

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

**Criminal Case No.: HAC 142 of 2018**

**STATE**

**V**

**MOHAMMED SHAHIL ABRAAN**

**Counsel** : Mr. A. Singh for the State.  
: Mr. I. Khan for the Accused.

**Date of Hearing** : 15 October, 2018

**Date of Sentence** : 17 October, 2018

---

**SENTENCE**

---

*[The names of all the victims are suppressed they will be referred by their name initials]*

1. The accused was charged with the following offences by virtue of amended charges dated 28 July, 2015 filed in the Magistrate's Court at Lautoka. All counts are representative counts:

**First Count**

**Statement of Offence**

**Sexual Assault**: contrary to Section 210(1) (b) (i) and (2) of the Crimes Act No 44 of 2009.

### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division procured **SZR** without his consent to commit an act of gross indecency.

### **Second Count**

#### **Statement of Offence**

**Sexual Assault:** contrary to Section 210(1) (b) (i) and (2) of the Crimes Act No 44 of 2009.

### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division procured **AH** without his consent to commit an act of gross indecency.

### **Third Count**

#### **Statement of Offence**

**Indecently insulting or annoying any person:** contrary to Section 213(1) (a) of the Crimes Act No 44 of 2009.

### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division with intent to insult the modesty of **HA** uttered insulting words such as "I want to do bad things with you" intending that such words be heard by the said **HA**.

### **Fourth Count**

#### **Statement of Offence**

**Indecently insulting or annoying any person:** contrary to Section 213(1) (a) of the Crimes Act No 44 of 2009.

### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division with intent to

insult the modesty of **MA** uttered insulting words such as “Qauri” meaning “gay” and “Maichod” meaning fuck your mother intending such words be heard by the said **MA**.

#### **Fifth Count**

##### **Statement of Offence**

**Common assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

##### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **MA**.

#### **Sixth Count**

##### **Statement of Offence**

**Indecently insulting or annoying any person:** contrary to Section 213(1) (b) of the Crimes Act No 44 of 2009.

##### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division with intent to insult the modesty of **MTIA** intrudes upon his privacy by pulling his underwear and spraying his private part with perfume and Mortein spray such actions likely to offend his modesty.

#### **Seventh Count**

##### **Statement of Offence**

**Common Assault** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

##### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **MTIA**.

### **Eighth Count**

#### **Statement of Offence**

**Indecently insulting or annoying any person:** contrary to Section 213(1)(b) of the Crimes Decree No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division with intent to insult the modesty of **MSS** intrudes upon his privacy by touching his penis while he was clothed such actions likely to offend his modesty.

### **Ninth Count**

#### **Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **MSS**.

### **Tenth Count**

#### **Statement of Offence**

**Indecently insulting or annoying any person:** contrary to Section 213(1)(b) of the Crimes Decree No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division with intent to insult the modesty of **MSS** intrudes upon his privacy by telling him to strip down his underwear and took photos of him such actions likely to offend his modesty.

### **Eleventh Count**

#### **Statement of Offence**

**Indecently insulting or annoying any person:** contrary to Section 213(1) (b) of the Crimes Decree No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division with intent to insult the modesty of the said **ISK** intrudes upon his privacy by touching his penis while he was clothed such actions likely to offend his modesty.

### **Twelfth Count**

#### **Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **SS**.

### **Thirteenth Count**

#### **Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **AAN**.

**Fourteenth Count**

**Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

**Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **MZ**.

**Fifteenth Count**

**Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

**Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **SA**.

**Sixteenth Count**

**Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

**Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **SAF**.

### **Seventeenth Count**

#### **Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **ZAA**.

### **Eighteenth Count**

#### **Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

#### **Particulars of offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **MSK**.

### **Nineteenth Count**

#### **Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

#### **Particulars of offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **MRB**.

### **Twentieth Count**

#### **Statement of Offence**

**Common Assault:** contrary to Section 274(1) of the Crimes Act No 44 of 2009.

#### **Particulars of Offence**

**Mohammed Shahil Abraan** between the 1<sup>st</sup> day of December 2013 and 31<sup>st</sup> day of January 2014 at Lautoka in the Western Division unlawfully assaulted **MS**.

