabuya in her Facebook post of 6th December, 2019

2. *The learned trial Magistrate erred in law and in fact in wrongly holding that the Appellant maintained that the Complainant confronted him and he was alarmed that she might assault him.*

3. *The learned trial Magistrate erred in law and in fact in not properly directing himself in respect of the delay in reporting the incident by the Complainant and wrongly applied the case of **Penaia Valevesi v The State** Criminal Appeal No. AAU 039 of 2016 when that case dealt with a complainant who was just 5 years old at the time of the incident.*

4. *The learned trial Magistrate erred in law and in fact in wrongly holding **'A pertinent was put to the Accused under cross examination namely "what would the complainant have to gain from lodging this complaint?"***

5. *The learned trial Magistrate erred in law and in fact in saying **"The acts if you accept either version of what transpired that night, would it constitute Indecent Assault to a so called "right minded person?"***

6. *The learned trial Magistrate erred in law and in fact in holding **"In deciding this, the Court needs to look at the context of the alleged act. The time was after 8pm in a largely deserted office building".***

7. *The learned trial Magistrate erred in law and in fact in holding* ***"The only two parties involved in that hug are a CEO of a big company and a young junior civil servant. The power imbalance implicit in that scenario would lead this court to accept the version of events set out by the complainant whom I found to be a witness of truth"***

8. *The learned trial Magistrate erred in law and in fact in not holding that the Complainant was the most evasive and untruthful witness with no credibility whatsoever.*

9. *The learned trial Magistrate erred in law and in fact in not properly applying the principles in the cases of* ***DPP v. Veresa*** *[2013] FJHC 361 and* ***the State v. Pushp Karan Naickar*** *Criminal Case No. 155 of 2011 in assessing credibility of the Complainant.*

10. *The learned trial Magistrate erred in law and in fact in not holding the Complainant was perverting the course of justice when she met up and discussed the case with PW3 Penijamini after she gave her evidence and just before he was to give his evidence.*

11. *The learned trial Magistrate erred in law and in fact in not properly considering the evidence of DW3 Ilaitia Tuilawaki.*

12. *The learned trial Magistrate erred in law and in fact in finding the Appellant guilty of the offence of Indecent Assault when the Prosecution failed to prove all the elements of the offence beyond reasonable doubt; and*

13. *Such further and other grounds as the Appellant may be advised upon receipt of the Court Record of the proceedings.*

APPEAL AGAINST SENTENCE

14. *The sentence is harsh and excessive in all the circumstances of the case."*

9. The court had carefully read the grounds submitted by the appellant. The thirteen grounds of appeal on conviction could easily be divided into two sub-groups, to make them understandable, because most of them are interwined and repetitive on the same issue. Firstly, appeal grounds number 2 to 10 could all come under Appeal Ground 12, because appeal grounds 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are matters that concerned the complainant's credibility. So instead of considering

each appeal ground, and thereby wasting the court's time, we will concentrate on Appeal Ground 12, since this appeal ground covers all. Secondly, Appeal Ground No. 1 could be simplified by considering only Appeal Ground 1 (ii), because this ground is fundamentally crucial in any criminal prosecution. The court will first consider Appeal Ground 12.

Appeal Ground No. 12 – The Learned Trial Magistrate erred in Law and in fact in finding the Appellant guilty of the offence of indecent assault when the Prosecution failed to prove all the elements of the offence beyond reasonable doubt:

10. In answering Appeal Ground No. 12, we have to find out what is "indecent assault"? Section 212 (1) of the Crimes Act 2009 creates the offence of "indecent assault". It reads as follows:

> ***"(1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.***
> ***Penalty – Imprisonment for 5 years".***

11. For the accused to be found guilty of "indecent assault", the prosecution must prove beyond reasonable doubt, the following elements:
    (i) the accused
    (ii) unlawfully and indecently
    (iii) assaults the complainant.

