

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**MISCELLANEOUS JURISDICTION**

**HAC NO. 148 OF 2016**

**BETWEEN : STATE**

**AND : PAULO TAKABWEA TAAKE KABWEA**

**Counsel : Mr. J. Niudamu for the State**  
**Mr. S. Luvena for the Accused**

**Date of Ruling : 28th of October 2016**

**RULING**

1. The accused is being charged with two counts of Indecent Assault, contrary to Section 154 (1) of the Penal Code, one count of rape contrary Section 149 and 150 of the Penal Code and four counts of rape, contrary to Section 207 (1) and (2) (a) of the Crimes Decree. On the 29th of August 2016, the accused pleaded guilty for two counts of Indecent Assault and pleaded not guilty for the five counts of Rape. The matter was then adjourned till 5th of September 2016 for the prosecution to file the summary of facts in respect of two counts of Indecent Assault.
2. Subsequent to the reading of the summery of facts to the accused, the learned counsel for the accused raised a preliminary objection stating that the two counts of Indecent Assault are defective. The learned counsel submitted that the particulars of offence have not specifically stated that the victim is a female,

making it a defective charge. He submitted that his argument is mainly founded on the approach adopted by the High Court in **Sakis Tabuatoga v State ([2009] FJHC 22; HAA0026.2008 (30 January 2009).**

3. In responding to the above objection, the learned counsel for the prosecution draw the attention of the court to the decision of Justice Gounder in **Khan v State [2008] FJHC 79; HAA004.2008 (5 May 2008).**
4. Both of the above mentioned cases have dealt with similar issues as of this objection. In both of these two cases, the statement of offences had not specifically stated the offence as "Indecent assault on female". Instead, it had only stated "Indecent Assault". Moreover, the particulars of offences of these two cases have not specifically stated that the victim was a female. Instead, it had only mentioned the names of the respective victims.
5. Justice Gounder in **Khan (supra)** having extensively discussed the purpose of the statement of the offence and the particulars of the offence, concluded that the above omissions had not made the charge defective.
6. However, Justice Maitoga in **Tabutoga (supra)** found otherwise. His Lordship found that the failure of stating that the victim was a female in the particulars of the offence was a fundamental error as the gender of the victim is one of the main elements of the offence. His lordship Justice Maitoga, stating his disagreement with the approach adopted in **Khan (supra)** found that;

*"Recently in Khan V State [2008] FJHC 79 the appellant was charged with Indecent Assault on female under section 154(1) of the Penal Code Cap 17. Like the charge in this present appeal the particulars. The defective charge claim was made on the basis that a*

*charge pursuant to section 154 (1) of the Penal Code Cap 17 must allege that the act of indecent assault was committed on a woman or girl, instead of naming the female complainant in the particulars. In its conclusion the court held:*

*'The charge in the present case in my view complied with the CPC. The charge commenced with a statement of offence, identified the offence of indecent assault and made reference to section 154 (1) of the Penal Code. The particulars of offence specified that the appellant 'on the 5th day of May 2007, at Kulukulu, Sigatoka in the Western Division had unlawfully and indecently assaulted Sainimere Kilitate'. There was absolutely no doubt that the complainant Sainimere Kilitate was a female and the appellant knew that his accuser was a female. For these reasons, I hold the charge was not defective.'*

*In this appeal I have reached a different conclusion. I do so because I do not agree that a charge that is a nullity because it discloses no offence in law or lacks an essential element of the offence may be saved by section 119 and 122 of the Criminal Procedure Code Cap 21.*

*In my view a charge that, as in this case, is without an essential element of the offence under section 154(1) of the Penal Code Cap 17, is null and void. On a strict interpretation of the charged as particularised in this case, the alleged offence is against a name rather than a woman or girl whose name is Dilitia Boginivalu. I note that it is highly possible that a male may carry a female name.*

7. Section 58 of the Criminal Procedure Decree states that;

*Every charge or information shall contain —*

- a) *a statement of the specific offence or offences with which the accused person is charged; and*
- b) *such particulars as are necessary for giving reasonable information as to the nature of the offence charged.*

