



the prosecution case, learned RM ruled that the Respondent had a case to answer.

4. At this stage, counsel for Respondent raising an issue submitted that the charge was defective. Learned RM advised the counsel for Respondent to wait until the end of the trial and raise the issue in his written submission. Having so advised, learned RM then read the charges to the Respondent and explained his rights in defence. Respondent maintained his not guilty plea and adduced evidence under oath.
5. At the end of the case for Defence, the counsel for Respondent made his submission and contended that the charges did not specify that the Indecent Assault was against 'a woman or girl' and therefore defective. He relied on *Kaukimoce v State* (2009) FJHC 22; HAA0026.2008 (30 January 2009).
6. Learned RM agreed with the defence counsel's submission on defective charge and acquitted the Respondent.
7. The Appellant (State) filed this appeal challenging the said acquittal.

#### **ANALYSIS**

8. The Respondent was charged with Indecent Assault under the Penal Code, Cap 17. The charges as amended read as follows:

**First Count**  
*Statement of Offence*

**INDECENT ASSAULT:** Contrary to Section 154 (1) of the Penal Code Cap 17.

*Particulars of Offence*

JOSEVA BECI between the 1<sup>st</sup> day of October, 2008 to 31<sup>st</sup> day of October, 2008 at Lautoka in the Western Division, unlawfully and indecently assaulted ADI MELAIA SOVASOVA by inserting his finger into her vagina.

**Second Count**  
*Statement of Offence*

**INDECENT ASSAULT:** Contrary to Section 154 (1) of the Penal Code Cap 17.

### *Particulars of Offence*

**JOSEVA BECI** between the 1<sup>st</sup> day of October, 2008 to 31<sup>st</sup> day of October, 2008 at Lautoka in the Western Division, unlawfully and indecently assaulted **ADI MELAIA SOVASOVA** by inserting his finger into her vagina.

9. Under Section 154 (1) of the Penal Code Cap 17, the offence of Indecent Assault can be committed only against females [i.e. woman or girl]. Subsection (1) states:

*'Any person who unlawfully and indecently assaulted any woman or girl is guilty of a felony and is liable to imprisonment for five years with or without corporal punishment'*

10. In other words, if a male person is subjected to the same indecent assault it is not an offence under this provision. Mataitoga J in *Kaukimoce v State* (supra) found this provision to be discriminatory and needs to be reviewed to bring it into line with other common law jurisdiction. [*However, His Lordship had not directed his mind to the relevant provisions of the then Constitution which stated that it (the Constitution) was the supreme law of the land [s. 2] and any law inconsistent with it was invalid to the extent of the inconsistency; all judges were bound to uphold the Bill of Rights [s. 21 (1) (a)] which included the right to equality before the law and prohibition of unfair discrimination, directly or indirectly, on grounds, inter alia, of his or her gender [s. 38 (1) & (2) (a)].*]
11. The charges in the present case did not specify that the indecent assault was against a woman or girl, instead the charges alleged that the Respondent 'unlawfully and indecently assaulted Adi Melaia Sovasova by inserting his finger into her vagina'.
12. Mr Qalinauci for State submits that the charges in the present case were clear and sufficiently particularized the offence the Respondent was charged with. He further argues that Respondent was not prejudiced in his defence even if there was a defect in the charges.
13. RM had relied on *Kaukimoce v State* (supra) where Mataitoga J observed:

*"The relevant principles of law governing charges are that they must include all the essential elements of the offence. The offence of indecent assault in Fiji can only be committed by a person on a female. Therefore in the drafting charges under section 154(1) of the Penal Code Cap 17, the minimum that should be*

*included in the particulars of the charge are the essential elements of the offence. So long as the all essential elements are in the particulars of the offence, if the wordings are imprecise or lacking detail they will be saved by section 119 of the CPC.*

*.....On that basis it is obvious that a charge preferred under section 154(1) of the Penal Code Cap 17 must have the following: Statement of Offence would be Indecent Assault on Female and the Particulars of the Offence may be worded in any number of ways under the provision of section 119 and 122 of the Criminal Procedure Code, but whichever way it is worded, it must include as a minimum the above three essential elements of the offence.*

*The failure to include an essential element of the offence in the manner of the wording by the charge cannot be saved by the provisions of section 119 and 122 of the CPC. This is so because without the inclusion of all the essential elements in the charge, it would in law be a nullity. The defect is not one of lack of particularity which prejudices the person charged, rather the fact that on the wording of the charge as laid, there is no offence disclosed.*

*Section 119 and 122 CPC would save a charge which does not give sufficient or clear information with regard to certain elements of an offence charged. It would not save a charge that is lacking in an essential element, because without the inclusion of that essential element the charge discloses no offence."*

14. However, in *Khan v State* [2008] FJHC 79, the court came to a different conclusion. In *Khan* (supra), the appellant was charged with Indecent Assault on female under section 154(1) of the Penal Code Cap 17. Like in the present case, the defective charge claim was made on the basis that a charge pursuant to section 154 (1) of the Penal Code Cap 17 must allege that the act of indecent assault was committed on a woman or girl, instead of naming the female complainant in the particulars. In its conclusion the court held:

*"The charge in the present case in my view complied with the CPC. The charge commenced with a statement of offence, identified the offence of indecent assault and made reference to section 154 (1) of the Penal Code. The particulars of offence specified that the appellant 'on the 5th day of May 2007, at Kulukulu, Sigatoka in the Western Division had unlawfully and indecently assaulted Sainimere Kilitate'. There was absolutely no doubt that the complainant Sainimere Kilitate was a female and the appellant knew that his accuser was a female. For these reasons, I hold the charge was not defective."*