12. Under the Crimes Act 2009, an offence must have a physical element and fault element (Section 13 (1), 15(1) and 18(1) of the Crimes Act 2009). For "indecent assault", the physical element of the offence is the accused's conduct of "assaulting the complainant". The fault element of "indecent assault" is the accused's "intention of assaulting the complainant unlawfully and indecently". Both the

physical and mental elements of the offence must be satisfied by the prosecution, beyond reasonable doubt, before an accused can be found guilty of "indecent assault" (Section 14 of the Crimes Act 2009).

13. It was often said that "the least touching of another in anger is an assault". It is the unlawful application of force to the person of another. Although the touch may not be painful, nevertheless the touching is in law an application of mild force on the person of another. It is still unlawful, unless the person receiving the touch had given her or his consent, or alternatively, there are other justification in law for the conduct. The touch or conduct becomes indecent if right thinking members of society considers the same to be indecent, given the surrounding circumstances. It was the court that will have to decide the issue of "indecency", taking into account as a guide the views of "right thinking members of society" (**State** v **Isoa Rainima**, Criminal Case No. HAC 064 of 2017S, High Court; Suva, Archbold, **Pleading, Evidence & Practice in Criminal Cases**, 42 edt.,1985;Peter Gillies, **Criminal Law**, 4th ed, 1997, pages 604 to 612).

14. In this case, there were two versions of events on the alleged indecent assault. We will first discuss the complainant's version of events, then the accused's version of events. As recorded in the transcript of proceedings from pages 26 to 31, when the complainant was examined in chief, she said the alleged indecent assault occurred in the accused's office complex, at Ra Marama House, on 15 May 2019, after 8 pm. She said, she and her boyfriend at the time, Mr. Penijamini Nawailulu (PW3), took the lift to the 7th Floor at Ra Marama House, to meet the accused. She said, the accused greeted her and PW3 at the 7th Floor at the reception area. She said, the accused asked PW3 to take a seat at the reception area, while she and the accused went into his office. In the office, she said, she sat in one of the couches chair. She said, the office door was closed. She said, the accused was sort of sitting/leaning on his office table facing her, about a meter and a half away. She said, they started talking about work prospects at the Fijian Holdings Limited

(FHL), of which the accused was the Chief Executive Officer. Previously, the complainant had applied for a job there, but she was having second thoughts. The accused was attempting to recruit her to FHL.

15. She said, after the above conversation, she said she stood up from where she was sitting. She said, thereafter the accused asked her for a hug. She said, she did not reply. She said, after the accused asked her for a hug, he walked towards her with his arms open. She said, she stood still. She said, the accused then put his arms around her. She said, both her arms were under his arms, which were over her shoulder. She said, he said nothing. She said, the distance between them were close. She said, when hugging her, he was also rubbing her back, with his hand going up and down the middle of her back. She said, she could feel his breath on her neck. She said, he sniffed her and then kissed her neck with his lips. She said, she felt disgusted, and the whole episode took about one minute. She said, there was no one else in the office, but themselves. The above was the complainant's version of events on the alleged indecent assault.

16. As for the appellant, his version of events on the alleged indecent assault, were as follows. He agreed he met the complainant and PW3 at the lift on the 7th Floor at Ra Marama House on 15 May 2019 after 8 pm. He said, as soon as the complainant and PW3 came out of the lift, he called out to the complainant and went and hugged her. He said, he also greeted PW3. He said, he and the complainant went to his office, while PW3 waited at the reception area. The appellant said, as soon as they entered the office, the complainant came close to him and complained to him about her job application to FHL. He said, she complained that the appellant promised a lot, but appeared not to be generous with salaries. He said, she appeared to be on $13,000 plus salary at the Ministry of Foreign Affairs, and expected more at FHL rather than starting at the same $13,000 plus salary level. He said, the two talked about the salary levels at FHL and there was a process to be followed if her salary was to go up at FHL. He said, it appeared

the complainant expected $18 to $20 thousands in salary. He said, he explained to the complainant that normally new recruits often start with $13,000 plus salary level, and they were assessed in the first 3 to 6 months. Based on the business they bring to the company and their positive contribution to the same, he said he told the complainant that salaries may go up to $35,000, $40,000 and the sky was the limit. He said, the complainant's tone of conversation at the time was like "you let me down" type. He said, he thought the complainant was going to manhandle him, but she didn't. The appellant said, he encouraged the complainant to follow the process, if she wants to work for FHL.

