

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 53 of 2020**

**BETWEEN** : **THE STATE**  
**APPELLANT**

**A N D** : **MELI NAMASARA**  
**RESPONDENT**

**Counsel** : Mr. S. Seruvatu for the Appellant.  
: Ms. E. Radrole for the Respondent.

**Date of Hearing** : 22 June, 2022

**Date of Judgment** : 11 July, 2022

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "A.T")*

**BACKGROUND INFORMATION**

1. The respondent was charged in the Magistrate's Court at Sigatoka as follows:

***Statement of Offence***

**INDECENT ASSAULT**: Contrary to section 212 (1) of the Crimes Decree 2009.

## ***Particulars of Offence***

**MELI NAMASARA** on the 22<sup>nd</sup> day of June, 2016 at Navosa in the Western Division, unlawfully and indecently assaulted “A.T” by touching her undergarments.

2. During the hearing at the Magistrate’s Court the prosecution called one witness. After the prosecution closed its case, the learned Magistrate held that the respondent had a case to answer. The respondent was given his options, he opted to give evidence and did not call any witness.
3. On 1<sup>st</sup> June, 2020 the learned Magistrate in his judgment acquitted the respondent.
4. The state being dissatisfied with the decision of the Magistrate’s Court filed a notice of motion and supporting affidavit seeking leave to appeal out of time against the acquittal.
5. On 13<sup>th</sup> December, 2021 this court granted state leave to appeal out of time.
6. On 16<sup>th</sup> February, 2022 the state filed and served the Petition of Appeal. After numerous adjournments due to the fact that counsels were not able to file their submissions this appeal was finally heard on 22<sup>nd</sup> June, 2022.
7. Both counsel filed written submissions and also made oral submissions for which this court is grateful, unfortunately both counsel failed to provide additional submissions and case authority in respect of the first ground of appeal during the time ordered. Bearing in mind the date of the appeal this court cannot wait for counsel to get their acts together but to proceed to judgment.

8. The brief summary of facts is as follows:

The complainant is the granddaughter of the respondent. On 22<sup>nd</sup> June, 2016 at about 8:30 am the 5 year old complainant met the respondent. She had some oranges with her which she carried in her singlet. The respondent asked for some oranges, as he stretched his hand to take the oranges he touched the front undergarments of the complainant.

9. The matter was reported to police the respondent was arrested, caution interviewed and charged. The respondent in his caution interview admitted committing the offence.

10. At trial the prosecution called the interviewing officer who tendered the caution interview of the respondent and the defence called the accused. On 1<sup>st</sup> June, 2020 the learned Magistrate in his Judgment found the accused not guilty and acquitted him of the charge.

11. The state aggrieved by the decision of the learned Magistrate appeals against the acquittal of the respondent.

### **GROUND OF APPEAL**

#### **Ground One**

*The learned Magistrate erred in law and in fact when exercising his discretion and refusing the application for an adjournment of the trial sought by the Appellant.*

## Ground Two

*The learned Magistrate erred in law when he held that the complainant had to be present to confirm how she felt when the Respondent touched her pants to determine the act of indecency.*

## GROUND ONE

*The learned Magistrate erred in law and in fact when exercising his discretion and refusing the application for an adjournment of the trial sought by the Appellant.*

12. The State Counsel in his submissions stated that the matter was for hearing on 23<sup>rd</sup> March, 2020 the prosecution had asked for an adjournment at the beginning of the trial since all the three witnesses had been summoned but only one was present that is the interviewing officer. The prosecutor had asked for a bench warrant to be issued for the absent witnesses.
13. The defence objected to an adjournment, the learned Magistrate refused adjournment and the matter proceeded with the prosecution calling one witness only. This witness was the interviewing officer who tendered the caution interview of the victim.
14. A court has discretion whether to grant an adjournment or not, the principles regarding such an application are settled. The court must weigh the interests of both parties when determining whether to grant or not to grant such an application. The chronology of events leading to the trial date and the attitude of the parties including the length of the delay from the date of the allegation and any prejudice caused to either of the parties

ought to be considered by the court. The most important factor to be noted is that the discretion must be exercised judicially. In *State vs. Agape Fishing Enterprises (2008) FJHC 19; HAA 011 of 2008 (15 February, 2008)*, Goundar J. at paragraph 6 stated:

*“The granting of an adjournment is a matter of discretion. The discretion must be exercised judicially so that the rights of the parties are not defeated and that no injustice are done to one or other of the parties (see, McCahill v State, Criminal Appeal No. 43 of 1980; Chand v State, Criminal Appeal No. AAU0056 of 1999S).*

15. In this case the prosecutor made an application for an adjournment before the trial began on the basis that two witnesses were not present and that this was the first time they were asking for an adjournment. After hearing the objection raised the learned Magistrate stated as follows at page 11 of the copy record:

*“The court rules that the matter shall proceed with the available witness today.”*

16. After the only available witness gave evidence the prosecutor correctly asked that a bench warrant be issued for the absent witnesses. The defence counsel again objected. The learned Magistrate in his ruling stated at page 12:

*“Adjournment application is denied.”*

17. The court then proceeded to rule that there was a case to answer and the defence then opened its case. It is noted that the allegation arose in 2016, however, it is unclear on what basis the application for an adjournment was refused, unfortunately there is no reason given by the learned Magistrate which led him to refuse the application for an adjournment.

