

IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 17 OF 2016

BETWEEN:

STATE

APPELLANT

AND:

SAMUELA NAPOLIONE

RESPONDENT

Counsel : **Ms. S. Kiran for Appellant**
: **Ms. S. Nasedra for Respondent**

Date of Judgment : **03rd October, 2016**

JUDGMENT

- 1 This is an appeal filed by the State against an acquittal recorded by the learned Magistrate at Lautoka on the 11th of May, 2015.
- 2 The Respondent was charged with a count of Common Assault contrary to Section 274 of the Crimes Decree, 2009. The Prosecution was conducted by a Police Prosecutor at the

Magistrates Court.

- 3 The Respondent pleaded not guilty to the charge and the matter proceeded to trial on the 7th of April 2015 before the learned Magistrate, Mr. Raramasi.
- 4 At the trial, only the complainant gave evidence. Her medical report was tendered in by consent and the case for Prosecution was concluded.
- 5 Respondent is the husband of the complainant. While they were sleeping, Respondent received a call around 2 a.m. She questioned Respondent about the call to find out the caller. He refused to divulge the name of the caller. She then followed him insisting that she be told the name of the caller. Respondent then pushed her. Whilst she was sitting on the floor, Respondent punched her on the head. She walked to the Lautoka Police Station and reported the matter the same night. She was then referred to a doctor at the Lautoka Hospital. Her medical report was tendered in evidence.
- 6 At the end of the Prosecution case, the learned Magistrate decided that there is a case to answer and put the Respondent in defence. The Respondent opted to remain silent thus the end of Defence case.

Appeal against acquittal

- 7 The Appellant (State) has filed the appeal on following grounds:
- I That the learned Magistrate erred in law in failing to properly identify the elements of the charge before him;
 - II The learned Magistrate erred in law and in fact in failing to properly consider and evaluate the evidence relevant to the elements of the charges before him, when he found the Respondent not guilty;

- III That the learned Magistrate erred in law and in fact in making a finding that the conduct of the accused could be proven by the investigation officer who had interrogated the accused;
- IV That the learned Resident Magistrate erred in law and in fact in concluding that the due process of the law was not complied for the reason that the case was a charge and summons case and the accused was not warned for prosecution before the charge is laid;
- V The learned Magistrate erred in law and in fact in acquitting the Respondent who did not mount a defence in the defence case, having found that all elements of the offence were met at the stage of no case to answer.

Analysis

Ground 1 -That the learned Magistrate erred in law in failing to properly identify the elements of the charge before him.

- 8 The Appellant was charged with Common Assault. The elements need to be proved by the Prosecution are as follows: -
 - (a) A person;
 - (b) Unlawfully;
 - (c) Assault;
 - (d) Another person.

- 9 The learned Magistrate in his judgment stated as follows:

“There was no evidence adduced in Court to prove that conduct of the accused if he had acted intentionally or recklessly in the commission of the crime. This can be proven by the investigating officer who has interrogated the accused”.

10 In light of the above passage, the learned Magistrate had concluded that there was no evidence adduced to prove that the accused had acted intentionally or recklessly. The learned Magistrate further stated that accused's intention/ recklessness could be proved by calling the investigating officer who had interrogated the accused.

11 To establish the offence of Common Assault, Prosecution is not burdened to prove that the accused acted either intentionally or recklessly. These are not elements of the offence as per the provision of Section 274. Learned Magistrate erred in law in finding that the Prosecution has failed to prove the intention or recklessness when the law does not require the Prosecution to prove either of these elements. Therefore, the learned Magistrate fell into error. This ground of appeal succeeds.

Ground II – The learned Magistrate erred in law and in fact in failing to properly consider and evaluate the evidence relevant to the elements of the charges before him, when he found the Respondent not guilty.

12 The identity of the accused is not an issue in this case. The complainant stated that the accused had pushed and punched her. She had reported the matter immediately thereafter. The fact that she was pushed and punched shows that the accused had applied/used unlawful force.

13 The complainant stated that when she enquired about the phone calls from the accused, he said that she should mind her own business. She stated "*she followed the accused through the door as she was trying to know the caller when the accused pushed her. She sat down beside the door and the accused punched her on the head.*" There is no reasonable justification to push the complainant and punch on her head.

14 When the complainant was medically examined, there was no abrasions/laceration or bruises seen. There was tenderness noted in the occipital area which could have been used to corroborate the complainant's evidence. In light of the above, I find that there is *prima facie* evidence to prove the charge of Common Assault. The learned Magistrate had apparently failed to properly evaluate the evidence before him. Therefore, this ground of appeal succeeds.

Ground III– That the learned Magistrate erred in law and in fact in making a finding that the conduct of the Accused could be proven by the investigation office who had interrogated the Accused.

- 15 The conduct or acts of the accused could be established by evidence of the complainant or any other independent witnesses (there were none in this case) who would give evidence to describe the actions of the accused at the time of the alleged offence. In this case, the complainant gave evidence of what had transpired on the day of the alleged incident which describes the conduct of the accused; pushing and punching her head. Therefore, there is no need for Prosecution to call the investigation officer to prove the conduct of the accused. This ground of appeal succeeds.

Ground IV – That the learned Magistrate erred in law and in fact in concluding that the due process of the law was not complied for the reason that the case was a charge and summons case and the Accused was not warned for prosecution before the charge is laid.

- 16 When there is a well-founded complaint it is sufficient for the police to lay or frame a charge after considering the evidence. The Respondent was caution interviewed on 14/11/2013 and the charging summons was filed on 16/12/2013 for the matter to be called on 10/2/2014. This shows that due process of the law was complied with in filing the charges against the Respondent.

Ground V - The learned Magistrate erred in law and in fact in acquitting the Respondent who did not mount a defence in the defence case, having found that all elements of the offence were met at the stage of no case to answer.

- 17 To find that there is a case to answer, the learned Magistrate, at the closure of the prosecution case, must have come to the conclusion that there was sufficient evidence for a reasonable tribunal to convict and there was evidence on each element of the offence. By holding that there is a case to answer, he had basically accepted that the offence was proved unless the

accused otherwise discredited the Prosecution version or valid defence is set up, which in this case did not happen. However, Magistrate erroneously found the accused not guilty. Therefore, this ground of appeal succeeds.

Conclusion

- 18 Appeal is allowed. Judgment of the learned Magistrate dated 11th May, 2015 and the acquittal recorded therein are set aside. At the end of the Prosecution case, the learned Magistrate found that there is a case for accused to answer. Respondent failed to discredit the Prosecution case or set up a valid defence. I find that there is sufficient evidence to find the Respondent guilty of Common Assault. Therefore, I find the Respondent guilty of Common Assault and convict him accordingly.
- 19 Case record is sent back to the learned Magistrate who heard the case for sentencing. The learned Magistrate is directed, after a sentencing hearing, to impose an appropriate sentence on the Respondent.




Aruna Aluthge
Judge

AT LAUTOKA

On 3rd October, 2016

Solicitors: Office of the Director of Public Prosecution for State (Appellant)
Office of the Legal Aid Commission for Respondent