17. The appellant said, their meeting then ended. They returned to the lift area. The appellant said, at the reception area, he hugged the complainant again and said goodbye and goodnight to her. He said, PW3 was present and saw the above. He said, the complainant and PW3 then said goodnight to him. They then left the 7th Floor at Ra Marama House. As to the complainant's indecent assault allegations in his office, the appellant denied the same. He said, he only gave the complainant two normal hugs at the lift area when she arrived and when she left. He said, he did not hug the complainant in his office, nor sniff or kiss her neck, at the time. He said, he also did not rub her back, as alleged. The appellant's version of events are contained in pages 94 to 99 of the transcript of proceedings.

18. The end result of the parties' version of events on the indecent assault allegations are two different and competing version of events. The complainant says one thing, and the appellant says another. However, since the charge in paragraph 1 hereof were based on the complainant's allegations, we will now examine the same.

19. The law required the prosecution to prove the complainant's allegations against the appellant (accused) beyond a reasonable doubt. In other words, the burden is on the prosecution throughout the trial, to prove their case against the accused beyond

a reasonable doubt. This burden never shifts to the accused, at any stage of the trial. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent, until he is proved guilty in a court of law. If there is a reasonable doubt, so that the court is not sure of the accused's guilt, he must be found not guilty as charged and acquitted accordingly.

20. Whether or not the complainant's version of events is to be accepted by the court, will depend on her credibility as a witness. Although the accused is on trial, the veracity of the complainant's evidence will also have to be carefully examined to determine its credibility. In other words, those who point fingers at others, must expect their evidence to be thoroughly scrutinized to determine its reliability.

21. Because of the above, the court had carefully read and examined the court record, the transcript of the proceedings, the parties' submissions and all the papers submitted by the parties.

22. In a case of this nature, the allegations must be considered within the context in which it was raised, including the surrounding circumstance. This appeared to be the appellant's complaint in Ground 6 of the Appeal Against Conviction. From the evidence, it appeared that the complainant and the appellant had worked together when the Ambassador of the Republic of Brazil visited Fiji between 25 to 28 March 2019. The complainant was working in the Protocol Division of the Fiji Ministry of Foreign Affairs, while the appellant was the Consul for the Republic of Brazil from January 2019. The Ambassador of Brazil was coming to present his credentials to the President of the Republic of Fiji on 26 March 2019. The complainant was appointed the Protocol Officer by the Ministry of Foreign Affairs and she accompanied the Ambassador and Consul to every meeting. On 26 March 2019, after presenting his credentials to the President of Fiji, the evidence showed that the Ambassador hugged the Consul (appellant), the protocol officer (complainant)

in appreciation of the work that day. The appellant said, he also hugged the complainant that day, for the successful work done that day.

23. The appellant said, the above was the first hug he ever gave the complainant. He said, for the next three days during the Ambassador's visit, the above mentioned hugs were repeated many times, in appreciation of the work done. The appellant said the Ambassador, himself as the Consul and the complainant were becoming friends. The complainant never complained about the hugs, according to the appellant. The evidence showed the complainant and the appellant, between 26, 27 and 28 March 2019, discussed a lot of subjects. The subjects ranged from Fiji, culture, economics, human resource work, the accused's career and work habits, and the complainant's desire to be groomed or mentored for higher positions. The appellant said, the complainant knew a lot about FHL and was keen to join FHL if there was an opportunity. During those three days, the Ambassador, the appellant and the complainant visited a lot of ministers and government officials. On 28 March 2019, the evidence showed that the Ambassador took a photo of the complainant and the appellant (Defence Exhibit No. 4). Both were in full smiles. At the end of the Ambassador's visit, the evidence showed the complainant was interested in working for the appellant, as part of FHL. The evidence showed she sent the appellant her CV and other relevant papers (Defence Exhibit No. 5). The above evidence showed the complainant and the appellant were familiar with each other and knew each other well from 26 March 2019. They had also hugged numerous times between 26 and 28 March 2019, when accompanying the Ambassador of Brazil in Fiji.

