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IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 31 of 1982

Between:

SURESH CHARAN s/o RAM CHARAN — Appellant

and

REGINAM — Respondent

Mrs. A. Hoffman for the Appellant
Mr. J. Sabhrawal for the Respondent

JUDGMENT

On the 5th February, 1982 in the Suva Magistrate's Court the appellant was convicted after trial on five counts and sentenced as follows:

Count 1

Criminal trespass - 1 month's imprisonment

Count 2

Assault occasioning actual bodily harm - 6 months' imprisonment

Count 3

Indecent Assault - 3 months' imprisonment

Count 4

Damaging property - 1 month's imprisonment

Count 5

Assault occasioning actual bodily harm - 3 months' imprisonment

The sentences were made concurrent i.e. 6 months in all

It was also ordered against appellant that a suspended sentence which was imposed on him on criminal file No. 3224/80 be brought into effect in full and to be consecutive i.e. making a total of 18 months in all.

This appeal is against conviction and sentence.

On the appeal against conviction the main contention underlying the several grounds of appeal filed and which it is not necessary to set out is that the trial Magistrate came to a wrong factual conclusion on the evidence adduced before him.

The findings of fact of the trial Magistrate were as follows:

(i) On morning of 6.381 at about 7 a.m. Satya Wati (P.W.1) was on her terrace and wearing a pink coloured nightie;

(ii) The appellant appeared near the gate of the terrace and started using abusive language at her and followed it up by jumping the gate, grabbed P.W.1 by her nightie tearing the sleeve in the process. He then pushed and pulled her until she fell whereupon he sat on her and punched her about the head and face;

(iii) Whilst sitting on her he pulled her nightie up and touched her private parts;

(iv) P.W.1 shouted and her sister, Uttra Devi (P.W.3) came with her husband. As P.W.3 tried to intervene appellant squeezed her breast;

(v) P.W.3's husband pulled appellant away from P.W.1 whereupon appellant ran off and as he did so punched P.W.3 in the face;

(vi) Appellant caught his foot in the gate, fell and then ran on. As he looked back after his fall blood was seen clearly on his head;

(vii) P.W.1 received injuries to her face and head. P.W.3 had a swelling on her forehead and a swelling on her left elbow.

There was ample evidence before the trial court to support the above findings of fact which were based on the trial court's assessment of the credibility of the witnesses.

It is a well established rule of practice that an appellate court will not interfere with the findings of fact based solely or mainly on an assessment of the credibility or reliability of witnesses. (Yuill v. Yuill /1945/ 1 All E.R. 183). The main reason for this rule of practice is that an appellate court does not have the same advantage as the trial court of seeing and hearing the witnesses and assessing their demeanour. In his speech in S.S. Hontestroom v. S.S. Sagaporack /1927/ A.C. 37 Lord Sumner explained the position in these words:

> "None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

In the present case the defence relied heavily upon the evidence of Dr. Tigarea (D.W.4) who had examined appellant and noted the injuries on him.

The trial Magistrate's assessment of D.W.4 which is far from flattering was as follows:

> "I am sorry to say that I was not impressed by Dr. Tigarea. I felt many of his answers were given in a careless manner and he made statements generally that he would not or could not substantiate."

As for appellant himself who gave evidence on oath the trial Magistrate said:

> "... I feel the accused is a skilful and very devious liar. I do not believe his account of the incidents of that morning at all."

In Watt or Thomas v. Thomas /1947/ A.C. 484 Lord Thankerton said:

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion."

Having regard to the evidence in the present case I can find no justification whatsoever for this Court to interfere with the findings of the trial Court.

In the result the appeal against conviction must be dismissed.

On the appeal against sentence it appears on the record that accused suffers from a heart condition for which he has been receiving extended treatment. The question is whether given that fact and the circumstances of the case a sentence of eighteen months' imprisonment was not too harsh. It is common ground that there was bad feeling between the two families which had greatly marred their relationship as neighbours. The

reason for their bad relationship is not altogether clear. Whatever it might be each side must bear a share of the blame for their mutual hostility. In the incident in question the appellant also suffered injuries which he received when escaping from the general fracas. It might be said he deserved it having himself started the fracas so early in the day. However, this was a factor that could be taken into account on the overall question of sentencing. This Court was also informed that the appellant and his family have moved out to another place so that the prospect of any further troubles between the parties is practically nil.

In these circumstances I am satisfied that upholding a sentence of eighteen months' imprisonment against appellant in this case would be entirely unjustified. The ends of justice would be met just as effectively by a lesser sentence.

Accordingly the appeal against sentence would be allowed to the extent that the sentences passed in respect of Counts 2, 3 and 5 would be varied to one month imprisonment each and that the suspended sentence imposed on criminal file No. 3224/80 shall not be activated. The total effective sentence against appellant for these offences will therefore be one month imprisonment.

Chief Justice

Suva,
20th May, 1983.