

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL APPEAL NO. HAA 001 OF 2020

BETWEEN : SYLVIA KAUR SINGH

AND : STATE

Counsel : Ms I Lutu for the Appellant
Ms W Elo for the Respondent

Date of Hearing : 12 May 2020

Date Judgment : 25 May 2020

JUDGMENT

- [1] Gospel Primary School is a faith based education institution. The appellant was a scripture teacher for Year 2 and Year 3 students at the school. Apart from teaching at the school she was also an active member of the Gospel Church.
- [2] On 19 July 2018, a Year 3 student (the complainant) accused the appellant of smacking him. The appellant admitted smacking the child once to stop him from assaulting another child. Both children were nine years at the time of the incident.
- [3] Following a trial in the Magistrates' Court, the appellant was convicted of assault causing actual bodily harm and sentenced to 9 months' imprisonment suspended for 5 years.
- [4] This is an appeal against both conviction and sentence. The grounds of appeal in summary are:

1. The learned trial magistrate erred in law and fact in holding that the prosecution had proved the charge beyond reasonable doubt.
2. The learned trial magistrate erred in law and fact in holding that the defence had failed to prove the defence of self-defence.
3. The learned trial magistrate failed to evaluate all the evidence when considering the defence of self defence.
4. The learned trial magistrate erred in principle to record conviction.
5. The learned trial magistrate did not take into account all the relevant considerations in recording conviction.
6. The sentence is harsh and excessive.

Evidence led at trial

- [5] At trial, the prosecution relied solely upon the evidence of the complainant. The defence case was based upon the evidence of the appellant, the school head teacher, the school counsellor and another child who was allegedly assaulted by the complainant. The medical report of the complainant and the record of interview of the appellant were admitted in evidence by the consent of both parties.
- [6] The complainant's evidence was that he was "playing rough" with his classmate, Suliano inside the classroom in the afternoon of 19 July 2018 when the appellant came and hit him several times on the face and back. After hitting him she grabbed his hand and told him that she was taking him to the head teacher so that he could be sent home. The complainant shoved the appellant's hand and told her to shut up and that he was not going home.
- [7] The complainant was medically examined at around 8.30pm the same day. The examining doctor noted a slight swelling on the right side of the complainant's face and that the complainant complained of pain on palpation of the face and upper back. The doctor also noted the injuries were consistent with blunt trauma like slap or punch.
- [8] At trial, the appellant admitted hitting the complainant. She claimed she acted in self defence of Suliano who was being bullied by the complainant. Her version was that she intervened when she saw the complainant involved in a scuffle with Suliano inside the

classroom. After separating the two boys she turned her back when she heard Suliano cry out in distress. When she turned to face the boys she saw the complainant was hitting Suliano in the chest.

- [9] The appellant approached the complainant and slapped him once to stop him from assaulting Suliano. The complainant reacted angrily at the appellant and pushed her away and told her to shut up and to get out of the classroom. The appellant grabbed the complainant's hand to take him to the head teacher's office but the complainant resisted and pushed her away. She then left the classroom to report the incident to the head teacher.
- [10] The appellant's evidence was consistent with her statement to police made under caution. Her version was supported by Suliano who was called by the defence to give evidence. Suliano was of the same age as the complainant. Suliano's evidence was that the complainant hit him three times when the appellant intervened and slapped the complainant. Suliano said that the complainant retaliated and slapped the appellant and pushed her and told her to shut up. Suliano said he did not play rugby that afternoon because he had chest pain.
- [11] The third witness for the defence was Mr Tuisau. He was the school counsellor. Mr Tuisau's evidence was that the complainant had behavioural issues and that he had counselled him on numerous occasions. He said that on the day of the alleged incident the complainant participated in a rugby training which was supervised by him. He said the training involved body contact and that he did not notice any injuries on the complainant either before or after the training.
- [12] The fourth witness for the defence was the head teacher, Mr Kelemedi. Mr Kelemedi's evidence was that there were several reports of bullying made against the complainant by other students and that he had spoken to the complainant's father about the complaints. He said that when the appellant reported the alleged incident to him, he accompanied her to the classroom and brought the complainant to his office. He said that the complainant was angry, disappointed and crying. He gave him lollies to calm him down so that he

could ascertain his side of the story. Mr Kelemedi said that the complainant was reluctant to talk to him.