24. In Appeal Ground No. 3 Against Conviction, the appellant complained that the complainant took about 7 months to raise the alleged indecent assault complaint. The alleged indecent assault occurred on 15 May 2019, and the evidence appear to show that the complainant reported the matter to police on 9 December 2019. Why take 7 months to raise such complaint? Although there is no time limitation

to report on any alleged sexual crime, the 7 months delay does raise some serious questions on the complainant's real motives. She was a well-qualified Bachelor of Arts graduate in Politics/Human Resources Management and Employment Relations, capable of reporting any injustices done to her. Her educational background, as shown in her curriculum vitae (Defence Exhibit No. 5), showed a confident and capable student from 2002 to 2018, when she graduated with a Bachelor of Arts Degree. Her Bachelor of Arts Certificate and Transcript of Academic Record (Defence Exhibit No. 5) showed a knowledgeable person, who potentially could use the knowledge, metaphorically speaking, both as a shield and a sword. After the alleged indecent assault, the complainant said, "I felt very uncomfortable. I felt something wrong happened. I felt my space and neck and body was like violated. I was shocked at the same time. I felt disgusted" (Transcript of proceeding, page 31). Given the complainant's knowledgeable and confident nature, why wait for 7 months to report the alleged incident? Being frightened and disheartened appears not to "hold water" for this knowledgeable and confident complainant. Were there other motives to report the matter 7 months later? Was this a calculated revenge against the appellant for not offering her an $18 to $20 thousand dollars salary package on 15 May 2019, when they met in his office? These unanswered questions does affect the complainant's credibility, as a witness.

25. In Appeal Ground No. 4 Against Conviction, the appellant complained that the Learned Magistrate erred in holding "A pertinent question was put to the accused under cross examination namely "What would the complainant have to gain from lodging this complaint?" Given the discussion in paragraph 24 hereof, it was arguable that the complainant had everything to gain by ruining the appellant's career, by lodging the alleged indecent assault allegation, especially so when her application to work for FHL at $13,000 plus salary rather than $18 to $20 thousand salary level she expected, was rejected. It was not at all illogical for someone to argue that the alleged indecent assault allegation, lodged 7 months afterwards,

after much thought and potentially pre-planning, was nothing short of a calculated revenge against a man, who was seen by the complainant, to have held her back from a lucrative $18 to $20 thousand dollar job at FHL. These unanswered questions again affects the credibility and/or reliability of the complainant's version of events.

26. At this point, it would be advisable to refer to Ground 7 of the Appeal Against Conviction, which were as follows: …"The Learned trial Magistrate erred in law and in fact in holding "The only two parties involved in that hug are a CEO of a big company and a young junior civil servant. The power imbalance implicit in that scenario would lead this court to accept the version of events set out by the complainant whom I found to be a witness of truth." Yes, the Learned trial Magistrate was correct in holding that the only two persons who hugged in this case were the appellant and the complainant. However, in my view, it would be dangerous and illogical to use the "power imbalance" between the appellant and the complainant, as a measure of a witness's credibility. As far as the law was concerned, everyone was equal before the law, whatever your social status was or is. Human beings as such, whether or not you are a CEO of a big company or young junior civil servant, are capable of lying or misrepresenting the facts, to suit one's motive. The appellant and the complainant enjoyed working together when the Ambassador of Brazil visited Fiji between 26 and 28 March 2019. The parties and the Ambassador hugged each other on numerous occasions. The complainant, during that time, found out more about the appellant's background, and thereafter applied for a job at FHL. The evidence showed she was expecting a salary of $18 to $20 thousand from $13,000 at the Foreign Affairs Ministry. On 15 May 2019, the appellant put a stop to her expectation, when he told her to follow the recruitment process. In my view, the relationship between the appellant and complainant does not amount to a "power imbalance". Their credibility as a witness will be judged on the basis that they are human beings and equal before the law, and not on their status in life.