2. The accused pleaded not guilty, prosecution called 19 witnesses whereas defence called two witnesses including the accused. The hearing proceeded for about six days. After the prosecution closed its case the court held that the accused had a case to answer in respect of all the counts.
3. The accused opted to give sworn evidence and also called one witness. By judgment dated 16 July, 2018 the learned Magistrate found the accused guilty of the following counts:
  - (a) 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup>.
4. The accused was acquitted of the following counts:
  - (a) 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup> and 18<sup>th</sup>.
5. The matter was adjourned to 23 July, 2018 for mitigation. The mitigation on behalf of the accused was filed on 20 July, 2018 in the Magistrate's Court.
6. The brief facts are as follows:

The victims were staying at a facility known as "Madrassa" in Lautoka. It provides accommodation for students who are given lessons in Islam. The accused a priest, was teaching at the "Madrassa" for four months from the beginning of September 2013 till the end of January, 2014. The victims were students staying at the "Madrassa" during this period. On 4 February, 2014, an investigation was conducted into the allegation made by the victims against the accused whilst he was teaching them at the "Madrassa".



### 1<sup>st</sup> count

On 6 January, 2014, after the prize giving ceremony, SZR (18 years) went to sleep after 12 midnight. He was fast asleep when he felt someone flash lights on his eyes. When he opened his eyes, he saw the accused standing the accused told the victim to go with him to the dining hall. At the dining room the accused took off SZR's pants, held his penis and started sucking his penis. The accused then lay down on the floor and told SZR to insert his penis into the accused's anus. They were at the dining hall for about 20 minutes. When they were done, the accused told SZR to go back and sleep. Out of respect and fear, SZR did what he was asked by the accused.

### 2<sup>nd</sup> Count

AH (19 years) was studying at Lautoka Muslim College from the year 2014 to 2015. In 2012, he was staying at "Madrassa" and later he was suspended. He went to "Madrassa" on 20 January, 2014. On this night when the victim went to sleep, the accused woke him in the morning at around 4.00am. The victim saw the accused was sucking his penis. The victim asked the accused what he was doing but the accused told him to be quiet and follow him to his room. When the victim went to the accused's room, the accused told him that whatever the victim wants, he will do it and whenever the victim wants to go the accused will allow him. The accused then closed his room and told the victim to quickly take off his pants so that he can masturbate and that he wanted to drink the fluid from the victim's penis

The following day, the accused took the victim to his room and told him to masturbate and ejaculate inside the accused's mouth. According to the victim, the accused told him that if he didn't listen to him, he will take him out of the "Madrassa" but if he listens, the accused will give him all the freedom he wants.

At about 7pm, the accused took the victim to his room and told him to take off his clothes. According to the victim, he was scared and started crying. The accused consoled him and gave him a bottle of coconut oil to apply on his penis and the accused's anus. The accused told the victim to penetrate his erected penis into the accused's anus. According to the victim, he did not want to do this but he had to do it as the accused forced him and told him that he had to obey him as he was his teacher. The accused changed position and told the victim to insert his penis between his legs from the front. When the victim ejaculated, the accused told him to clean himself and go to the Mosque.

#### 4<sup>th</sup> and 5<sup>th</sup> Counts

MA (15 years) was staying at the "Madrassa" in the year 2013. During December 2013 and January 2014, the accused slapped the victim when he was hanging clothes on a rope. The accused slapped him three times on his face. According to the victim his face was painful and swollen. The accused then told him to go and sleep.

On a different occasion sometimes in the month of January, 2014, the Accused swore at the victim by saying 'maichod'. In his evidence, the victim said *"how can a person hear word 'mother fucker' sir because a mother gives birth to you sir and when you say such insulting things to the mother how can anybody take that."* According to the victim, he felt insulted when he heard such a thing against his mother.

#### 8<sup>th</sup> and 9<sup>th</sup> Counts

MSS (16 years) was staying at "Madrassa" during the school holidays in 2013. One night during this period, the victim was sleeping when the accused came squeezed and twisted the victim's penis from on top of his clothes. According to the victim, he woke up and at the same time, got hold

of the accused's hand. The accused left without saying anything. The victim did not like what the accused had done to him.

