

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 015 OF 2022

BETWEEN: **SHIU JI SHRI KRISHAN** **APPELLANT**

A N D: **STATE** **RESPONDENT**

Counsel: Ms. R. R. Raj for Appellant
 Ms. L. Latu for Respondent

Date of Hearing : 08th November 2022
Date of Ruling : 08th December 2022
Date of Judgment : 21st December 2022

JUDGMENT

- 1 Appellant was charged in the Magistrate's Court in Labasa with two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The Appellant pleaded not guilty to these two offences. Consequently, the matter proceeded to the hearing. The Prosecution presented evidence from one witness, the victim's mother. The Appellant gave evidence for the Defence. The Learned Magistrate, in his judgment dated 8 April 2022, found the Appellant guilty of both counts and convicted the same accordingly. The Appellant was subsequently sentenced to four years and ten months imprisonment with a non-parole period

of four years on the 6 June 2022. Aggrieved with the said conviction, the Appellant filed this appeal on the following grounds *inter alia*:

Ground 1:

The Learned Trial Magistrate erred in law and in fact when he wrongly convicted the Appellant by making a finding that the elements of the Offence were proven beyond reasonable doubt.

Ground 2:

The Learned Trial Magistrate erred in law and in fact when he wrongly convicted the Appellant by failing to properly analyze all the evidence during trial and made a finding that there was no inconsistent evidence led by the complainant PW1 that would have weakened her credibility.

Ground 3:

The Learned Trial Magistrate erred in law and in fact when he misdirected himself to believe that since the identity of the Accused and the Victim was not an issue PW1 recollection of events to be more probable than the Appellant.

- 2 The Prosecution alleged that the Appellant had contacted the vagina of his youngest daughter, who was one year old in 2017, with his mouth twice in 2017. The first such incident occurred between 1 February 2017 and 31 March 2017, and the second occurred on 22 July 2017. The Appellant and the Prosecution's witness, who is the mother of the victim, were married and living with their children during this period.
- 3 For the purpose of convenience, I first turn to the second and third grounds of appeal. The second ground of appeal is founded on the contention that the Learned Magistrate failed to properly analyze all the evidence presented before finding that there were no inconsistencies in the evidence given by the Prosecution's witness. The third ground of appeal is that the Learned Magistrate erroneously concluded that the Prosecution's witness's recollection of

events is more probable than the Appellant's. It is prudent to determine these two grounds of appeal together as they are linked to the correctness of the evaluation of the evidence presented before the Learned Magistrate.

- 4 In an appeal like this, the Court is very reluctant to intervene in the judgment delivered by the lower Court. The Appellate Court must recognize and indeed must remember the advantage that the Learned Magistrate had in seeing and hearing the witnesses before him. This Court had no such advantage of seeing the witnesses and observing their demeanour and deportment in giving evidence. Hence, this Court must not lightly intervene unless it has scrutinized the impugned Judgment of the Learned Magistrate in order to determine whether the Learned Magistrate had erred in fact and law in evaluating the evidence and concluding that the Appellant was guilty in line with the evidence presented before the Court. In doing that, the Appellate Court must not substitute its own view about the evidence presented in the trial.
- 5 Section 142 (1) of the Criminal Procedure Act states that every judgment delivered by a Judge or a Magistrate must contain the point or points required to determine the decision and the reasons for such decision. The Supreme Court of Fiji in **Pal v Reginam [1974] FJLawRp 1; [1974] 20 FLR 1 (17 January 1974)** has given a descriptive and precise guideline in formulating the judgments in the Magistrates' Court, which I find of a great assistance. Grant CJ in **Pal v Reginam (supra)** had outlined that:

“As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts or rejects, and should proceed to make his findings of fact, apply the appropriate law to those facts, and give his reasoned decision; bearing in mind throughout the provisions of Section 154 (1) of the Criminal Procedure Code. If these considerations are kept in view, not only will it make the task

of an appellate court easier, it might well lead to fewer decisions being upset.”

