

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No, HAA 071 of 2017

SAKARIA YAUYAU

Appellant

VS

THE STATE

Respondent

Counsel : Mr. W. Roza for the Appellant
Mr. J. Niudamu for the Respondent.

Date of Hearing : 2 February 2018
Date of Judgment: 16 February 2018.

JUDGMENT

1. On the 20th April 2017 the Appellant (“the accused”) was convicted after trial in the Magistrates Court at Rakiraki of one count of indecent assault and was sentenced the following day to a term of imprisonment of 3 years and 6 months with no minimum term.
2. The appellant appealed against conviction and sentence out of time but was granted leave to appeal by this Court on 30th November 2017 after which he filed 9 grounds of appeal.
3. These grounds can be distilled into one major ground being the failure of the learned Magistrate to properly analyse the evidence of the prosecution witnesses, such failure leading to miscarriage of Justice. Counsel prays that had the Magistrate

properly evaluated the evidence, he would have had no option but to find the accused not guilty.

The Evidence

4. The complainant, 5 years old at the time (and 7 years old when giving her evidence) told of what "Babu" (the accused) did to her on the bed in her home. Her mother was in the kitchen and her father was away. "Babu" is her mother's uncle and he lifted up her sulu, pushed her panty to one side and then licked her private part (which she called "qeqe" (pointing to her genitals). The accused's daughter (Akisi) Akisi. Was also present but sitting outside at the time.
5. The young girl then said that she got off the bed and ran to the kitchen where she told her mother and Akisi what had happened.
6. The mother told the Court that she was cooking in the detached kitchen when she was curious about her daughter's silence. She went inside the house, calling her and she followed her into the kitchen where the girl told her what had happened. She also told Akisi. The mother told her husband who was angry and the matter was reported to the Police the next day. She described the house as being partitioned with curtains.
7. The father gave evidence of being "wild" when he heard about the evidence and he returned and a meeting was held with him, his wife, the victim and the accused. At that meeting the accused admitted the offence.
8. Akisi (the accused's daughter) said that she was outside washing dishes when the mother relayed what the victim had

told her. She challenged her father with the allegation to which he admitted. He asked for forgiveness.

9. Medical evidence revealed a broken hymen but no symptoms of assault.
10. Police evidence was called to prove the report, the arrest and the generating of the record of interview and answer to charge. Both records were held to be admissible.
11. Answers in the interview under caution contain detailed and unambiguous admissions of guilt.
12. Counsel for the accused made an application for no case to answer at the end of the prosecution case, an application which was refused in a reasoned judgment by the Magistrate.
13. The accused when put to his defence, elected to remain silent.

The Appeal

14. Counsel for the accused appears to have a case theory that is not supported by the evidence .He even handed up a paper to the Court entitled "Theory" which sets out a theory that is totally unjustifiable.
15. His "theory" is that the mother drilled the 5 year old until she admitted sexual assault. He claims hat there could not have been an assault because the room was completely open and anyone could see what was happening in the house. He says that when the mother couldn't hear or see her daughter, she immediately suspected that some illicit activity had occurred and her bias against her uncle made her force the young girl to say she had been licked.

Such “theories” are preposterous and contrary to the weight of the evidence.

16. An appellate court will be very reluctant to allow an appeal on the facts alone, the Magistrate being in the position to observe the demeanour of the witnesses and gauge the truth of what is being said in Court. Reference to what Counsel says are inconsistencies are not helpful. There will always be inconsistencies between the evidence of State witnesses: a Court would be very suspicious of collusion if the evidence was identical.
17. Counsel is in error when he claims that all of the evidence of the father is hearsay; admittedly the first part of his evidence is hearsay, but he told the Court that he was present at the family meeting when the accused admitted his oral assault.
18. The grounds of appeal are fanciful and frivolous. Counsel appears to ignore that his client confessed to the Police under caution and that confession satisfies this Court that there has been no miscarriage of justice.
19. The appeal against conviction is dismissed.

Sentence

20. The maximum penalty for this offence is 5 years imprisonment. The range of sentences (tariff) is from 1 year to 4 years. (**Ratu Penioni Rakoto** HAA 68 of 2002). Contact between the mouth of the assailant and naked genitalia of the victim is the most serious of sexual assaults.
21. The sentence of three years 6 months is well within tariff and condign punishment for this assault on a 5 years old relative.

22. The appeal against sentence is dismissed.
23. The Magistrate has already imposed a Domestic Violence Restraining Order.



P.K. Madigan
Judge

At Lautoka

16th February 2018