IN THE HIGH COUT OF FIJI
AT LABASA
APPELLATE JURSDICTION

Criminal Appeal No. HAA 17 of 2018

JASON BROWN

v

STATE

Counsels: Mr. A. Kohli for the Appellant
Mrs. D. Kumar for the State

Date of Hearing: 16 August 2018
Date of Judgment: 22 August 2018

JUDGMENT

1. On the 6th of December 2017 at the Magistrates' Court at Savusavu, the appellant was convicted of one count of sexual assault and sentenced on the 6th June 2018 to two year's imprisonment with a minimum to serve of 12 months before being eligible for parole.

2. The brief facts of the case are that the appellant (accused) is the step father of a very young girl around 5 or 6 years old (the record gives no clue as to her actual age). The girl told the Court that he came to her bed one morning at about 4 to 5am. He was drunk, he undressed he rubbed her thighs and licked her

breasts. As soon as he left her she went and told her mother and a report was made to the Police.

3. The accused is appealing his conviction on the grounds that:

- He was not given an explanation as to his rights in defence in accordance with s.179 of the Criminal Procedure Act 2009
- He was not given the election to have this indictable offence tried in the High Court
- The learned Magistrate failed to take the evidence of the accused into consideration.

4. It is clear from the very unclear record of proceedings below that at the end of the prosecution case, the accused's rights in defence were not put to him in accordance with s.179 of the Criminal Procedure Code 2009. Those rights as stipulated in the section are the rights to give evidence and be cross-examined or to remain silent and in either case to call witnesses.

5. Failure to adhere to the provisions of that section has been dealt with previously by the Court of Appeal in **Ovini Tuitoga** [2007] AAU63/06 (25 June 2007) (Ward P. Ellis J.A. and Penlington JA) in discussing the same section (s.211) in the then Criminal Procedure Code. The Court held:

"we are of the opinion that a failure to comply with s.211 does not of itself necessarily invalidate the trial. That would be so, however if the trial was otherwise unsatisfactory and that would result in the quashing of the conviction"

and later....." *While there was an error of law on the part of the Magistrate there has not been a substantial miscarriage of justice"*

6. In following that case therefore this Court would say that it would be prudent for Magistrates to follow the directions of s. 179 of the Criminal Procedure Act, but a failure to do so is not in itself fatal to any conviction. Failure to comply however can be a factor to consider when other matters might suggest that there has been a miscarriage of justice.

7. This ground fails.

8. Failure to afford the accused the right of election however has been viewed differently in earlier cases. In the Court of Appeal case of ***Batikalou*** AAU31.2011(2 January 2015), it was decided following cases from the English Court of Appeal, that the terms of the law on election of jurisdiction are clear and unambiguous and it is the role of the Judge to apply it as it is. Failure to allow an accused to elect venue makes the entire proceedings null and void.

9. Similar findings have been made in the High Court be Temo J. in ***Koroi*** [2013]FJHC 306 and by Rajasinghe J. in ***Rasaro*** [2016]FJHC 765.

10. This ground of appeal succeeds.

11. The third ground is that the Magistrate failed to consider the evidence of the accused.

12. At trial the accused gave evidence of having been out late that night drinking grog, that he had come home, had a shower, and gone to sleep on a mattress in the sitting room with the children who sleep with him every night. His wife came into the room a little later and was angry at him, saying you'll be sorry, and

then left. Twenty minutes later she returned with the accusation of having abused their daughter.

13. In her detailed written judgment the learned Magistrate analyses the evidence of all the prosecution witnesses and while rehearsing the evidence of the accused, she fails to state that she has taken it into account in her deliberations.

14. An accused has a right for his evidence to be taken into account. To know that the tribunal has considered it and given it the weight it deserves.

15. A very busy Magistrate need do no more but to say that he or she has considered the evidence of the accused but rejected it. Every accused who gives evidence deserves to know that the Court has turned its mind to what he or she says.

16. Unfortunately this was not done in this case and as a result justice has not been seen to have been done.

17. This ground too succeeds.

Result

18. With two out of the three grounds succeeding, the appeal is allowed.

19. The conviction is quashed and the sentence set aside.

P. K. Madigan

Judge

At Labasa

22 August 2018