- 6 In view of the guideline as expounded in **Pal v Reginam (supra)**, the Magistrate must state what witnesses he believes and what evidence he accepts or rejects. In doing that, he should give reasons for believing the witness and accepting or rejecting the evidence. To do that, the Learned Magistrate must adequately evaluate the evidence and the witnesses presented in the hearing. Determination of the reliability and credibility of the evidence is one of the main factors in this process. It would help the Court finally determine which evidence to accept or what part of the evidence to refuse.
- 7 In this matter, the Learned Magistrate had discussed the evidence presented before the Court in detail and given his reasons for his conclusion, thus making the work of this Court much easier.
- 8 It would be prudent to discuss the principle pertaining to the evaluation of evidence and determining the evidential trustworthiness of the evidence. Then I shall proceed to examine whether the Learned Magistrate had adequately evaluated the evidence to conclude that there were no inconsistencies in the evidence given by the Prosecution’s witness; thus her evidence is credible.
- 9 Kulatunga J in **State v Solomone Ourai (HC Criminal - HAC 14 of 2022)** has explained the test of determining the testimonial trustworthiness of the witness on the basis of credibility and reliability of the evidence, where His Lordship held that:

“In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy and reliability. The former relate to the witness’s sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relate to the actual accuracy of the witness’s testimony. The accuracy of a witness’s testimony involves

considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526); 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]"

- 10 Consequently, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. A discredited witness is obviously unreliable; however, a credible, honest witness may be unreliable. An honest witness may not have accurately observed the events that the witness is describing. Therefore, this Court must carefully examine the Judgment of the learned Magistrate to see whether he had correctly concluded the Prosecution witness is credible and reliable.
- 11 In order to determine the credibility and the reliability of the evidence given by a witness, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide *Matusavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomon Qurai* (HC Criminal - HAC 14 of 2022).
- 12 Having carefully pursued the evidence presented before the Magistrate's Court, I observed certain inconsistencies in the evidence given by the Prosecution's witness. She has given contradictory versions of events regarding whether the Appellant contacted the vagina of the victim with his mouth in respect of the second count. She explained in her evidence that when she went to the room to check on the children on the night of the 27th of July, 2017,

she saw the Appellant was under the blanket, kneeling. The victim and the other child were watching something on the mobile phone, and the victim's undergarment was removed. The witness said she saw the father's mouth close to the vagina. She then told the Court the mouth and the vagina were together. The Prosecutor then asked her when she pulled the blanket how close the father's mouth was to the daughter's vagina, to which she answered it was next to each other. (*vide; page 49 of the copy record*). During the cross-examination, the witness said the Appellant licked the vagina of the victim. (*vide page 61 of the copy record*). Accordingly, the witness has given three different versions; one is that the father's mouth was closed to the vagina, then the mouth and vagina were together, indicating they were touching, and the third is that he licked the victim's vagina.

13 According to the witness, she saw this incident when she removed the blanket that covered the Appellant. There is no evidence explaining where the witness was standing when she pulled the blanket. It is unclear whether she was standing in a position where she could accurately see the face of the Appellant. The Learned Magistrate had not considered these facts in order to determine whether the witness had accurately seen what was happening under the blanket when she removed it. The inconsistency nature of the explanation of whether the Appellant's mouth was actually touching the vagina of the victim or was close to the vagina of the victim creates a reasonable doubt about the accuracy of the observation made by the witness when she removed the blanket, thus creating further doubt about the reliability of her evidence.

14 Regarding the first count, the witness said she went to check the children in the bedroom as they were silent. Then she saw the Appellant was under the blanket and was kneeling. His mouth was on the victim's vagina. She then stated that the Appellant had given the phone to the children and then taken off their pants, and his mouth was on the vagina. (*vide: page 50 of the copy record*). If the Appellant was under the blanket and kneeling, was it possible for the witness to see the Appellant was removing the victim's pants? It appears that the witness's evidence that the Appellant gave the phone to the children and then removed the victim's undergarments was a speculation than an observation of events, thus creating a reasonable doubt about the reliability of her evidence. This creates a further doubt about the

probability and accuracy of the evidence given by the witness. The Learned Magistrate has not considered these issues in his Judgment.

