IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Decree 2009.

JEMESA GAUNAVINAKA

Appellant

CASE NO: HAA. 07 of 2017
[MC Suva, Crim. Case No. 118 of 2016]

Vs.

STATE

Respondent

Counsel	:	Ms. S. Vaniqi for Appellant Ms. M. Chowdhury for Respondent
Hearing on	:	30th May, 2017
Judgment on	:	13th June, 2017

JUDGMENT

1. The appellant was charged with one count of indecent assault contrary to section 212(1) of the Crimes Decree (now Crimes Act) before the magistrate court. After trial the Learned Magistrate found the appellant guilty as charged and convicted him accordingly on 14/12/16. The Learned Magistrate sentenced the appellant on 21/12/16 for 30 months imprisonment with a non-parole period of 20 months.

2. The appellant indicated his intention to appeal against the said judgment and the sentence by filing a document with the following grounds of appeal in person on 19/01/17;

a) *That the sentence imposed was very harsh and excessive due to the given facts that the appellant was a first offender.*

b) *That the magistrate erred in fact and law when he failed to take into account the appellant's defence in the case.*

c) *That the magistrate erred in fact and law when he failed to weigh all evidences in the case.*

Brief facts

3. The complainant was 12 years old at the time of the offence. The appellant is related to her as her uncle. When she was playing with her cousins, the appellant had told her to go to the washroom. When the complainant was inside the washroom the appellant had approached the window of that washroom from outside and had told the complainant to stand on the toilet pan. Then he had touched the complainant's breast by putting his hand through the window. The complainant had run away when the appellant had thereafter told her to wait for him to come inside. She had complained to her aunt, the second prosecution witness soon after the incident.

Appeal against the Conviction

4. The counsel for the appellant has made submissions against the conviction on the issue that '***the Learned Magistrate failed to take into account the appellant's case resulting in the court's failure to weigh all the evidence before the court***' stating that it is a consolidation of the two grounds of appeal against the conviction.

5. The appeal against the conviction is focused on the Learned Magistrate's decision to give no weight to certain allegations raised by the defence during the defence case on the basis that those allegations were not put to the prosecution witnesses. Appellant submits that in doing so the Learned Magistrate failed to take into account other reasonable doubts the defence had raised.

6. The appellant during his cross-examination had said that the complainant's mother told him that '*someone was forcing her to make this complaint*'. The third defence witness who appears to be the appellant's sister had stated during her

cross-examination that the complainant may have lodged the complaint because the mother would have given a beating that night.

7. The Learned Magistrate considered it unfair for the defence to raise these allegations during the defence case without first cross examining the prosecution witnesses regarding same and decided not to give any weight to the said allegations. He refers to the principle laid down in ***Browne v Dunn*** [(1893) 6 R 67] in this regard.

8. In the case of ***Browne v Dunn*** (1893) 6 R 67 Lord Halsbury stated thus;

> *". . . nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed to their credit or to the accuracy of the facts they have deposed to."*

9. The rule established in ***Browne v Dunn*** (supra) precludes the leading of evidence to discredit a witness or to challenge the accuracy of what a witness said in evidence through other witnesses without cross-examining the said witness in that regard.

10. It is pertinent to note that there may be instances where a prosecution witness is not cross examined at all or not cross examined on a particular point due to an oversight of the defence counsel. In such circumstances justice is not served by allowing the accused to suffer for his counsel's mistake.

11. All in all, the principle established in the case of ***Browne v Dunn*** cannot be applied strictly in criminal cases especially where no burden is shifted to the accused, to exclude the defence evidence on a matter not put to a prosecution witness. However, in my view, the fact that the defence did not cross examine the relevant prosecution witness on a matter that was introduced later by a defence

witness can be considered in deciding what weight should be given to that evidence introduced later keeping in mind the possibility that it may well be an oversight.

12. In the case at hand, the defence counsel has not cross examined the complainant or her mother when they gave evidence with regard to the aforementioned allegations that were made for the first time during the defence case. I also note that the said allegations have been made by the appellant and the third defence witness when they were cross-examined and not even during their examination in chief. Considering all the circumstances of this case and the nature of the aforementioned allegations, in my view, the Learned Magistrate's decision not to give any weight to the said allegations cannot be criticised.

13. It is pertinent to note that the appellant in fact does not take up the position that the Learned Magistrate erred by not giving any weight to the allegations in question. The appellant's complaint is that the Learned Magistrate failed to take into account any other reasonable doubt raised by the defence because of his focus on the aforementioned failure to put the said allegations to the prosecution witnesses.

14. The counsel for the appellant argues that the second defence witness who was also one of the kids playing with the complainant at the time material to the case had created a reasonable doubt on the evidence given by the complainant.

15. I note that the Learned Magistrate has provided a summary of the evidence given by the second defence witness at paragraph 11 of his judgment and the said summary is in line with the evidence highlighted by the counsel for the appellant in the written submission as the evidence of the second defence witness that contradicts the complainant's version of events. This indicates that the Learned Magistrate has correctly identified the facts the defence sought to present through the second defence witness and also he has given his mind to the said facts in his judgment.

16. Moreover, having gone through the evidence highlighted by the counsel for the

appellant in her written submission, I am not convinced that the said evidence creates a reasonable doubt on the complainant's evidence.

17. In the circumstances, I find no merit in the grounds of appeal against the conviction.

Appeal against the Sentence

18. The appellant submits that the sentence imposed by the Learned Magistrate is harsh and excessive given the fact that the appellant was a first offender.