On another occasion, the accused came from behind and kicked the victim on his penis and testicles. When this incident happened, the victim was in "sizda" position by keeping his head on the floor and hands on the sides and in a bending position.

On another occasion, the victim was late from "Madrasa" going to the Mosque when the accused came with a chain and smacked the victim's hands and his back. According to the victim, it was very painful and his hands were swollen. The accused keeps the chain which is used to close the gate, once he opens it.

#### 10<sup>th</sup> Count

During the month of December, 2013, the victim "MSS" (14 years) was schooling at Lautoka Muslim College. During this period, he was staying at "Madrasa" in Lautoka Town. During the period December 2013 to January, 2014, the accused told them to bath and he took some pictures of them. According to the victim, the accused had put those pictures on Facebook. When the accused took the pictures with his mobile phone, the victim was not wearing any clothes. According to the victim when they bath, they only wear undergarments. The victim felt bad when the accused took his pictures. He was scared that the accused would punch him if he complains about the incident to someone.

#### 12<sup>th</sup> Count

Between the years 2013 to 2014, SS (13 years) was studying at Lautoka Muslim Primary School. He was staying at the hostel. On one occasion the accused punched him on his chest. According to the victim, it was painful

he was scared and he did not complain to anyone since he thought the accused will punch him again.

#### 13<sup>th</sup> Count

AAN (13 years) was studying at Lautoka Muslim Primary School. In 2013, he started residing at Madrasa. The accused used to teach them holy Quran recital. Between 1<sup>st</sup> December, 2013 and 31<sup>st</sup> January, 2014 the accused took the victim to the bathroom and hit him several times on his buttocks with a stick. According to the victim, the accused took off the victim's pants and assaulted him without any reason. The victim did not feel good about it and started crying. The following day, the victim complained about the incident to one HMP.

#### 15<sup>th</sup> Count

In the year 2013, "SA" was studying in class 5 at Lautoka Muslim Primary School. During that time, the victim was residing at "Madrasa". In the beginning of the year 2014, he was punched on his cheek by the accused. According to the victim, he was assaulted by the accused since he could not do his homework. The victim started crying when he was assaulted and his ear was painful.

#### 16<sup>th</sup> Count

SAF (17 years) was studying at Lautoka Muslim College and he was staying at "Madrasa". There were about 20-22 students staying there at that time and the accused was their teacher. In January 2014, the victim was slapped by the accused. According to the victim, the accused slapped him on his face when he did not pick his clothes from the ironing table. He felt pain and had a cut inside his cheek. He complained about the incident to his mother.

### 17<sup>th</sup> Count

During the year 2013, "ZAA" (15 years) was staying at "Madrassa" in Lautoka. Between 1<sup>st</sup> of December, 2013 to 31<sup>st</sup> January, 2014 the accused hit the victim two times with a mop since he was late to come out of the bathroom when the accused was calling him. According to the victim, he had to come out of the bathroom naked and he did not feel good about it. When the accused hit him with a mop stick, his leg got swollen. The victim first complained to his parents and later he complained to master Nazeem on 16<sup>th</sup> January. According to the victim, when they were sleeping, the accused used to come and sit on top of them.

### 19<sup>th</sup> Count

MRB (12 years) is the cousin brother of the accused. He was at "Madrassa" in the beginning of the year 2014. The accused hit him with a ruler without any reason. The accused held him by his shirt and hit his hand. According to the victim, his hand was red and swollen. He did not complain about the incident to anybody and when the police officers were recording the statements, he decided to complain about it. The incident happened in the beginning of 2014. According to the victim, the accused used to assault other children as well.

### 20<sup>th</sup> Count

MS (16 years) was residing at Madrasa from the year 2012 to 2016. According to the victim, the accused used to assault him. When he was in Form 3 in 2013, the accused hit him on the upper body and slapped his face. After complaining to one HMP, the accused stopped hitting him. The police came to record the statements of the students about one or two months after he was slapped by the accused.