- 15 The Prosecution's witness reported this incident to the Social Welfare office after the Appellant obtained a Domestic Violence Restraining Order against her. The Appellant and the witness were separated and engaged in a battle for the custody of their children when this allegation was reported. Moreover, the Prosecution's witness had complained to the Police against the Appellant, alleging that he had assaulted her. The witness explained in her evidence that she reported to the Police about the assault by the Appellant before these two alleged incidents occurred. (*vide; page 63 of the copy record*). The additional evidence adduced before the Learned Magistrate pursuant to Section 257 of the Criminal Procedure Act established that this alleged assault occurred on the 30th of July 2017. That was eight days after the second alleged incident and a few months after the first incident. Accordingly, the explanation given by the witness why she did not report these incidents to the Police when she reported the incident of the Appellant's assault is not accurate and creates doubt about the veracity of the evidence given by the witness.
- 16 The above-discussed inconsistent nature of the evidence given by the Prosecution's witness must be evaluated, taking into consideration the facts discussed in paragraph 15, to determine the evidential trustworthiness of her evidence.
- 17 In paragraph 38 of the Judgment, the Learned Magistrate stated that he is more inclined to accept the Prosecution's witness's evidence than the Appellant's evidence. The Learned Magistrate further stated that he had no reason to disbelieve the Complainant on the point that the Appellant had licked the victim's vagina. It appears that the Learned Magistrate had accepted the evidence of the Prosecution's witness on the basis of a comparison between the Prosecution's witness and the Appellant.
- 18 In this case, the Appellant and the Prosecution had presented different versions of the event. In such circumstances, the Court must consider the whole of the evidence adduced in the trial, including the evidence of the Appellant, to determine whether the Prosecution has

proven beyond reasonable doubt that the Appellant committed these crimes. The task of the Court is not to decide who is acceptable between the Complainant and the Appellant.

- 19 Brennan J in Liberato and Others v The Queen ((1985) 159 CLR 507 at 515) has succinctly discussed the appropriate approach in a case where there are conflicting versions of evidence given by the Prosecution witnesses and the Defence witnesses. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification.”

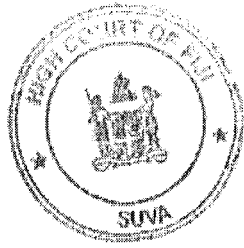
- 20 Basnayake JA in Goundar v State [2015] FJCA 1; AAU0077.2011 (2 January 2015), while accepting the principle expounded in Liberato (supra) and R v Li (supra) held that:

“The learned judge directed the Assessors to find the appellant guilty or not guilty by considering whose evidence they believe. By so doing the Assessors have been misdirected with regard to the burden of proof, and thereby caused

a miscarriage of justice. The Assessors may believe the evidence of Emma and disbelieve the evidence of the appellant. It does not mean that the case has been proved beyond a reasonable doubt. If, after considering the evidence of the whole case, a reasonable doubt is created in the minds of the Assessors with regard to the guilt of the appellant, the appellant is entitled to the benefit of that doubt and entitled to an acquittal. The courts have held in a series of cases that it is not correct to find the guilt of the accused by allowing the Assessors to believe either party”

- 21 Considering the reasons discussed above, it is my opinion that if all these issues discussed above, pertaining to the evidence given by the Prosecution’s witness, were taken into proper consideration, together with evidence given by the Appellant, the conclusion would have been favourable to the Appellant. The Learned Magistrate had erroneously failed to consider the above-discussed evidence with the applicable legal principles and concepts before he reached the conclusion that the evidence of the Prosecution witness was credible, reliable and consistent. Hence, I find the conviction entered against the Appellant cannot be supported, having regarded the totality of the evidence adduced in the hearing. Thus, I am satisfied that a substantial miscarriage of justice has occurred.
- 22 In that context, I find there is a reason for me to intervene in the Judgment of the Learned Magistrate pursuant to Section 256 (2) of the Criminal Procedure Act. I do not find this is an appropriate case to have a re-trial before another Magistrate. I accordingly make the following orders that:
- i) The Appeal is allowed,
 - ii) The conviction dated 8th of April 2022 is quashed and the sentence dated 6th of June 2022 is set aside,

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




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Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

21st December 2022

Solicitors

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.