15. Having cited *Khan v State*, (supra) Mataitoga J in *Kaukimoce v State* (supra) drew a distinction and said:

*“In my view a charge that, as in this case, is without an essential element of the offence under section 154(1) of the Penal Code Cap 17, is null and void. On a strict interpretation of the charge as particularised in this case, the alleged offence is against a name rather than a woman or girl whose name is Dilitia Boginivalu. I note that it is highly possible that a male may carry a female name”.*

16. Recently in *Vakatalai v State* [2017] FJHC 228; HAA035.2016 (17 March 2017) Gounder J took a different view and held;

*“Even if the particulars lack an essential element of the offence, the charge may be defective but not bad. In such a case, the question is whether the accused was prejudiced by the defect (McVitie (1960) 44 Cr App R 201; Skipper v R [1979] FJCA 6; Tavurunaiqwa v State (2009) FJHC 198; HAA0221.2009 (10 September 2009)”.*

17. In *Vakatalai* (supra), the appellant was convicted of Robbery contrary to Section 310(1) (a) (i) of the Crimes Act 2009. It was contended in appeal that the charge was defective because the particulars did not allege that the appellant used force to steal, which is an essential ingredient of the offence. The court having accepted that the use of force to steal is an essential ingredient of the offence of Robbery rejected the contention that the charge was defective. The Court referring to similar provision in the Criminal Procedure Decree 2009 observed:

*“All criminal charges filed in court must comply with section 58 of the Criminal Procedure Decree 2009 (CPD). The charge must contain a statement of offence and such particulars that are necessary for giving reasonable information as to the nature of the offence charged. The statement of offence must be described in an ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence (section 61(2) of the CPD). Particulars of the offence must be set out in ordinary language, and the use of technical terms is not necessary (section 61(4) of the CPD).*

18. In *Deo v State* [2011] FJHC 372; HAA010.2011 (6 July 2011), took a similar approach and observed the following:

*“Considering decided cases in Fiji and other similar jurisdictions it is clear that the Accused should be given reasonable details of the charge against him. In*

*simple term the Accused should clearly identify and understand the charges leveled against him. There should not be any ambiguity in the details of charges against him. This Court is of the view if the Accused is given the name of the offence (if provided by the law) or the relevant section is sufficient. Providing more details will be helpful to the Accused but it is not mandatory". (p23).*

19. In Shekar & Shankar v State Criminal Appeal No. AAU0056 of 2004, the Court of Appeal made the following observations about the purpose of a charge:

*"The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the Section in the Act."*

20. Having analysed the authorities cited above, I come to the conclusion that the charges in the present case complied with the Criminal Procedure Code. Each charge commenced with a statement of offence, identified the offence of Indecent Assault and made reference to section 154 (1) of the Penal Code cap 17. The particulars of offence specified that the Respondent 'between 1<sup>st</sup> day of October, 2008 and 31<sup>st</sup> day of October, 2008, at Lautoka in the Western Division had unlawfully and indecently assaulted Adi Melaia Sovasova by inserting his finger into her vagina'.
21. There was absolutely no doubt that the complainant Adi Melaia Sovasova was a female as the charge specifically referred to the victim as 'her' and it specified female genitalia.
22. Moreover, it is clear from Court Record that Respondent in his evidence, referred to the victim as 'she'.

Q: *Do you know Adi Melaia?*

A: *Yes, of course.*

Q: *How do you know her?*

A: *Sir, Adi Melaia was brought up by her mother.*

Q: *Joseva in October of 2008 where were you residing at?*

A: *Sir, I was residing with Kasenata Navuna.*

Q: *And where was Adi Melaia residing at in October, 2008?*

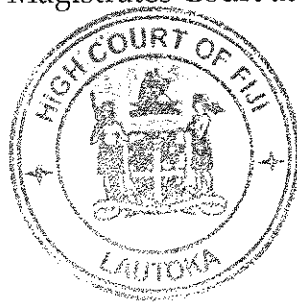
A: *She was residing with Jone Sovasova.*

(page 29 of the Court Record)

23. The Respondent knew of the victim and knew that his accuser was a female. In my view the omission on the part of the prosecution to include the words 'Indecent Assault of a Female' or 'woman or girl' does not make the charge bad in the sense of disclosing no offence known to the law, but merely defective or imperfect one in that it described a known offence with incomplete particulars, in other words, it described the offence with complete accuracy in the 'Statement of Offence', only the particulars which merely elaborate the 'Statement of Offence' were incomplete.
24. For these reasons, I hold that the charge was not bad and Respondent was not embarrassed or prejudiced by the alleged defect.

### CONCLUSION

25. There is no legal basis for the finding of the learned RM. Interests of justice demand that, while guaranteeing the right to a fair trial of the accused, serious sexual offences are tried upon their merits and not dismissed on mere technicalities. Therefore, I set aside the judgment dated 5<sup>th</sup> December, 2016 entered by the learned RM at Lautoka.
26. The learned RM had the opportunity to hear evidence of both sides hence I direct the learned RM at Lautoka to enter the judgment based on evidence.
27. I further direct the Deputy Registrar of the High Court to send the case record and this Judgment to the Magistrates Court at Lautoka forthwith. Respondent is warned to appear in the Magistrates Court at Lautoka on 6<sup>th</sup> November, 2017.



  
Aruna Aluthge  
Judge

At Lautoka  
30<sup>th</sup> October, 2017

Solicitors: **Office of the Director of Public Prosecution for Appellant**  
**Office of the Legal Aid Commission for Respondent**