7. Upon investigation by the police, the accused was arrested and interviewed under caution and then charged.
8. By order dated 23 July, 2018 the Magistrate's Court pursuant to section 190 of the Criminal Procedure Act after finding the accused guilty for most of the offences as charged transferred this case to the High court for sentencing.
9. Before this court could proceed to sentence the counsel for the accused filed two separate applications namely:
  - (a) Petition of Appeal filed on 13 August, 2018; and
  - (b) Notice of Motion filed on 23 August, 2018 supported by the affidavit of the accused sworn on 23 August, 2018 seeking bail pending appeal and sentence.
10. On 28 August, 2018 by consent of both counsel it was decided that both the above applications and the sentencing be dealt with together.
11. State counsel filed written sentence submissions whereas counsel for the accused relied on the mitigation submission already filed in the Magistrate's Court. Both counsel also made oral submissions during the hearing.
12. On the day of the hearing the learned counsel for the accused withdrew the Petition of Appeal filed on 13 August, 2018 and the Notice of Motion filed on 23 August, 2018. The above files namely HAA 52 of 2018 and HAM 152 of 2018 were withdrawn and struck out.
13. During the hearing although not raised by any of the counsel this court referred both counsel to the amended charges relating to the offence of sexual assault. Under section 210 of the Crimes Act the offence of sexual

assault is an indictable offence which is triable summarily. In this case there are two representative counts of sexual assault.

14. A perusal of the copy record does not indicate that the mandatory election was put to the accused before the trial began. At page 22 of the copy record part 1 the following is recorded:

*“28/7/15*

*Acc: Present – Ms. Diroiroy*

*Prosecution files amended charges*

*Preferred language – English*

*Charges are read out and explained. Accused understands the charges.*

*Accused pleads not guilty to all 20 counts.*

*Case is fixed for hearing...”*

Page 45 of the copy record part 1:

*19/03/16*

*Pros: Cpl. Arvind*

*Acc: Present – Mr. Iqbal Khan*

*Case is taken up for hearing*

*Pros: This matter is for hearing sir. At present I only have one witness present in court and I am ready to proceed with that witness sir. And I believe the others will be here by 9.00 sir.*

*Court: You can call that witness...”*

15. Both counsel agreed that the court record did not show that the accused was given his right to election in respect of the two counts of sexual assault.
16. Section 190 (3) of the Criminal Procedure Act states:

*“The High Court shall enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court.”*

17. Section 190 (3) of the Criminal Procedure Act mandates the High Court to enquire into the circumstances of the case and to deal with the accused in any manner in which he or she could be dealt with if that person had been convicted by the High Court. This means the High Court on its own motion shall examine the court record of the court below to satisfy itself by taking into account the circumstances of the case that the conviction entered was not erroneous.
18. It should be borne in mind that the High Court when examining the court record of the proceedings should consider whether there is any serious question of law and fact to be addressed. In *Jitendra Prasad v. the State, criminal case no. HAC 75 of 2017 (01 August, 2017)* at paragraph 12 Aluthge J. stated the procedure that should be followed before the High Court exercised its revisional jurisdiction under section 260 of the Criminal Procedure Act:

*“Upon perusal of the record and evidence led before the Magistrate, it appeared that, without answering serious questions of law and fact raised by the accused in his frustrated appeal, Court should not proceed to sentence the Accused. Accordingly, Court decided to exercise revisional jurisdiction of the High Court under section 260 of the Criminal Procedure Act.”*

19. If the High Court after perusing the court record is of the view that there are serious question of law and fact that needs to be addressed which affect the conviction entered the court may invite the parties to make submissions. Upon hearing both parties if the court is satisfied that the conviction is erroneous then under section 260 of the Criminal Procedure Act the High Court shall exercise its revisional jurisdiction.



