

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 001 of 2017

STATE

Appellant

v

NAULU LUTUNICAUCAU

Respondent

Counsel: Ms. A. Vavadakua for the State
Mr. A. Paka (L.A.C.) for the Respondent

Date of Hearing : 18 May 2017

Date of Judgment : 23 May 2017

JUDGMENT

1. On the 13th day of February 2017, at the Magistrates Court in Labasa, the Respondent was found not guilty of and acquitted from one charge of assault causing actual bodily harm contrary to section 275 of the Crimes Act 2009.

2. Being dissatisfied with that outcome, the State appeals.
3. The facts of the case are that on the 18th January 2015, the accused, who was at the time a Superintendent of Police, was outside a Labasa nightclub shortly after midnight waiting for his wife. He either sat on or leaned on the bonnet of a taxi, which annoyed the driver of that taxi, and the driver asked him to move. That exchange led to a physical confrontation between the accused and the driver during which there was a certain degree of shirt pulling and twisting. Two junior police officers entered the affray and attempted to separate the pair. It is the State's case that at this juncture the accused punched the driver on his face.
4. The driver later presented at the Labasa hospital with injuries. A medical officer told the Court that the victim had tenderness and swelling on his chin and bruising and swelling on the back of his neck.
5. The accused and his witness denied that the accused had ever punched the driver.
6. The State's grounds of Appeal are:
 1. That the learned Magistrate erred when considering irrelevant facts and minor inconsistencies.
 2. That the learned Magistrate erred when failing to consider that assault can occur without a punch landing on the cheek or chin of the victim.
 3. That the learned Magistrate erred when not providing a reasoned analysis as to why he rejected the prosecution's case.

Ground One

7. Counsel makes submissions about three areas where she pleads that the Magistrate “lost his way” in his analysis of the evidence. This happened in respect of three issues
 - (i) who sat on the victim’s taxi?
 - (ii) did the punch land on the victim’s cheek or chin?
 - (iii) Inconsistencies relating to the covering of the victim’s head.
8. It is clear from the record that the Magistrate has in his long reasoned judgment dealt with the evidence in detail, analyzing it and comparing witness with witness before he made his final determination.
9. Of course it is not relevant to the charge whether the accused sat on the victim’s taxi or not, but its relevance comes into play as the provocation that made the victim engage with the accused.
10. Having read the complete record of evidence before the lower Court it can be seen that apart from the good Doctor’s evidence the balance of the prosecution evidence is extremely unsatisfactory.
11. The second prosecution witness (PW2) was a junior policeman who attended at the scene. He saw the melee and described the pushing and pulling and the pulling of shirts and the attempt to pull the victim away from the accused but he said specifically that there was no punch.
12. The third prosecution witness (PW3) gave the most unsatisfactory evidence. He is a fellow taxi driver and friend of

the victim. He saw the accused sit on the victim's bonnet and reported the matter to the victim. The victim challenged the accused on which the accused grabbed the victim's collar and the victim grabbed his collar in return. He saw "one punch being thrown" by the person holding on to his friend the victim. The punch hit his cheek. Somebody then pulled the victim back. He and the victim went to the Police Station to report the incident where they were faced by reluctant report officers. A report was eventually made and they went to the hospital for medical examination. He identified the accused in Court and said most oddly that the accused also went to the hospital to see a lady that he had assaulted earlier.

13. In cross-examination PW3 said he couldn't tell which side of the face was punched, nor could he tell whether it was cheek, nose, ear or eyes. He couldn't remember. Nor could he remember which hand the accused used to punch the driver. He later said that the victim's face was covered with a t-shirt when the punch was thrown and the head was down but he could see that he was punched on the chin.
14. The victim driver was the fourth prosecution witness. He told the Court that when he was trying to take off his shirt to free himself from the accused, the accused punched him however he admitted in cross-examination that he failed to tell the police when he reported the matter that he was punched on the cheek. He later said he did tell the Police that he was punched but they didn't write it down. He later said he was punched on the chin.
15. The accused gave evidence in his own defence. He also called a witness who observed the confrontation that evening. Both said that the accused never punched the driver PW4.

16. The record shows that the matter of who sat on the car bonnet and how he sat on the bonnet was the subject of many questions of the witnesses by counsel from both sides. It cannot therefore behoove the prosecution to say the Magistrate in dealing with it was dealing with irrelevant issues. The irrelevancy comes in the questioning.
17. Both PW3 and PW4 gave inconsistent evidence about where the punch landed on the victim's face, PW3 even contradicting himself. State counsel takes issue with translation in that the two terms "chin" and "cheek" were used by PW3 interchangeably. The learned Magistrate saw this as an inconsistency which is not surprising. According to the record PW3 first said cheek, then said he couldn't remember then finally said chin. PW4 the victim said first it was the cheek, then closed by saying it was the chin. Given this highly unsatisfactory evidence, the Magistrate quite properly spent part of his judgment dealing with it. The evidence was given in Hindi, which is not the State Counsel's dialect and apart from one comment by the prosecutrix "I hope Sir, it is recorded as chin" there is no other objection noted in the record and the record must remain for an appellate Court the definitive evidence.
18. The learned Magistrate in carefully analyzing the evidence, properly dealt with issues in proportion to the time that Counsel dealt with those issues at trial and this court does not agree that he spent too much time in dealing with irrelevant issues and minor inconsistencies.
19. The State's first ground of appeal is not made out.

