IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA12 OF 2017

(Magistrates' Court Case No. 171 of 2013)

BETWEEN: **KHALID HASSAN**

APPELLANT

AND: **THE STATE**

RESPONDENT

Counsel: **Ms C Choy for the Appellant**
Ms A Vavadakua for the Respondent

Date of Hearing: **9 January 2018**

Date of Judgment: **19 January 2018**

JUDGMENT

[1] This is a timely appeal against conviction only.

[2] The appellant was charged with one count of indecently insulting and annoying a person contrary to section 213 (1) (a) of the Crimes Act 2009. The complainant was an adult female. The appellant was a police officer. The alleged incident arose at the Labasa Police Station in the early hours of 2 September 2012 when the complainant was detained at the station in an unrelated matter. The appellant was on duty at the station on the night in question.

[3] Following a trial, the appellant was convicted of the charge and sentenced to 6 months imprisonment suspended for 1 year. At trial, both the complainant and the appellant

gave evidence. The learned Magistrate believed and accepted the complainant's evidence and convicted the appellant.

[4] The grounds of appeal are:

(i) **THE** Learned Magistrate erred in law and in fact in his judgment dated 18th April, 2017 when he convicted the appellant on the nullified charge dated 26/03/2013 which was amended by the State.

(ii) **THE** Learned Magistrate erred in law in his judgment dated 18th April, 2017 when he misguided himself by misinterpreting the elements of the offence of section 213 (a) of the Crimes Decree No. 44 of 2009.

(iii) **THE** Learned Magistrate erred in law and fact when he considered irrelevant factors and minor inconsistencies.

Whether the appellant was convicted on a void charge?

[5] According to the initial charge, the incident between the appellant and the victim occurred in October 2012. The charge was later amended and the new charge alleged that the incident occurred in September 2012. The substance of the charge was not changed. When the learned trial Magistrate wrote his judgment, he adopted the date alleged in the initial charge that contained the alleged date of the offence as October 2012.

[6] However, at trial, it was not in dispute that the alleged incident took place in September 2012. The appellant's evidence was that he did have a conversation with the complainant, but he disputed the contents of that conversation. The reference to the wrong month in the judgment is a technical mistake. Section 182 (3) of the Criminal Procedure Act 2009 states that variance between the charge and the evidence produced in support of it with respect to the date or time at which the alleged offence was committed is not material and the charge need to be amended for such variance. In the presence case, there was no variance in respect of the dates in the amended charge and the evidence led at the trial. The amended charge was put to the appellant and he entered a not guilty plea. The trial proceeded on the amended charge and the appellant was convicted of that charge, which was valid. Ground one fails.

Whether the learned Magistrate misdirected on an essential element of the offence charged?

[7] Grounds two and three were argued together. The appellant was specifically charged with an offence contrary to section 213 (1) (a) of the Crimes Act 2009. Section 213 (1) states:

> A person commits a summary offence if he or she, intending to insult the modesty of any person-
>
> (a) utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by the other person; or
>
> (b) intrudes upon the privacy of another person by doing an act of a nature likely to offend his or her modesty.

[8] Section 213 (1) (a) requires proof that the accused, intending to insult the modesty of the complainant, uttered words, intending that such words be heard by the complainant. The test is whether the uttered words, when viewed objectively, had the effect of insulting the modesty of the complainant (*Chand v State* [1996] FJLawRp 28; [1996] 42 FLR 131 (12 August 1996)).

[9] In his judgment, the learned Magistrate in directing on the issue for determination said at paragraph 16:

> The crucial issue, in this case, is whether the accused intruded upon the privacy of the complainant as is alleged and insulted her modesty. The accused in his part denies that he invaded the privacy of the complainant. The Court is satisfied as to the other elements of the offence which are identity, date and time of the offence which are not denied by the accused person.

[10] Counsel for the appellant submits that the element of intrusion upon privacy is an element under subsection (b) of section 213 (1), and since the appellant was not charged under subsection (b) but under subsection (a), the learned Magistrate misdirected on the elements of the offence charged. I accept that intrusion upon

privacy of the complainant is not an element alleged in the charge. The prosecution explicitly alleged that the appellant uttered words with the intention to insult the modesty of the complainant.

[11] In assessing the evidence, the learned Magistrate did not refer to the physical element (uttered words) that the prosecution alleged in the charge to see if that element had been proved. Instead he referred to the physical element (intruded privacy) to find the appellant guilty. In her evidence the complainant said that she was embarrassed by the appellant when he questioned her about her private life, that is, whether she has been kissed before or has remained untouched in the 20 years. The appellant in his evidence admitted having a conversation with the complainant but denied asking her questions about her private life as alleged by her. He said he had a conversation with the complainant because she was of the same religious background as him and that he was also a religious counsellor in his community. His intention was not to insult but to counsel her.

[12] Both, the physical and the fault elements of the offence charged were disputed by the appellant. The learned Magistrate in his judgment did not make any specific finding that the appellant had uttered words with the intention to insult the modesty of the complainant. The judgment does not refer to the crucial evidence of the complainant which the prosecution alleged were uttered to her by the appellant with the intention to insult her modesty. The learned Magistrate convicted the appellant after erroneously identifying the issue was whether that appellant intruded upon the privacy of the complainant and insulted her modesty. The appellant was convicted not according to the law, resulting in a miscarriage of justice. The conviction cannot stand.

[13] The next question is whether there should be a retrial. A retrial is ordered in the interests of justice. The charge against the appellant is not trivial. A serious allegation was made by a young civilian female against the appellant who at the time was a senior police officer. The evidence is strong. A retrial is justified in the interests of justice.

Orders of the Court:

[14] Appeal allowed.

Conviction and sentence set aside.

Case is to be retried by another Magistrate.

Appellant to appear before the Magistrates' Court at Labasa on 29 January 2018, 9.30am for mention.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent