

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 39 of 2020

BETWEEN : **URAIA NABOGI**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. J. B. Niudamu and Mr. P. Sharma for the
Appellant.
: Ms. L. Latu for the Respondent.

Date of Hearing : 21 August, 2020

Date of Judgment : 21 August, 2020

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "KM")

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Rakiraki for one count of sexual assault contrary to section 210 (1) (a) of Crimes Act 2009.

2. It was alleged that the appellant between 20th August, 2018 to 26th August, 2018 at Malake Island, Rakiraki unlawfully and indecently assaulted “KM” by fondling her breast and her vagina.
3. The appellant elected Magistrate’s Court trial and pleaded not guilty to the charge. The prosecution called one prosecution witness, whereas the accused exercised his right to remain silent and called one witness.
4. On 13th February, 2020 the learned Magistrate found the appellant guilty and convicted him for one count of sexual assault as charged.
5. On 27th May, 2020 after hearing mitigation the learned Magistrate sentenced the appellant to 3 years imprisonment without a non-parole period.
6. The brief summary of facts is as follows:

Sometimes in August, 2018 the complainant who was 12 years of age was attending a birthday party near the house of the appellant. During the night the appellant who was known to the complainant called her from his house and took her into a bedroom. The appellant made the complainant sit on the bed, he removed her panty and tried to insert his penis inside her vagina the complainant felt pain so she kept moving back. The matter was reported to the police the appellant was arrested, interviewed and charged.

7. The appellant being aggrieved by the conviction filed the following amended grounds of appeal as follows:

APPEAL AGAINST CONVICTION

- i) *The learned Resident Magistrate erred in law and in fact by convicting the appellant based on a defective charge which amounts to miscarriage of justice.*
- ii) *The learned Resident Magistrate erred in law for not requiring corroboration of the complainant's evidence who was still a child of tender age.*
- iii) *The Learned Magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt.*

8. During the hearing today the learned counsel for the appellant abandoned grounds one and two but argued ground three.

GROUND THREE

- 9. The learned Magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt.
- 10. The appellant's counsel argues that the learned Magistrate had erred when he convicted the appellant after the prosecution had failed to prove the charge of sexual assault beyond reasonable doubt. The evidence did not support the elements of the charge of sexual assault.
- 11. The elements of the offence of sexual assault under section 210 (1) (a) of the Crimes Act is as follows which the prosecution must prove beyond reasonable doubt:

- a) The accused;
 - b) Unlawfully and indecently;
 - c) Assaulted the complainant “KM” by fondling her breast and her vagina.
12. From the evidence of the complainant the appellant had removed the panty of the complainant and he was trying to insert his penis inside her vagina. This points more towards an attempt to commit rape whereas the charge of sexual assault alleged the fondling of the complainant’s breast and vagina.
13. On the basis of the evidence the charge of sexual assault had not been proved beyond reasonable doubt by the prosecution there was absolutely no evidence of any fondling of the complainant’s breast and vagina. The learned Magistrate was aware of this situation as per paragraphs 55 and 56 of his judgment, however, he disregarded this crucial aspect by stating that there was no issue raised by the defence counsel during the course of the proceedings about the charge not being made out. This is where the learned Magistrate erred.
14. It is trite law that all the elements of an offence must be satisfied beyond reasonable doubt before an accused can be found guilty in the instant case there was no evidence of any fondling of the complainant’s breast and her vagina.
15. The proceedings in the Magistrate’s Court in my view should not have proceeded beyond no case to answer application since the elements of the offence of sexual assault had not been satisfied by the prosecution. Ms. Latu, the state counsel in her usual fairness concedes the appeal.

16. The error by the learned Magistrate is fatal and therefore the conviction cannot be allowed to stand. In the interest of justice and in accordance with section 256 (2) of the Criminal Procedure Act the appeal is allowed and the conviction quashed and set aside.

ORDERS

1. The appeal against conviction is allowed.
2. The appellant is acquitted of the charge forthwith.
3. The sentence is also set aside.
4. The appellant is to be immediately released by the Corrections Department.
5. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

21 August, 2020

Solicitors

Messrs Niudamu Lawyers for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.