8. Section 61 of the Criminal Procedure Decree has stipulated the manner in which the charges have to frame, where it states that;

- i) *A count of a charge or information shall commence with a statement of the offence charged, and this shall be called the statement of offence.*
- ii) *Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.*
- iii) *The charge shall contain a reference to the section of the law creating the offence.*
- iv) *After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.*
- v) *Where any rule of law or any Act Decree or Promulgation limits the particulars of an offence which are required to be given in a charge or information, nothing in this section shall require any more particulars to be given than those so required.*
- vi) *The forms applying or approved under this Decree (or forms conforming to these forms as nearly as may be) shall be used in cases to which they are applicable; with*

*the statement of offence and the particulars of offence being varied according to the circumstances of each case.*

*vii) Where a charge or information contains more than one count, the counts shall be numbered consecutively.*

9. Accordingly, the charge constitutes two main components. The first is the statement of the offence. The second component is the particulars of the offence.
10. The statement of the offence should state the offence in ordinary language, avoiding as much as possible the use of technical terms. It is not required to mention all the essential elements of the offence. However, it must refer the relevant Section or provision of the law that creates the offence.
11. Subsequent to the statement of the offence, it is required to state the particulars of the offence. It should be in ordinary language.
12. Justice Gounder in **Khan (supra)** having discussed **Shekar v State ( criminal appeal No HAA 0056 of 2004)** and **State v Brian Singh ( 2007) AAU0097/05S** concluded that the information provided in the charge sufficiently informed the accused about the accuser was a female. His Lordship held that;

*“In Shekar v State Criminal Appeal No. HAA 0056 of 2004, the appellant on an appeal against conviction on a corruption charge contended that the omission in the particulars of the offence of the name of the person from whom he received the money, whether the payment was for himself or another person and whether it was made as an inducement or reward were fatal defects and, on the authority of Tui’s case, meant that no offence had been disclosed. The Court of Appeal rejected the appellant’s argument and said:*

*“We cannot accept that those omissions were such as to render the charges defective. The purpose of the charge is to ensure that the accused person knows of the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the section in this Act”*

The Court of Appeal took a similar view in *State v Brijan Singh* [2007] AAU0097/05S.

The Court said:

*“The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the State intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented”*

*The charge in the present case in my view complied with the Criminal Procedure Code. The charge commenced with a statement of offence, identified the offence of indecent assault and made reference to section 154(1) of the Penal Code. The particulars of the offence specified that the appellant “on the 5th day of May, 2007, at Kulukulu Sigatoka in the Western Division had unlawfully and indecently assaulted Sainimere Kilitale”. There was absolutely no doubt that the complainant Sainimere Kilitale was a female and the appellant knew that his accuser was a female. For these reasons, I hold the charge was not defective.*

13. In view of the approach adopted by Justice Gounder in **Khan (supra)** and Section 61 of the Criminal Procedure Decree, it is my option that the appropriate test in determination of the correctness of the charge in an application of this nature, is to determine whether the statement of offence and the particulars of the offence

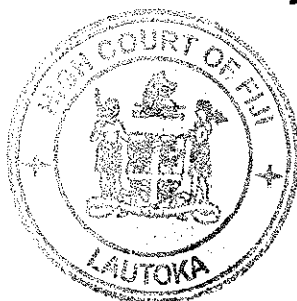
have given the accused sufficient information with sufficient particularity about the offence that he is being charged.

14. In this instant case, the statement of offence has clearly stated the relevant Section of the penal code with the offence as "Indecent Assault". It was revealed at the early stages of this proceedings that the victim is the biological daughter of the accused. Hence, the name stated in the particulars of the offence sufficiently informs the accused that the accuser is a female.
15. Having considered the reasons discussed above, I hold that the first and second counts as charged in the information are not defective. I accordingly refuse and dismiss the objection raised by the learned counsel for the defence.



R. D. R. Thushara Rajasinghe

Judge



At Lautoka

28th of October 2016

Solicitors : Office of the Director of Public Prosecutions  
Office of the Legal Aid Commission