18. I agree that the matter was an old one, however, there is nothing that would show how the discretion to refuse adjournment was exercised by the learned Magistrate. A judgment whether by a judge or a Magistrate must be in writing in accordance with section 142 of the Criminal Procedure Act and must contain reasons see *State vs. John Miller and others [2011] CAV 8 of 2009 (15 April, 2011 at [28]*. The learned Magistrate had wrongly exercised his discretion to refuse an adjournment without giving any reasons.
19. This ground of appeal is allowed.

## GROUND TWO

*The learned Magistrate erred in law when he held that the complainant had to be present to confirm how she felt when the Respondent touched her pants to determine the act of indecency.*

20. The state counsel submitted that it was erroneous of the learned Magistrate to mention that it was important for the complainant to come to court and explain how she felt when she was touched in the front portion of her pants in order to determine the act of indecency.
21. The respondent was charged with one count of indecent assault, the elements which the prosecution must prove beyond reasonable doubt are:
- (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant.

22. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence. This element was not in dispute at trial.
23. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
24. Assault is the unlawful use of force on the complainant by the act of touching her front undergarments.
25. The prosecution had called the interviewing officer who tendered the caution interview of the respondent. In answer to question 27 the respondent admitted that he had touched the front part of the complainant’s undergarments. On the strength of this admission the court ruled that the accused had a case to answer.
26. For defence the accused gave evidence and he admitted committing the offence. At paragraphs 24 and 25 of the judgment the learned Magistrate stated the following:

*“24. In terms of the second element the complainant was not present to explain how she had felt when the accused had touched her pants.*

*25. As such on the second element, the explanation by the victim of how she felt when she was touched in the front portion of her pants was crucial in determining the act of indecency.”*
27. The learned Magistrate fell in error when he stated that the second element of the offence of indecent assault had not been satisfied because the complainant had not come to court to explain how she felt when she was

touched by the accused in the front portion of her pants. The test in the second element is whether any right minded person would consider the act of the respondent to be indecent.

28. In any event, the evidence before the court was the admission of the respondent in his caution interview and his evidence under oath that he had committed the offence. In my judgment there was evidence beyond reasonable doubt that the respondent had committed the offence as charged.
29. This ground of appeal is allowed.

### **POWERS OF THIS COURT**

30. Having allowed the grounds of appeal it is for this court to decide whether there ought to be a retrial or this court can exercise its powers under section 256 (2) of the Criminal Procedure Act to convict the respondent on the strength of the evidence and sentence him.
31. The allegation dates to 2016 which is 6 years ago. The evidence in the copy record is self-explanatory which none of the parties have complained about. In my view any retrial will only delay the finality of the proceedings further and may also prejudice the prosecution on the availability of the witnesses due to time lapse and more so the fact that the complainant was 5 years at the time. The evidence in the copy record has been adequately reflected.
32. In my judgment a retrial will not be in the interest of justice.



## **CONCLUSION**

33. Considering the evidence adduced in the Magistrate's Court and taking into account the prosecution exhibit as mentioned in the copy record I do not see any reason why a retrial ought to be ordered. This court is in equally good position as the Magistrate's Court to analyze and evaluate the evidence since the appeal involves the drawing of a reasonable inference from the proven facts.
34. In view of the above, the observations of Lord Reid in *Benmax v Austin Motor Co. Ltd* [1955] 1 All ER 326 at page 329 is helpful:
- "...I think that the whole passage...refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion..."*
35. In the interest of justice and in accordance with section 256(2) (e) of the Criminal Procedure Act this court sets aside the order of acquittal of the Magistrate's Court and finds the accused guilty of one count of indecent assault contrary to section 212 (1) of the Crimes Act and convicts him accordingly.

## **ORDERS**

1. The appeal against the order of acquittal is allowed;

2. The order of acquittal by the Magistrate's Court is quashed and set aside;
3. The respondent is found guilty and convicted as charged;
4. The respondent is bailed in the sum of \$800.00 on his own recognizance;
5. Both counsel are to file their sentence submissions and mitigation within 7 days from today;
6. Matter is adjourned to 19<sup>th</sup> July, 2022 for sentencing at 2.30pm.



*Sunil Sharma*  
**Sunil Sharma**  
**Judge**

**At Lautoka**  
11<sup>th</sup> July, 2022

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Respondent.**