20. Section 260 of the Criminal Procedure Act states:

*“(1) The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to –*

*(a) The correctness, legality or propriety of any finding, sentence or order recorded or passed; and*

*(b) The regularity of any proceedings of any Magistrates Court.*

*(2) The High Court shall take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken.”*

21. In *State v. Lalta Prasad*, miscellaneous action no. HAM 0034 of 2004S, (24 June, 2004) Shameem J. stated:

*“...State counsel submitted that the revisional jurisdiction of the court could not be used on section 222 transfer for sentence. However, this submission flies in the face of the provisions of section 325 (1). Further, if he is right, the consequence would be that the High Court would be forced to sentence on erroneous convictions. I do not accept that this is the position. The logical meaning of section 325 (1) is that the High Court may revise proceedings which have been brought to its attention anyway.”*

22. Mr. Singh the learned state counsel in his response urges this court to consider the facts of the case and undertake a balancing exercise whether the prosecution has proved the two charges of sexual offence against the accused beyond reasonable doubt. Counsel further submits that just because the election was not put to the accused did not mean that the entire trial in respect of both the counts were a nullity. The important consideration was whether the accused was prejudiced as a result of the failure to put the election to the accused which was a procedural oversight.

23. This court notes that since the appellant was charged under section 210 of the Crimes Act he was alleged to have committed an indictable offence which was triable summarily. Section 4 (1) (b) of the Criminal Procedure Act states:

*“(b) any indictable offence triable summarily under the Crimes Act shall be tried by the High Court or a Magistrate’s Court at the election of the accused person...”*

24. “Indictable offence triable summarily” means any offence stated in the Crimes Act 2009 or any other law prescribing offences to be an indictable offence triable summarily, and which shall be triable – (a) in the High Court in accordance with the provisions of this Act; or (b) at the election of the accused person, in a Magistrate Court in accordance with the provisions of this Act (see section 2 of the Criminal Procedure Act 2009).

25. Indictable offences are tried in the High Court, however, indictable offences triable summarily, shall be tried by the High Court or Magistrate Court at the election of the accused person (section 4 (1) (b) of the Criminal Procedure Act). Such cases should be transferred to the High Court only if the accused has indicated to the Magistrate’s Court that he or she wishes to be tried in the High Court (section 35(2)(b)(ii) of the Criminal Procedure Act 2009).

26. A similar situation arose in *Vereniki Batikalou v The State, criminal appeal no. AAU 0031 of 2011 (2/01/2015)*. The appellant was not given the statutory option laid down by law to choose the court to stand trial. The appellant was convicted for the offence of robbery contrary to section 310 (1) (a) (i) of the Crimes Act which was an indictable offence triable summarily. The Court of Appeal whilst quashing the conviction and setting aside the sentence made the following pertinent observations at paragraph 30:

*“It is not disputed that the appellant was deprived of a statutory requirement. The appellant possessed a legal right to choose to be tried either in the Magistrate’s Court or the High Court, a right given by law. Can this right arbitrarily be taken away? The intention of the relevant sections in the Criminal Procedure Decree 2009 is clear and unambiguous. And when the law is clear and unambiguous as this, it is not the role of the judge to make or even modify the law but rather to apply it as it is.*

27. The accused was represented by counsel at the time the plea was taken, and there was no issue taken by defence in respect of the right of election not being put to the accused as required by law. There is also no evidence of any prejudice caused to the accused during the entire trial as a result of the election not being put to the accused. However, this court is bound by the decision of the Court of Appeal in *Vereniki’s* case.
28. The copy record does not show that the accused was given his right of election that is whether he wanted a Magistrate’s Court trial or a High Court trial. The right of election imposed by section 4(1) (b) of the Criminal Procedure Act is mandatory. The oversight or omission in putting the right of election to the appellant before the Magistrate’s Court trial is fatal to the conviction in respect of the two counts of sexual assault only.
29. A mandatory requirement of law had not been put to the appellant. A right that accrued to the appellant cannot be arbitrarily taken away under any circumstances. The learned Magistrate erred when he failed to put the mandatory election to the accused before the trial began since the accused was charged with an indictable offence triable summarily.
30. The error by the Magistrate’s Court is fatal to the conviction resulting in a trial which was a nullity. In the interest of justice a retrial is the only option available for this court to order in respect of the two counts of sexual offences only.