19. The maximum punishment for the offence of indecent assault contrary to section 212(1) of the Crimes Act is an imprisonment term of 5 years. In sentencing the appellant, the Learned Magistrate had correctly identified the applicable tariff as 12 months to 4 years imprisonment referring to the case of ***Ratu Penioni Rokota v State*** [2002] FJHC 168; HAA0068J.2002S (23 August 2002).

20. The Learned Magistrate took 20 months as the starting point, added 15 months in view of the aggravating factors and deducted 5 months considering the mitigating factors to arrive at the imprisonment term of 30 months.

21. The appellant's only complaint against the sentence is that the sentence is harsh and excessive given that he is a first offender. The Learned Magistrate had taken into account the fact that the appellant is a first offender as a mitigating factor. I note that the Learned Magistrate had also taken into account the age and marital status of the appellant as mitigating factors. Such personal circumstances of an accused person cannot be regarded as mitigating factors to reduce the sentence. Therefore, the only mitigating factor relevant to the appellant was the fact that he was a first offender. I am of the view that, deduction of 5 months is an appropriate concession in view of the fact that the appellant was a first offender.

22. I note that the Learned Magistrate had said that *"[c]onsidering the objective seriousness and your culpability, I select 20 months as the starting point . . ."*. The impugned ruling does not indicate what the Learned Magistrate meant by the

term 'culpability' in the sentence quoted above. On the face of it, the above statement of the Learned Magistrate indicates that he had taken into account the same aggravating factors that were considered to increase the sentence by 15 months when he selected the starting point of 20 months which is 8 months more than the lower end of the applicable tariff.

23. In view of the relevant case authorities, the starting point of a sentence of imprisonment should be selected considering the objective seriousness of the offence. The aggravating or the mitigating factors of the actual offending should not be considered in selecting the starting point.

24. In my view, the objective seriousness of a particular offence is to be determined taking into account the impact of that offence on the society in general (E.g. seriousness of the offence of rape compared with the offence of indecent assault). The maximum sentence prescribed for each offence by the legislature is the key to discern the objective seriousness of a particular offence compared to other offences. I am of the view that the starting point of a particular offence should be construed as the minimum period of imprisonment a particular offence should attract without considering the nature and circumstances of the actual offending. Looking at the 'starting point' of a sentence in this perspective will assist the courts to maintain parity in the sentences imposed. It will also send a clear message to the public. As an example, the recognition that the starting point for rape of a child is 10 years imprisonment gives a clear message that a person who rapes a child will face a minimum imprisonment term of 10 years.

25. However, it is pertinent to note that at the end what matters is to arrive at a sentence which is just and proportionate to the nature and the circumstances of the offending.

26. Generally, the lower end of the tariff applicable to a particular offence signifies the minimum sentence that offence should attract. Therefore, in most cases it may be appropriate to select the lower end of the tariff as the starting point unless there is any special circumstance (other than the aggravating factors relevant to the case at

hand) that would warrant the selection of a higher starting point. The fact that a particular offence is a prevalent offence in the country may be a reason to select a higher starting point among others.

27. In this case, I am inclined to form the view that the starting point of 20 months imprisonment, given that the applicable tariff is 12 months to 48 months imprisonment and the objective seriousness of the offence of sexual assault is relatively excessive. As I have noted before the Learned Magistrate had apparently taken into account the same aggravating factors he subsequently relied on to increase the sentence, in order to select this high starting point.

28. Had the Learned Magistrate selected 12 months imprisonment as the starting point of the sentence, the final sentence would have been 22 months, which in my view would be more appropriate given the nature and the circumstances of the offending in this case.

29. In the case of ***Rokota*** (supra) the Learned Judge of the High Court had stated thus;

> *"A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type."*

30. In view of the aforementioned dictum, a non-custodial sentence is not appropriate in this case given that there is a breach of trust, the age difference and the fact that the victim is a child. However, given that the appellant is a first offender and the nature of the offence, that is, the fact that the assault is a non-penetrative and fleeting type, I am of the view that it is appropriate to suspend part of the sentence.

31. In the circumstances, I find that there is merit in the ground of appeal against the sentence. Therefore, the appeal against the sentence should be allowed.

32. For the reasons given above, I would substitute the sentence imposed by the Learned Magistrate with an imprisonment term of 22 months. I would not fix a

non-parole period for the reason that the court has discretion whether or not to fix a period during which the offender is not eligible to be released on parole in view of the provisions under section 18(3) of the Sentencing and Penalties Act, if the sentence is a term of imprisonment less than 2 years but not less than one year. I would order that the appellant should serve the first six months of his sentence forthwith and the balance period of 16 months is suspended for 2 years.

33. The appellant has not challenged the Learned Magistrate's decision not to regard the one week spent by the appellant in custody as a period of imprisonment already served. Given the provisions of section 24 of the Sentencing and Penalties Decree, it was within the Learned Magistrate's discretion to take that decision. For the same reasons given by the Learned Magistrate, I order that the 1 week spent in custody shall not be regarded as a period of imprisonment already served.

34. In the result;

a) The appeal against the conviction is dismissed;
b) The appeal against the sentence is allowed;
c) The sentence imposed by the Learned Magistrate on 21/12/2016 in Magistrate Court Suva Criminal Case No. 118 of 2016 is quashed; and
d) The said sentence is substituted with an imprisonment term of 22 months. The appellant should serve the first 6 months of that sentence forthwith and the balance period of 16 months is suspended for 2 years. Accordingly, the sentence should be suspended after the appellant serves a term of 6 months imprisonment from 21/12/2016.

HIGH COURT OF FIJI SUVA

Vinsent S. Perera
JUDGE

Solicitor for the Appellant : Vaniqi Lawyers, Suva.
Solicitor for the State : Office of the Director of Public Prosecutions, Suva.