IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 88 OF 2017

BETWEEN : **MUNENDRA**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel	:	Mr. N. Padarath for the Appellant.
	:	Ms. R. Uce for the Respondent.
Date of Hearing	:	12 February, 2018
Date of Judgment	:	16 February, 2018

JUDGMENT

Background Information

1. The Appellant was charged in the Magistrate's Court at Tavua for a count of indecently annoying a person contrary to section 213 (1) (a) of the Crimes Act. It was alleged that the Appellant on the 24th day of October, 2012 at Maqere, Tavua with intent to indecently annoy the modesty of Roshni Mudaliar made a gesture by holding his private part intending that such gesture be seen by the said Roshni Mudaliar.

2. The Appellant had pleaded not guilty but after a trial, on 15th May, 2017 the Appellant was found guilty and convicted as charged. After hearing mitigation, on 17th July, 2017 the Appellant was sentenced to 50 hours of community work.

3. The Appellant being dissatisfied with the conviction filed a timely appeal upon the following grounds:

"(1) The Learned Trial Magistrate erred in law in his application and interpretation of proof beyond reasonable doubt.

(2) The Learned Trial Magistrate erred in law and in fact at paragraph 19 of the judgment when it was held that the alibi evidence was unbelievable wherein:

(a) The Learned Trial Magistrate did not give adequate reasons to not believe the defence witness given the evidence led.

(b) The Learned Trial Magistrate failed to define and explain the term significant event.

(c) The Learned Trial Magistrate failed to consider the evidence of the alibi evidence despite being satisfied that the evidence was not discredited and took an opinion which was not led in evidence by the prosecution and defence."

4. Both counsel filed written submissions and made oral submissions during the hearing for which the court is grateful.

Ground One

"The Learned Trial Magistrate erred in law in his application and interpretation of proof beyond reasonable doubt.

5. The learned counsel for the Appellant submits that the learned Magistrate did consider the standard of proof stated in the case of *Woolmington vs. DPP (1935) AC 462* of proof beyond reasonable doubt but erred in its application and interpretation.

6. At paragraph 7 and 8 of the judgment the learned Magistrate stated the following:

> *"[7]. Before analyzing the evidence I bear in mind that prosecution has the burden of proving the accused guilt beyond a reasonable doubt. This burden never shifts to the accused and remains with the prosecution throughout the trial (see: Woolmington v DPP (1935) AC 462).*
>
> *[8]. Further it is well established principle that an accused is always presumed innocent until proven guilty. Prosecution must prove all the elements of the offence beyond a reasonable doubt before an accused is found guilty for any criminal offence. (see: sections 57 and 58 of the Crimes [Act], 2009)."*

7. In this case the complainant gave evidence for the prosecution whilst the accused gave evidence and called two other witnesses. From the judgment of the Magistrate's Court it is obvious that the learned Magistrate had accepted the evidence of the complainant as credible and reliable over that of the Appellant and his witnesses.

8. At paragraph 13 of the judgment the learned Magistrate had accepted the evidence of the complainant as not being discredited and consistent. At paragraph 17 the learned Magistrate states the defence case with his reasons at paragraphs 18 and 19 as to why he prefers the prosecution witness over the defence witnesses.

9. In view of the above the learned Magistrate came to the conclusion that it was the accused who had committed the offence as charged and that all the elements of the offence had been proven beyond reasonable doubt.

10. I am satisfied that the learned Magistrate did not err and had correctly applied and interpreted the standard of proof in this case.

11. This ground of appeal is dismissed due to lack of merits.

Ground Two

The Learned Trial Magistrate erred in law and in fact at paragraph 19 of the judgment when it was held that the alibi evidence was unbelievable wherein:

(a) The Learned Trial Magistrate did not give adequate reasons to not believe the defence witness given the evidence led.

(b) The Learned Trial Magistrate failed to define and explain the term significant event.

(c) The Learned Trial Magistrate failed to consider the evidence of the alibi evidence despite being satisfied that the evidence was not discredited and took an opinion which was not led in evidence by the prosecution and defence."

12. The Appellant submits that the learned Magistrate erred when he did not believe the alibi evidence at paragraph 19 of the judgment without giving adequate reasons.

13. At paragraph 19 the learned Magistrate stated:

"The defence alibi, I find unbelievable as there is no significant event established in the defence evidence to trigger the memories of DW1, DW2, and DW3 in recalling the incident on 24th October, 2012."

14. The learned Magistrate at paragraph 22 of the judgment explains the reasons of his conclusion in the following words:

"As I see it on the evidence, DW1's going to town on the said date at 7.30am and DW3 coming to accused shop on the said date at 8am is not a significant event to prompt their memory as to the alleged date of the incident. The going to town of DW1 and coming to accused shop by

DW3 cannot be a random practice hence there's a high possibility that what they've stating occurred on a different date and not on the alleged date of the incident."

15. The Appellant also argues that the learned Magistrate failed to define and explain the term "significant event" as mentioned in paragraph 19 of the judgment.

16. This argument in my view is misconceived since paragraph 19 should not be read in isolation but in the context of the entire case in particular paragraphs 20 and 21 of the judgment as follows:

> *"[20] DW1 and DW2 both confirmed that DW2 was looking after the shop at while DW1 left at 7.30am to Ba town to do their shopping for their shop and carry out other errands. In my view this going to town by DW1 to do shopping for their shop and attend to other errand is not significant due to the high possibility that he was doing these on many occasions due to the existence of their shop business. If accused had been doing these on many occasions then obviously DW2 would have been looking after the shop on many occasions too and not necessarily only on 24th October 2012, whilst DW1 was away in town doing shopping for their shop.*
>
> *[21] Likewise for DW3 he stated that he goes to accused shop. Hence there is a high possibility that he had gone to accused shop on many other occasions and not only on 24th October 2012".*

17. At paragraph 19 of the judgment the learned Magistrate had stated that there was no significant event established in the defence evidence to trigger the memories of the defence witnesses in recalling the date of the incident. This was open to the learned Magistrate on the evidence adduced accordingly there was no need for the learned Magistrate to define the term "significant event" in view of the explanations given at paragraphs 20 and 21 of the judgment.

18. The fact that the defence witnesses told the court that they recalled the 24th day of October, 2012 and maintained their version of events did not mean that when assessing the evidence the learned Magistrate was satisfied of its truthfulness. According to the learned Magistrate, there was no evidence before the court that would have triggered the memories of all the defence witnesses in recalling the date of the incident.

19. The learned Magistrate did not fall in error when he made a finding of credibility which he was entitled to do since he was able to see the witnesses give evidence and note their demeanour in court. At paragraphs 23 and 24 of the judgment the learned Magistrate concludes that the alibi evidence was weak and unreliable based on his assessment of evidence in comparison to the evidence of the complainant whom the learned Magistrate found to be credible, reliable and worthy of belief.

20. In *Ajendra Kumar Singh vs. R (1980) 26 FLR 1* the Court of Appeal said at page 9:

> *"...It is also set out in [Director of Public Prosecutions- v- Ping Lin [1975] 3 All ER 175] as has frequently been said that an appellate Court should not disturb a judge's findings unless it is satisfied that a completely wrong assessment of the evidence has been made, or the correct principles have not been applied".*

21. After perusing the evidence contained in the copy record I am satisfied that the learned Magistrate had correctly assessed the evidence for the prosecution and the defence in deciding the credibility of the witnesses. There is no compelling reason why this court should interfere with the fact finder's decision in this regard.

22. Although the defence counsel in his cross examination had put to the complainant that the accused was not at his residence (at page 35 of the copy record) which was denied, however, when one looks at the

line of cross examination of the complainant in its entirety it gives a different picture.

23. In this case, the Appellant had relied on the defence of alibi. When such a defence is raised it is incumbent upon the prosecution to disprove the defence of alibi raised. The Court of Appeal in *Laisenia Bese and Are Amae vs. The State AAU 0067 of 2011* confirmed the above principle of law at paragraphs 9 and 10 as follows:

> *"[9] ...In Rex v Anderson [1991] Crim. L.R. 361 the Court of Appeal stated that (pg. 362) "It was certainly better if a judge when dealing with an alibi defence repeated that the burden was on the Crown to disprove it..."*
>
> *[10] Beldam L.J in Robert David George Haron [1996] 2 Cr App R 451 at 461 held that, "The jury would have understood that they had not only to be sure that the alibi was wrong, they had to be sure that the Crown evidence was right..."*

24. A perusal of the judgment does not show that the learned Magistrate had directed his mind to the above principle of law. In this regard, this court will have to consider whether any substantial miscarriage of justice has actually occurred by the above failure in accordance with section 256 (2) (f) of the Criminal Procedure Act. Section 256 (2) (f) states:

> *"the High Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."*

25. After perusing the evidence contained in the copy record, I am satisfied that no substantial miscarriage of justice has actually occurred as a result of the learned Magistrate's failure.

26. Despite the Appellant and his witnesses maintaining their version of events the learned Magistrate did not believe them. The complainant

in her evidence maintained that it was the Appellant who had made a gesture by holding his private part which was seen by her in broad daylight.

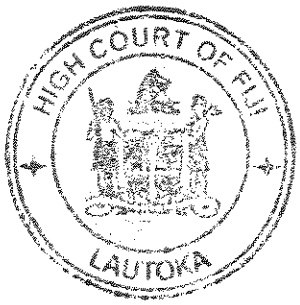
27. There was no chance of any mistaken identification since both the Appellant and the complainant were known to each other and lived on properties opposite each other. The prosecution had disproved the defence of alibi beyond reasonable doubt which is obvious from the evidence adduced at trial. On the evidence the learned Magistrate had correctly found the Appellant guilty and convicted him.

28. This ground of appeal is dismissed due to lack of merits.

ORDERS

1. The appeal against conviction is dismissed.

2. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
16 February, 2018

Solicitors

Messrs Samuel K Ram, Barristers and Solicitors, Ba for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.