

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION**

Criminal Case No: 217 - 2017

STATE

-v-

TIMOCI BROWN

For Prosecution : Inspector Lenaitasi S. [Police Prosecution]
Accused : In Person, Waived Right To Counsel
Date of Trial : 15th November 2019
Date of Judgment : 31st January 2020

JUDGMENT

BACKGROUND

1. The Defendant denies the following charge which was preferred by the prosecution :

Statement of Offence

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

Particulars of Offence

TIMOCI BROWN, on the 26th day of August, 2017 at Tavua in the Western Division unlawfully and indecently assaulted **LOATA LEITALA**.

2. Some information in this judgment will have to be redacted or generalized, if there is to be any publication.
3. The purpose of that exercise is to protect the identity of the alleged victim in light of the sexual nature of the allegation.
4. During the trial, the prosecution called 1 witness.

5. I found that there was a case to answer.
6. Having explained the options available to the defendant, he chose to give evidence himself. No adjournment was granted to him to call another witness as he had been given several months to prepare.
7. I summarise the evidence of the witnesses below.

PW1

8. Prosecution witness 1 [PW1] is Ms Loata Naitala. She is now 21 years old.
9. She would be around 19 years old at the material time which is in 2017.
10. On the 26th of August 2017 she was working at a restaurant.
11. She was a ' kitchen hand '.
12. She started work around 6 pm.
13. Around that time, the defendant together with 3 others entered the restaurant.
14. They were drunk.
15. They made some comments.
16. The defendant made a comment too that he wanted PW1 to go and eat with them.
17. A plate of food containing rice fell on the floor and it was dropped by one of them in the group.
18. One of them in the group touched PW1 around her chest area.
19. The defendant slapped PW1's buttocks with his hand. He also pulled her top.
20. When the defendant was pulling her top, he told PW1 in Itaukei ' kua ni vaka che che ' or ' don't be a show off '.
21. PW1 could smell liquor on the defendant. The defendant's eyes were bloodshot and there was bad odour emanating from the defendant. The defendant was also shouting.

22. PW1 did not like what the defendant did.
23. PW1 does not have any relationship with the defendant.
24. PW1 knows the defendant as the defendant comes almost every day to the restaurant or almost every pay week.
25. In cross examination, PW1 stated that she saw the group come in together into the restaurant.
26. The group sat together in one table.
27. They were telling PW1's boss not to act indifferently to them as they normally come to buy food from the restaurant.
28. The group was shouting too.
29. The group ordered juice and food. No liquor was ordered.
30. When the police arrived around 8 or 9 pm, the group ran outside.

DW1

31. Defence witness 1 [DW1] is the defendant himself Mr. Timoci Brown. He is now 35 years old.
32. He said that he entered the restaurant alone.
33. His friend was already in the restaurant drinking.
34. He then drank alcohol with his friend in the restaurant.
35. The defendant denies being drunk.
36. The defendant ordered for chicken curry and rice and he waited for his food.
37. When his food arrived, the defendant was not happy that it was cold so he only ate some of the chicken.

38. He called the owner or the female boss of the restaurant and asked the boss why he was served cold food as he had given ' good money ' for the food.
39. The defendant was upset and pushed the food off the table.
40. Police were called and the defendant was arrested.
41. The defendant thinks that he has paid for the damage.
42. In cross examination, the defendant accepts that he had some alcohol prior to going to the restaurant.
43. He saw PW1 at the restaurant but denies touching her or slapping her buttocks.
44. In re-examination, the defendant said that he respects women.

ANALYSIS

Burden and Standard of Proof

45. I remind myself that the defendant is presumed innocent until proven guilty.
46. The prosecution carries the burden of proving his guilt.
47. I also remind myself that I must be convinced beyond a reasonable doubt or I must be sure that the defendant committed the offence before I find him guilty.
48. The defendant has elected to give evidence. The evidence adduced by the defendant can be used for him and even against him. The evidence could be neutral as well or inconsequential.
49. If for example, I accept the defendant's denial that he did not slap PW1's buttocks and which appears to be the core of the prosecution's allegation, then the defendant is entitled to an acquittal.
50. Even if I don't believe the defendant, it does not necessarily mean that he is guilty.
51. The prosecution still carries the burden of proving his guilt and they must meet the requisite standard of proof.