Ground 2

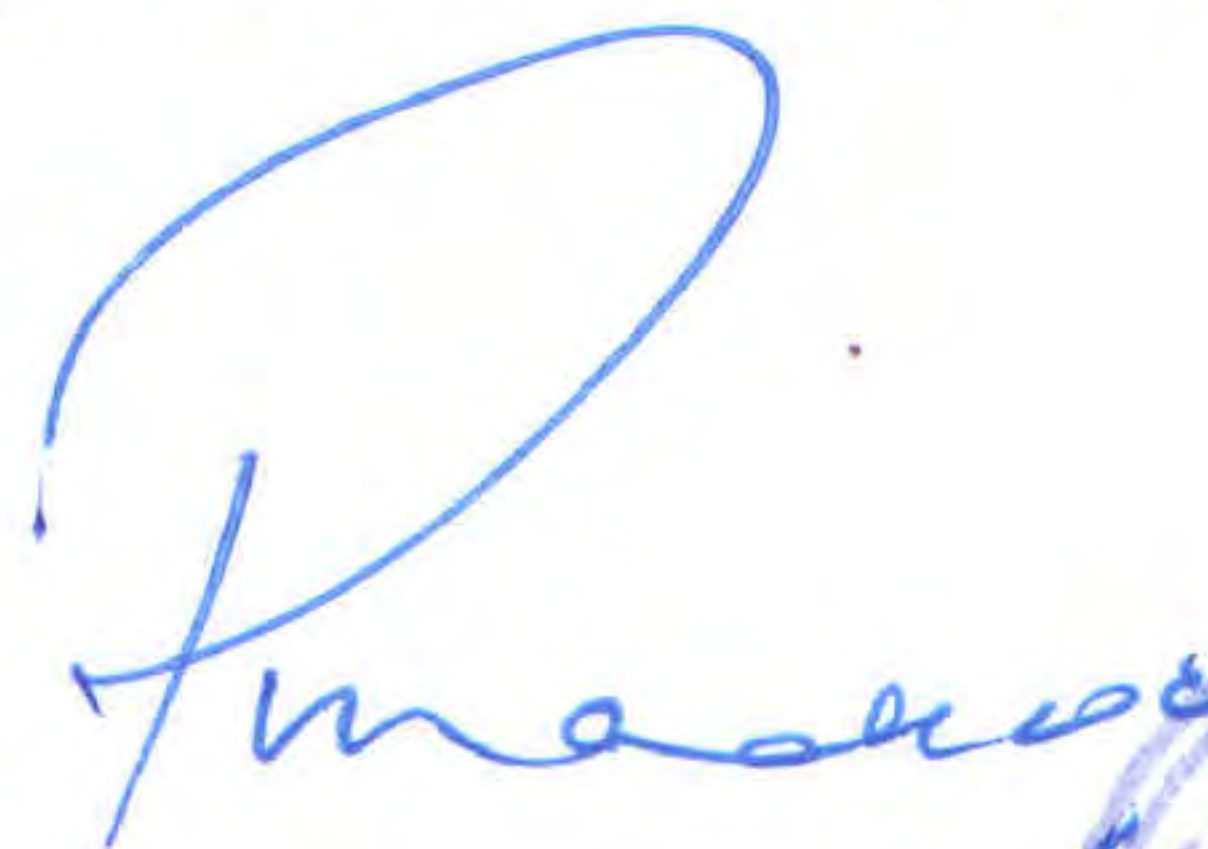
20. Counsel for the State is quite correct in submitting that assault need not necessarily involve physical contact. It can be an act by which the person intentionally or recklessly causes another to apprehend unlawful violence.
21. Two problems arise with this ground of appeal:
1. It was never the case for the prosecution in the court below that this was an apprehension of assault case. It was run, and indeed charged as, a physical assault.
 2. In her closing submissions to the learned Magistrate, the prosecutrix (the one and same who appears here), mentioned the alternative apprehension assault definition but not once in her submission does she invite the lower court to make that alternative finding.
Her final plea to the Magistrate reads: *“We submit that we, Prosecution, have proven (sic) beyond reasonable doubt that it was this accused and no other, who punched the complainant causing him pain also known as ‘actual bodily harm’”*
22. This second ground of appeal does not succeed.

Ground 3

23. The State argues that because the Magistrate was diverted by irrelevant and minor inconsistencies, he did not provide a proper analysis to explain why he rejected the prosecution case.
24. In his judgment the Magistrate very carefully discusses the evidence of each witness, witnesses both for the Prosecution and for the Defence. After doing so and in analyzing the

strengths and difficulties of each witness, he was able to reach his decision that the State had not satisfied the Court to the requisite standard that the complainant was indeed punched.

25. In paragraphs 46 to 50 in his judgment, the Magistrate makes clear, relevant and decisive findings as to why he was acquitting the accused below. He makes no error of law, nor does he appear to mistake the relevant facts adduced by the evidence.
26. Ground 3 fails as does this appeal.
27. This case represents a classic example of doubt raised by the evidence. PW2 saw no punch; PW3 and PW4 who did see a punch are unreliable and contradictory witnesses. The accused and his witness both deny that there was a punch.
28. Of course the Magistrate cannot be faulted for finding that an important element of the charge, **as laid**, (this Court's emphasis) cannot be established beyond reasonable doubt.
29. The Magistrate has quite properly given the benefit of that reasonable doubt to the accused, by acquitting him.
30. This appeal against acquittal is dismissed



P. K. Madigan
Judge



At Labasa
23 May 2017