

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

CRIMINAL APPEAL NO. HAA 016 OF 2020

BETWEEN : **SANJEEV KUMAR**

AND : **STATE**

Counsel : Mr A Sen for the Appellant
Ms J Fatiaki for the State

Date of Hearing : **29 October 2020**

Date of Judgement : **18 November 2020**

JUDGMENT

[1] Following a trial in the Magistrates' Court at Labasa, the appellant was convicted of indecent assault contrary to section 212 of the Crimes Act and sentenced to 2 years' imprisonment. This is an appeal against conviction and sentence on the following grounds:

1. THAT the Learned Magistrate erred in law in failing to properly evaluate the evidence in the case including that of the defence.
2. THAT the Learned Magistrate erred in law and in fact in taking into consideration (?) (sic) the defence case before convicting the appellant.
3. THAT the trial was not concluded fairly and the Magistrate failed to analyze the evidence and give reasons for accepting or rejecting the evidence of the witness (?) (sic).

4. THAT the learned Magistrate imposed the sentence which was harsh, excessive and unconscionable and further took into consideration irrelevant matters and failed to take into consideration relevant matters.

5. THAT the learned Magistrate erred in law in failing to correctly apply the principles of sentencing before setting a minimum term to be served before pardon may be considered (?) (sic).

[2] At trial, the appellant was represented by counsel of his choice. He was convicted solely upon the victim's testimony. Both the appellant and the victim were employees of a supermarket in Labasa at the relevant time. She was an adult married woman. He was her immediate supervisor. The alleged incident occurred at their workplace. The appellant instructed the victim to go to the bulk store of the supermarket to carry out a stock take. He followed her to the bulk store. He kissed her lips and touched her breasts and thighs over her clothes. The incident occurred on 13 August 2014. Another employee of the supermarket placed the victim and the appellant at the bulk store but he did not see the incident. The victim did not report the incident to anyone at her workplace. The following day she reported the incident to the police.

[3] The appellant gave evidence in his defence. He denied the allegation and said that the victim had fabricated the allegation because he had confronted her regarding her work performance.

[4] All three grounds of appeal against conviction can be conveniently dealt together. The appellant's contention is that the learned trial magistrate did not properly evaluate all the evidence including that of the appellant before convicting him. Counsel for the appellant submits that the learned magistrate was obliged to give reasons for believing the victim and for not believing the appellant before convicting him instead of a bare statement to the effect of 'I believe the prosecution witness...I don't believe the defence evidence', citing *Bir Chand v The State* [1996] FJHC 3; HAM0001d.1996b (7 February 1996).

[5] The learned magistrate's reasons are clearly set out in the judgment. After directing himself to the elements of the charge and the burden and standard of proof, he carried out

a detailed analysis of the evidence before arriving at his findings. The only incriminating evidence against the appellant was that of the complainant. She was consistent with her evidence that the appellant had inappropriately touched her. She gave an explanation for not immediately reporting the incident to anyone at her workplace. She said she was in a state of shock. The appellant was her supervisor. She felt safe informing the incident to her husband when she returned home that day. She filed a police complaint the following morning.

[6] The appellant's defence was of a denial. He offered a motive for the victim to fabricate the allegation against him, but the learned magistrate found that the complainant was consistent with her report of indecent assault and believed her account over the appellant's denial. After analyzing all the evidence, the learned magistrate came to following findings:

17. In assessing the evidence and the demeanor of the accused and the victim, I find the victim to be more credible and I accept her evidence. This is a sexual offence that requires no corroboration. The evidence of the victim was not discredited. I am convinced by the evidence of the victim that the accused indecently assaulted her.

18. I therefore, find that the Prosecutor has discharge the burden of prove in this case.

[7] On the evidence led at the trial, it was open for the learned magistrate to believe the account of the victim and reject the denial of the appellant before convicting him. There is no error in the judgment convicting the appellant of indecent assault.

[8] The main complaint against sentence is that the learned magistrate failed to consider a non-custodial sentence and that a custodial sentence should only be a last resort when a lesser or alternative sentence is not appropriate in the circumstances to meet the objectives of sentencing.

[9] The learned magistrate identified denunciation and deterrence as the primary purposes of sentence. The offence occurred at the victim's workplace. She was a female employee.

The appellant was a male colleague and was also in a position of authority and trust. The only mitigating factor was that the appellant was a person with previous good character. For that the learned magistrate gave a discount of 6 months. Otherwise, the appellant expressed very little remorse to deserve further discount.

[10] Workplace should be safe and secure environment for female employees. When women are sexually assaulted by their male colleagues at workplace, the courts duty is to denounce such acts and impose deterrent sentences. A custodial sentence was appropriate in all circumstances of this case.

[11] The maximum penalty for indecent assault is five years imprisonment. The tariff is 1-4 years imprisonment (*Rokota v The State* [2002] FJHC 168; HAA0068J.2002S (23 August 2002)). The sentence of 2 years imprisonment, therefore, is within the permissible range for indecent assault.

[12] Neither there is an apparent error in the reasons for sentence nor can an error be inferred from the length of sentence (*Bae v State* [1999] FJCA 21; AAU0015u.98s (26 February 1999)).

[13] For these reasons, the appeal against conviction and sentence is dismissed.



A handwritten signature in black ink, appearing to read "D. Goundar", written over a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Maqbool and Company for the Appellant

Office of the Director of Public Prosecutions for the State