Elements Of the Offence

52. The elements of the offence all of which the prosecution must prove beyond a reasonable doubt are:
- i. **The defendant;**
 - ii. **Unlawfully and indecently**
 - iii. **Assaulted the victim or PW1**
53. Unlawful is anything that is without legal justification.
54. An assault is an act which intentionally or recklessly causes someone else to apprehend immediate and unlawful personal violence [Fagan v Metropolitan Police Commissioner [1968] 3 All E.R 442] .
55. What is indecent is relative or depends on factors such as the act itself, the context in which it was done, the relationship of the parties [if any] amongst other factors and whether they would lead a right thinking person to conclude that it was indecent.
56. Under the Crimes Act 2009, generally, there is no defence to committing an act of indecency on a girl or child under the age of 16 years.
57. If the girl or child under 16 years is involved and gave consent and that the defendant had reasonable cause to believe and did in fact believe that the person was not a child, then the defendant is not guilty.
58. No person in a position of control or trust can rely on the above defence.
59. In this case, the above defence will not be relevant if the court accepts that PW1 was above 16 years old at the material time.
60. It is inevitable in many cases that there would be circumstantial evidence.
61. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but

that also the facts must negative any other reasonable conclusion that may exonerate the defendant. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [Varasiko Tuwai v. The State Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53.

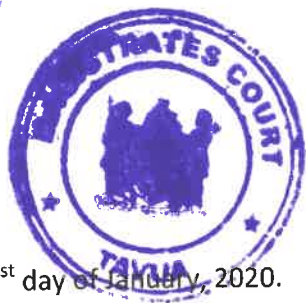
Findings

62. I will address the defendant's evidence first.
63. I did not find his evidence compelling or convincing.
64. For example, he claims to respect women [as he said so during re-examination].
65. If one were to accept his version of events, according to the defendant, he was served cold food and then after raising it with the female owner of the restaurant, the defendant threw the food on the floor.
66. This is not the character of a person who respects others, let alone women. It is the reaction of a petulant child. It may even support the claim that he was drunk at the time.
67. I did not find the defendant a credible witness. His evidence was self-serving and his demeanour was evasive.
68. I however accept that some food fell on the floor but not for the reason as suggested by the defendant.
69. I am not sure who dropped the food on the floor.
70. I found PW1 more forthright and believable. I also found her a reliable witness as well. Nothing suggests to me that I should reject her evidence either in part or in whole.
71. I accept that she would have been 19 years old around the material time, from my calculation.
72. She was working at the restaurant and would serve customers as part of her job although she was a kitchen hand.
73. It is not in contention that PW1 and the defendant have seen each other before that day.
74. I believe and accept PW1's evidence that the defendant had come into the restaurant with some others. It is very likely that those in the group were all males.

75. I find and accept that the defendant was drunk and the description given by PW1 that the defendant was shouting, had blood shot eyes and smelt of liquor is strong circumstantial evidence of that.
76. I am satisfied that the defendant was emboldened not only by the alcohol he already had but being in the company of his acquaintances.
77. I am satisfied that the defendant slapped PW1's buttocks with his hand. He also pulled her top.
78. I am satisfied that when the defendant was pulling PW1's top, he told PW1 in Itaukei ' kua ni vaka che che ' or ' don't be a show off '. This was also how PW1 could smell liquor on the defendant.
79. Slapping PW1's buttock , the context and circumstance in which it was made, the non-relationship of the parties except as a customer and server, that the defendant was drunk, his actions such as pulling her top *inter alia*, I find that a right thinking person would conclude that what the defendant did was indecent.
80. I also do not find any lawful excuse or justification for slapping PW1's buttocks.
81. PW1 did not consent to it. It was an assault.

CONCLUSION

82. I find all the elements of the allegation proven by the prosecution beyond a reasonable doubt. They have discharged their burden.
83. I find the defendant guilty of the charge of indecent assault contrary to section 212 of the **Crimes Act 2009** and I convict him accordingly.
84. I will take further evidence or information in relation to sentence after this from the parties before sentence is passed.



At Tavua this 31st day of January, 2020.

LISIATE T.V FOTOFILI
Resident Magistrate