31. In respect of the other counts namely 3 counts of indecently insulting or annoying any person and 9 counts of common assault for which the accused stands convicted this court is satisfied after perusing the copy record and considering the circumstances of the offending there are no serious questions of law or fact which would require this court to revise the decision of the learned Magistrate in respect of the above mentioned 12 counts.
32. The convictions entered are not erroneous and this court can now proceed to sentence the accused for 3 counts of indecently insulting or annoying any person and 9 counts of common assault for which the accused stands convicted.
33. The maximum penalty for the offence of indecently insulting or annoying any person and common assault are 1 year imprisonment respectively.
34. There is no established tariff for the offences of indecently insulting or annoying any person and common assault. This is so in my judgment considering the differing circumstances in which such offences can be committed from less serious to more serious. The sentence will be at the discretion of the sentencing court.

#### **MITIGATION**

35. The learned counsel for the accused presented the following personal details and mitigation on behalf of the accused.
  - (a) The accused was a first offender;
  - (b) He is 24 years of age;
  - (c) Is single lives with his parents;
  - (d) Is currently working as a Priest at Sunni Islamic Association Mosque;
  - (e) Accused fully co-operated with the police;

- (f) As a Priest he assists anyone who requires his help, also assisted in raising funds for poor school children by providing them books, fees for school and building of Mosques;
  - (g) Accused was a person of good character before these charges were laid;
  - (h) The age of the offences or any post charge delay.
36. Counsel seeks a suspended sentence, relies on 2 characters references in support and prays that this court affords leniency to the accused in sentencing.

### **AGGRAVATING FACTORS**

#### Breach of Trust

37. The accused was a spiritual teacher/priest who was teaching the victims about Islam and Quran and also was a live-in mentor who stayed with the victims at the hostel. The victims were fully dependent on the accused for support and guidance.
38. The accused grossly breached the trust bestowed on him by the parents and the victims by his actions.

#### Vulnerable victims

39. All the victims were juveniles away from their parents and families who had joined the "Madrassa" for the purpose of learning about their religion. They were helpless and vulnerable. The actions of the accused instilled fear in them and also undermined their self-esteem.

### Victim Impact Statements

40. Four of the victims who have submitted their victim impact statements have expressed a sense of disbelief and hopelessness from their experience. The statements filed suggest an emotional and psychological impact the actions of the accused had on some of the victims.

### Harm and Trauma

41. The accused was not an ordinary teacher but a spiritual teacher/priest who commanded the respect of all the victims and parents alike. The action of the accused has not only demonstrated a disregard to human values, dignity, esteem and self-respect but has gone beyond the limits of society's tolerance, religious and traditional rules that denounces and forbids harm and trauma inflicted by the accused on the innocent victims who were not able to stand up against the unwelcome, ruthless behaviour of the accused.

### Planning

42. There is evidence of planning and premeditation by the accused of the manner in which he committed the offences.
43. In sentencing the accused this court has to take into account the individual counts and the number of victims since each count is separate from the other in terms of the nature of the offending and its circumstances. As per the noting of the learned Magistrate (at page 71 of the copy record) the accused was seen to be making faces and smiling at one of the victim's "MA" when this victim was giving evidence.
44. The summary of the amended charges for which the accused has been convicted of are as follows:

(a) COUNTS FOUR AND FIVE

Count Four - indecently insulting or annoying any person

Count Five - common assault

Victim: 15 years of age

(b) COUNTS EIGHT AND NINE

Count Eight- indecently insulting or annoying any person

Count Nine - common Assault

Victim: 16 years of age

(c) COUNT TEN

Indecently insulting or annoying any person

Victim: 14 years of age

(d) COUNT TWELVE

Common Assault

Victim: 13 years of age

(e) COUNT THIRTEEN

Common Assault

Victim: 13 years of age

(f) COUNT FIFTEEN

Common Assault

Victim: 10 years of age, Class 5 student

(g) COUNT SIXTEEN

Common Assault

Victim: 17 years of age

- (h) COUNT SEVENTEEN  
Common Assault  
Victim: 15 years of age
- (i) COUNT NINETEEN  
Common Assault  
Victim: 12 years of age
- (j) COUNT TWENTY  
Common Assault  
Victim: 16 years of age

45. Since the maximum penalty for both offences are 1 year imprisonment respectively the sentence structure for the offences are the same as follows:
46. Considering the objective seriousness of the offences committed this court takes a starting point of 3 months imprisonment for each of the offences, for the aggravating factors an increase of 5 months is allowed. The interim sentence is 8 months imprisonment, for the mitigating factors a reduction is allowed of 2 months. The interim sentence is now 6 months imprisonment.
47. There are 9 counts of common assault and 3 counts of indecently insulting or annoying any person.

#### **CONCURRENT OR CONSECUTIVE SENTENCE**

48. This court has considered an interim term of 6 months imprisonment for each count of indecently insulting or annoying any person and common assault.
49. The facts of the case show a dreadful and/or a sorry state of affairs where a spiritual teacher/priest carried out unlawful activities on his students



without any thought about the effect on them. There are multiple victims all of them under the age of 18 years.

50. Bearing in mind the seriousness of the offending over a short period of time involving innocent and vulnerable victims who had joined the "Madrasa" to learn about their religion a consecutive sentence is justified to show general and special deterrence that such actions will never be tolerated by the court and the community .

#### SENTENCE

- (1) Count four - indecently insulting or annoying any person  
- 6 months imprisonment to be served consecutively with counts 8 and 10. Counts 8 and 10 served consecutively with each other as well.
- (2) Count eight - indecently insulting or annoying any person.
- (3) Count ten - indecently insulting or annoying any person.

Total sentence for the offence of indecently insulting or annoying any person the accused is sentenced to 1½ years imprisonment (18 months).

51. For the offences of Common Assault:

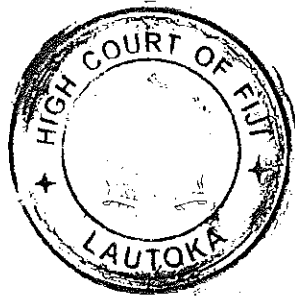
Count five (victim 15 years) is made consecutive to count 12 (victim 13 years), Count 13 (victim 13 years), Count 15 (victim 10 years), Count 17 (victim 15 years) and count 19 (victim 12 years) and these counts are consecutive to each other. The other remaining 3 counts are to be served concurrently with each other and the sentence herein.


Total sentence for the offences of common assault is 36 months imprisonment.

52. The interim consecutive sentences for 3 counts of indecently insulting or annoying any person and 9 counts of common assault is 54 months (4 ½ years imprisonment). The accused was in remand for 14 months and 22 days. In exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act I further reduce the interim sentence by 1 year 3 months as a period of imprisonment already served.
53. The final sentence of imprisonment is now 39 months which is 3 years and 3 months for all the 12 counts for which the accused stands convicted. The above sentence conforms to the principle of totality of sentence which does not have a crushing effect on the accused.
54. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the number of victims who were students of the accused under the age of 18 years of age compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
55. Considering the fact that there is a need for rehabilitation as opposed to retribution and the age of the offender this court declines to impose a non-parole period.
56. Mr. Abraan you have committed offences against your students who trusted and respected you. This court is duty bound to ensure that children are protected from any form of physical, sexual and mental abuse. An imprisonment term is inevitable you have not only brought shame to the teaching profession but discomfort and agony to the victims and their families. Since the final sentence is over three years in law this sentence cannot be suspended.

## **ORDERS**

1. The convictions in respect of count one and count two for the offences of sexual assault are quashed and set aside.
2. The offences mentioned in (1) above are remitted to the Magistrate's Court at Lautoka to be tried "*de novo*" before another Magistrate. This matter is adjourned to 24 October, 2018 for mention at Magistrate's Court, Lautoka.
3. The accused is sentenced to 3 years and 3 months imprisonment from today for 3 counts of indecently insulting or annoying any person and 9 counts of common assault without a non-parole period.
4. 30 days to appeal to the Court of Appeal.



  
**Sunil Sharma**  
Judge

**At Lautoka**  
**17 October, 2018**

### **Solicitors**

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

**Messrs Iqbal Khan & Associates for the Accused.**