IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 10 of 2015

SHEIK MOHAMMED FIROZ

v

STATE

Counsels : Mr. A. Kohli for the Appellant
Mrs. A. Vavadakua for the State

Date of Hearing : 22 August 2018

Date of Judgment : 28 August 2018

JUDGMENT

1. On the 7th of July 2017, the appellant was convicted in the Magistrates Court at Labasa of one count of indecent assault contrary to section 213(1)(b) of the Crimes Act 2009 and one count of indecent assault contrary to section 212(1) of the Crimes Act 2009.

2. On the 28th March 2018 he was sentenced to 5 months imprisonment on the first count and 2 years 3 months and 3 weeks on the second count, both terms to be served concurrently.

Facts

3. In the month of November 2013, the victim Anna (not her real name) was a Class 8 student at a primary school in Labasa. She was a exemplary student, excelling academically and was the Head Prefect. The accused was a senior teacher at the same school.

4. In the first incident, Anna was counting money alone in the school canteen when the accused entered, closed the door and pushed her into a corner. He put his hand inside her dress and touched her breast. In the second incident, she was again in the school canteen when the accused came, closed the door, pulled up her dress and putting his hand inside her panty he touched her genetalia.

5. The Appellant appeals against his conviction on the following grounds:

1. That the learned Magistrate made an erroneous assumption in his finding of the truth of the complainant's evidence
2. That the learned Magistrate failed to take into account the motive behind the girl's complaints.
3. That the learned Magistrate prejudiced the appellant by delivering the judgment 14 months after the trial was concluded
4. That the learned Magistrate failed to address the inconsistencies and contradictions in the evidence of the complainant.
5. The learned Magistrate failed to comply with section 179 of the Criminal Procedure Act, that is failing to advise the Appellant his rights in defence.

First Ground

6. Very unfortunately, the Magistrate says this in his judgment at para 18.

"The evidence of AZ shows the trauma she goes through during and after the incidents. Her determination to testify and go through the ordeal of the trial shows the genuine (sic) *and truth of her story."*

7. This is a stock deduction of this Magistrate in sexual abuse cases and it is not correct.

8. This Court recently allowed two appeals when the same deduction, same Magistrate, was included in the judgment. (***Ravneet Kumar*** HAA15.2018Lbs and **Mohammed Janif** HAA 18.2018Lbs). It was said in ***Ravneet Kumar*** supra.

9. "Such an astonishing declaration suggests that the learned Magistrate has come to his finding of guilt not by factual analysis but through sympathy and bias."

10. However, as much as the offending declaration is far from being judicial, the judgment in this particular case can be distinguished. Unlike the other two cases referred to above, the learned Magistrate has in this case gone on to analyse in some detail the evidence of the victim, arriving at a reasoned decision.

11. This ground of appeal does not succeed.

Second Ground

12. In submissions made to the Court after trial Defence Counsel (who is the counsel in this appeal) stated that the accused was

the acting Head Teacher of the school at the time and was expecting to be promoted to Head Teacher. He was not liked by the Management Board and was offered a transfer out of the school. He refused. Because of this refusal to go it is alleged that he was framed by this fictitious claim of indecent assault, an allegation that would spoil his reputation and thus prevent his promotion.

13. The learned Magistrate dealt with this issue in para16 of the Judgment, when he said:

> *"It was the defence case that he was framed as the school committee wanted him to be transferred out from the school. There was no evidence to relate or link AZ to this move by the committee and I reject this Defence."*

14. As the State submits, the child had no control over the promotions of teachers, nor was this matter put to her in cross-examination.

15. There being no link between the child complainant and the school committee, this ground is purely speculative and totally without merit.

16. This ground fails.

Third Ground:

17. The accused, by his Counsel, complains that the judgment having been delivered some 14 months after the evidence was heard, must result in prejudice to the accused because he submits, "that it would indeed be very difficult for the learned

Magistrate to recall the demeanour of the witnesses some 14 months after the evidence was recorded."

18. Although there does seem to be a long lapse of time for the delivery of the judgment, part of the delay was occasioned by counsel for the accused himself. He twice asked for time to file his closing submissions and these were not filed until 23rd August 2016.

19. Moreover, as counsel for the State submits, the Magistrate has the benefit of the notes of evidence and an audio record of proceedings to assist him/her.

20. The accused makes no complaint of the record being inaccurate or incomplete nor provides any other reason for the claim that the Magistrates memory of proceedings in impaired.

21. While this Court would agree that it is best practice for a Magistrate to deliver judgment as soon as possible after trial and submissions, there is nothing in this case to suggest that delay has prejudiced the defence.

22. This ground is not made out.

Fourth Ground

23. This ground relating to inconsistencies and contradictions in the evidence and out of court statements made by the complainant was the ground strongly relied on by Counsel at the hearing of the appeal.

24. Counsel relies on the England and Wales Court of Appeal decision of ***Cooper*** (1969) 53 Cr. App. R. In his submission that

if a Court has a lurking doubt about a conviction and feels that under all the circumstances it feels that the conviction is unsafe or unsatisfactory then it can quash the conviction.

25. Unfortunately for the accused the situation in England and Wales is different. The powers referred to in the preceding paragraph were given to appellate courts by the Criminal Appeal Acts of 1966 and 1968, powers which do not apply in Fiji. We still subscribe to the pre Act situation in England which Widgery LJ describes in ***Cooper*** *(supra) as:*

> *"It has been said over and over again throughout the years that this Court must recognize the advantage which a (tribunal) has in seeing and hearing the witnesses, and if all the material was before the (tribunal) and the summing up was impeccable, this court should not lightly interfere."*

And later...

> *"it was almost unheard of for this Court to interfere in such a case"*

26. The perceived inconsistencies in the complainants evidence relied on by Counsel are minor and to be expected from a child in Class 8 remembering and telling of an incident some three years earlier.

27. Most of Counsel's written submissions on this point are speculative and conjectural and they fail to persuade this Court that the conviction is unsafe.

28. Defence counsel, being trial counsel below, was aware of what he perceives to be contradictions or inconsistencies and he would have made the Court aware of them. The learned

Magistrate rehearses and analyses the child's evidence in detail. He comes to a reasoned decision that she is telling the truth and he finds the case proved beyond reasonable doubt. This Court sees no reason to interfere.

29. This ground fails.

Fifth Ground

30. Counsel claims that the accused's rights in defence were not put to him as mandated by section 179(1) of the Criminal Procedure Act 2009.

31. This appears to be true, however it is not fatal to the conviction.

32. This matter has been dealt with previously by the Court of Appeal in **Ovini Tuitoga** [2007] AAU63/06 (25 June 2007) (Ward, P. Ellis J.A. and Penlington JA) in discussing the same section (s.211) in the then Criminal Procedure Code.

33. The Court held:

"We are of the opinion that a failure to comply with s.211 does not of itself necessarily invalidate the trial. That would be so, however if the trial was otherwise unsatisfactory and that would result in the quashing of the conviction"

and later....." *While there was an error of law on the part of the Magistrate there has not been a substantial miscarriage of justice"*

34. There being no other unsatisfactory manner relating to these proceedings these dicta must prevail.

35. This ground has no merit.

Conclusion

36. There being no merit to any of the grounds of appeal against conviction, relied on by the accused; the appeal is dismissed.

P. K. Madigan

Judge

At Labasa

28 August 2018