27. In Appeal Ground 10 Against Conviction, the appellant complained as follows, "…The learned trial Magistrate erred in law and in fact in not holding the Complainant was perverting the course of justice when she met up and discussed the case with PW3 Penijamini after she gave her evidence and just before he was to give his evidence…" In their written submission, the appellant referred to Order 5 rule 2 of the Magistrate Court Rules, which read as follows:

> ***"The court may, during any trial, take such means as it considers necessary and proper for preventing communication with witnesses who are within the court house or its precincts awaiting examination."***

The above rule also applied to criminal proceedings. The above rule was designed to prevent witnesses, on the day of the trial, or before and after a trial when the same is pending, to discuss their evidence with each other. The reason was that the witnesses may be tempted or even deliberately tailor their evidence, to suit each other. This would amount to tampering with evidence. It is potentially a crime pursuant to section 190 (b) and (e) of the Crimes Act 2009, which reads as follows:

> ***"190… A person commits a summary offence if he or she-***
>
> ***(b) conspires to do anything to obstruct, prevent, pervert or defeat the course of Justice; or***
>
> ***(e) in any way obstructs, prevents, perverts or defeats, or attempts to obstruct, prevent, pervert or defeat, the course of justice..."***
>
> ***Penalty - Imprisonment for 5 years.***

28. Mr. Penijamini Nawailulu (PW3), on pages 62 and 63 of the transcript of proceeding, admitted seeing and walking with the complainant after she had already given evidence in the matter, and while he was still giving evidence in the case. During the appeal hearing Ms. Shameem for the State, submitted that she recalled the learned Magistrate warned PW3 not to discuss this case with anyone,

before the lunch break. Mr. Nagin for the appellant, confirmed what Ms. Shameem said above. The above warnings were standard warnings that trial Magistrates and Judges issue to witnesses, when witnesses were giving evidence in court. The reasons for the above were to avoid the witnesses tampering with others witnesses' evidence to advance a party's theory of the case. When the above rule was broken, two possible consequences could arise. One, a person may be charged under Section 190 (b) and/or (e) of the Crimes Act 2009 for allegedly perverting the course of justice. Second, when the same was brought to the court's attention, the following consequences may result. One, the court's directive had been violated by the particular witness, in this case, PW3. If PW3 had seen it fit to violate the court's direction, thereby showing utter disobedience to the court's authority, to what extent should the court treat him or her, as a credible and reliable witness? Obviously, as a matter of logic, if a witness shows utter disrespect to the trial court by violating its direction, it tells you the type of character you are dealing with. In my view, the learned Magistrate had erred in not taking this point seriously, especially so when he was a recent complaint witness and also when the alleged indecent assault was committed with no eye witness present.

29. Furthermore, by admitting in cross examination that he was with the complainant during the court lunch breaks, PW3 had indirectly tainted the complainant's credibility. Already the appellant's counsel had submitted that it was not illogical to suspect them discussing the case, and thereby tampering with PW3's evidence, to enable him to present his evidence in such a way as to support the complainant's version of events. It was often said that justice may not only be done, but it must also be seen to be done. PW3 in violating the trial court's direction not to contact anyone during the lunch break, was a serious violation of the trial process. The prosecution's case was fundamentally based on the complainant's evidence. In support of the complainant's case, was PW3's recent complaint type evidence. When PW3 violated the trial court's direction, he not only tainted his credibility and reliability, but also tainted the complainant's credibility and reliability. By seriously

undermining the trial process, by being seen with each other during the lunch break, despite the trial court's direction, PW3 and PW2 had undermined their own credibility as witnesses. They had indirectly, although unconsciously, undermined the appellant's right to a fair trial, as guaranteed to him under Section 15 (1) of the 2013 Fiji Constitution. In my view, the learned trial Magistrate erred in law when he ignored the ramification of PW3's violation of his direction for him not to discuss the case with anyone during the lunch break. He may have not discussed the case with the complainant, but there was a strong perception that he had done so, by being seen with her.

30. **Appeal Ground No. 1 (ii) – The learned trial Magistrate erred in law and in fact when he failed to order that there was no case to answer at the end of the Prosecution case. The learned Magistrate erred for the following reasons**:

(ii) There was no reliable or credible evidence against the Appellant

In a criminal trial in the Magistrate Court, the charge, which contained the statement and particulars of offence, was the most important piece of document. It was the State's allegation against a citizen. It was a legal combat between the mighty State, with its vast resources, against a mere citizen, with its limited resources. Therefore, the law required the State to prove the charge and/or the allegation against the citizen (accused) beyond a reasonable doubt. Part and parcel of that duty was to file in court the relevant charge, and present the relevant evidence, in order to make a prima facie case.

31. Section 178 of the Criminal Procedure Act 2009, reads as follows:

> ***"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused."***

In this particular case, the charge was that mentioned in paragraph 1 hereof. The complainant's name in the charge was **LUISA FATHA SAVOU**. When giving her evidence, the complainant, on oath said her name was **LUISA FAITH NAIKASAVOU** (transcript of proceeding, page 13). The name contained in the charge and that given in evidence are not similar. Only the first mentioned matched, the second and third do not match. Words and spelling of names in law are crucial and important. It is a matter of identity. What should have been done was for the prosecution to seek an amendment of the complainant's name, before they closed their case. They did not do so. So, as a matter of law, the complainant's name in the charge does not match the complainant's name in the evidence. The evidence does not support the charge. On this point alone, the learned Magistrate should have found the appellant had no case to answer and acquit him accordingly.

CONCLUSION

32. Appeal Ground No. 12. When considering the matters mentioned from paragraphs 10 to 29 individually and collectively, in my view, the prosecution had not proven its indecent assault allegation against the appellant beyond a reasonable doubt. I am only looking first at the complainant's version of events. No eye witness was present to confirm her version, especially so when the appellant denied the allegation. There was no CCTV footage available to confirm her version of events. The complainant had damaged her credibility when seen talking to PW3 during the lunch break, despite the court's warning to PW3. PW3's credibility was also damaged when he violated the trial court's warning not to talk to anyone during the lunch break. Also, the complainant knew the appellant well between 26 to 28 March 2019, when they were accompanying the Ambassador of Brazil around in Suva. She was also applying for a job at FHL, and was hoping to get $18 to $20 thousand dollars salary package, instead of the $13,000 she was getting at the Ministry of Foreign Affairs. Her hope was dashed on 15 May 2019, the date of the allegation, when the appellant put a stop to it, and advised her to follow the recruitment process. Her complaint 7 months later appeared to be a calculated

revenge against the appellant for dashing her hope. In a nutshell, there was a lot of doubt in the prosecution's case, and the learned Magistrate erred in law and in fact in not recognizing it. The benefit of that doubt should have gone to the appellant, and he should have been found not guilty as charged and acquitted accordingly.

33. Furthermore, as explained in paragraph 30 and 31 hereof, the learned Magistrate erred in law and in fact in not finding that the appellant had no case to answer.

34. Given the above, the appellant's appeal against conviction is allowed. Pursuant to section 256 (2) (a) of the Criminal Procedure Act 2009, the court finds the appellant not guilty as charged, and acquits him accordingly.

35. As for the appeal against sentence, it becomes academic.

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JUDGE

Solicitor for Appellant : Sherani and Company, Solicitors, Suva
Solicitor for Respondent : Office of the Director of Public Prosecution, Suva.