IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 65 of 2020

TIMOCI MATAKIVIWA

V

THE STATE

Counsel	:	Mr. S. N Luvena for the Appellant.
	:	Mr. T. Tuenuku for the Respondent.
Date of Hearing	:	22 January, 2021
Date of Judgment	:	02 February, 2021

JUDGMENT

(The name of the victim is suppressed she will be referred to as "AB")

BACKGROUND INFORMATION

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

2. It was alleged that the appellant on the 5th day of January, 2020 at Namataveikai village, Ra unlawfully and indecently assaulted "AB" by fondling with her vagina.

3. The appellant elected Magistrate's Court trial and pleaded not guilty to the charge. The prosecution called two witnesses, whereas the appellant exercised his right to remain silent and called one witness.

4. On 27th August, 2020 the learned Magistrate found the appellant guilty and convicted him for one count of sexual assault as charged.

5. On 5th November, 2020 after hearing mitigation the learned Magistrate sentenced the appellant to 3 years imprisonment without fixing a non-parole period.

6. The brief facts were as follows:

a) The victim, a 6 year old child on 5th January, 2020 was at home with her parents, grandmother and uncles. The victim and the appellant are known to each other, the appellant is the church leader for the family who had come to the house of the victim to conduct prayers with the family.

b) The victim was outside the house, the appellant called her into the house, when the victim went in the appellant carried the victim into the bedroom.

c) In the bedroom the appellant had put the victim on the bed where an elderly family member of the victim's family was bedridden and blind. Thereafter, the appellant removed the victim's panty and touched her buttock. After a while the victim's grandmother went into the bedroom looking for the

victim, she saw the victim on the bed holding her panty and the appellant was standing not far away from the victim.

d) The appellant was confronted and the matter was reported to the police who was arrested and charged.

7. The appellant being aggrieved by the conviction filed a timely appeal against conviction as follows:

APPEAL AGAINST CONVICTION

GROUND ONE

The learned trial Magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt.

8. The learned counsel for the appellant argued that the particulars of the charge mentioned the act of fondling of the victim's vagina. However, the learned Magistrate had as per the evidence of the victim accepted that the appellant had touched the victim's buttock after removing her panty.

9. In view of the above counsel submits that the charge of sexual assault had not been proved beyond reasonable on the evidence presented.

10. At paragraph 162 of the judgment the learned Magistrate had stated:

"For the above reasons I have outlined above, I am sure that defendant committed the offence of sexual assault on the 6 year old female victim by removing her panty and touching her bum or buttock which is contrary to section 210(1)(a) of the Crimes Act No. 44 of 2009."

11. On the totality of the evidence, the learned Magistrate had come to the conclusion that the appellant had removed the victim's panty and

touched her buttock. However, the evidence was at variance with the particulars of the charge, for the appellant to be found guilty of the charge of sexual assault all the elements of the offence must be satisfied beyond reasonable doubt.

12. In this case, the learned Magistrate was satisfied beyond reasonable doubt that the appellant had touched the victim's buttock after removing her panty.

13. The elements of the offence of sexual assault (as charged) under section 210 (1) (a) of the Crimes Act which the prosecution must prove beyond reasonable doubt is as follows:

a) The accused;
b) Unlawfully and indecently;
c) Assaulted the victim by fondling her vagina.

14. There was no evidence that the appellant had fondled the victim's vagina hence in my view the offence of sexual assault was not proven beyond reasonable doubt. Furthermore, the act of touching the victim's buttock by the appellant was not sexual in nature although the appellant had removed the victim's panty.

15. In the circumstances, the appellant's conviction in respect of the charge of sexual assault cannot be allowed to stand. The conviction of the appellant is quashed and set aside. At paragraph 159 of the Judgment the learned Magistrate had stated as follows:

"The defendant who was there to hold prayers, ... taking her to the bedroom, taking off her panty and touching her bum or buttock, I am sure that any right thinking person would consider it indecent."

16. Unfortunately the learned Magistrate did not direct his mind to the lesser offence of indecent assault which was available for consideration on the evidence. In the interest of justice and in accordance with section 162 (2) of the Criminal Procedure Act, this court after considering the totality of the evidence finds the appellant guilty of the lesser offence of indecent assault and convicts him accordingly.

TARIFF FOR INDECENT ASSAULT

17. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment.

18. In accordance with section 256 (2) of the Criminal Procedure Act the appellant is sentenced afresh for the lesser offence of indecent assault. Bearing in mind the objective seriousness of the offence committed, I take one year (lower end of the scale) as the starting point of the sentence. For the aggravating factors namely planning, being bold and undeterred and gross breach of trust on an unsuspecting and vulnerable child of 6 years I increase the sentence by 1 year and 10 months. The interim sentence is 2 years and 10 months imprisonment. For the mitigation (as identified by the learned Magistrate) I reduce the interim sentence by 1 year. The appellant was not in remand so no further reduction will be considered.

19. The final sentence for one count of indecent assault is one year and ten months imprisonment. Considering section 26 (2) (a) of the Sentencing and Penalties Act, this court has a discretion to suspend the imprisonment term. In this regard, I have directed my mind to the following relevant special circumstances or special reasons which needs to be weighed in choosing an immediate imprisonment sentence or a

suspended sentence. The appellant was a trusted person, he was bold and undeterred in what he did. He also took advantage of the victim's vulnerability.

20. As a mature adult the appellant ought to have restrained himself from what he was doing, he did not give a second thought despite knowing that all the family members were in the house yet he indecently assaulted the victim (who was 6 years of age) by taking her into the bedroom where an elderly relative of the victim was bedridden and blind. The above sequence of events show a high degree of planning by the appellant which weighs in favour of a custodial sentence and not a suspended term although the appellant is elderly and a person of good character who had committed an isolated offence.

21. The purpose of the custodial sentence is to act as a deterrent factor so that offenders and other persons committing offences of the same or similar nature are deterred from committing such offences. In view of the above and in absence of any exceptional reasons to suspend the imprisonment term, the appellant will serve an immediate custodial sentence.

ORDERS

1. The appeal against conviction is allowed.

2. The conviction for the offence of sexual assault is quashed and set aside.

3. The appellant is convicted of the lesser offence of indecent assault.

4. The appellant is sentenced to 1 year and 10 months imprisonment with effect from 5th November, 2020.

5. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
02 February, 2021

Solicitors

Messrs Howell and Associates, Tavua for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.