Self Defence and Standard and Onus of Proof

[13] Self defence is a complete defence. Self defence exonerates a person from any criminal liability. This position is based on the clear wording of section 42 (1) of the Crimes Act 2009, which states:

A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence.

[14] Subsection (2) (a) defines self defence as follows:

A person carries out conduct in self defence if and only if he or she believes the conduct is necessary to defend himself or herself or another person and the conduct is a reasonable response in the circumstances as he or she perceives them.

[15] In the context of the present case, the issues were as follows:

- Did the appellant believe the assault on the complainant was necessary to defend another child under her supervision? And
- Was the assault a reasonable response in the circumstances as she perceived them?

[16] The issue of reasonableness must be determined by the appellant's subjective perception of the threat she faced at a particular point in time. As the Supreme Court said in *State v Li Jun* [2008] FJSC 18; CAV0017.2007S (13 October 2008) at [46]:

It is important to appreciate that the test stated in *Zecevic* is not wholly objective. It is the belief of the accused, based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused's position would have believed...It follows that where self-defence is an issue, account must be

taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his or her response to the threat....

- [17] In the present case, the appellant gave evidence at the trial as to her subjective belief just before and immediately after she saw the complainant hit Suliano in the chest, causing Suliano to cry out in distress. The appellant said in her evidence:

When I turn back first thing I when I saw them the children I mean Mitieli and Suliano fighting. I first step I separated them. I said no no fighting. And then I turn back again. When I turn back again I heard Suliano he cried loudly and then when I turn I saw Mitieli was hitting Suliano on his chest. And I really got scared because I tried but he Mitieli he pushed me.

- [18] The appellant further said:

In defence of saving Suliano I had to smack slap Mitieli to calm that situation down.

- [19] In his judgment the learned trial magistrate considered self defence by reference to section 42 of the Crimes Act 2009 and the English common law. He then identified the issue to be considered at paragraph 47 as follows:

There is no dispute that the accused is entitled in law to use force in self-defence. However, the defence of self-defence has one qualification. That is the force used must be reasonable to protect himself or another. In this case accused states that she was trying to save Suliano. The question whether her actions in assaulting Mitieli can be considered as using reasonable force to save Suliano". (underlining mine)

- [20] After framing the issue using the objective test, the learned magistrate gave the following reasons at paragraphs 54-55 of the judgment to reject the appellant's defence:

Accused stated that Mijieli pushed her away when she tried to pull his hand to take him to head teacher's office. But that is after her giving a slap to him. As per her evidence she was worried about the safety of Suliano. She could have pulled Suliano's hand and taken him out of the class in order to protect him, or she could have stay in between the two children to protect Suliano from any attack from Mijieli. However, she resort to hitting Mijieli on his face thereby causing bodily harm to him. I am unable to accept this conduct of the accused as "reasonable" to protect Suliano. Accused clearly acted recklessly thereby caused bodily harm to Mijieli.

I refuse to accept that she did what was reasonable necessary to save Suliano. By assaulting Mijieli accused exceeded her right of self-defence and not entitle to raise it as a valid defence. Thus I am unable to conclude that accused created any reasonable doubt against the strong evidence of the prosecution by advancing her defence of self defence. I refuse to believe her evidence. (underlining mine)

- [21] It is clear from the judgment that the learned trial magistrate applied the wrong test for reasonableness when considering self defence. The issue was not whether the appellant's conduct was reasonable. The issue was whether the belief of the appellant that the use of force was necessary, based on the circumstances as she perceived them to be, was reasonable. An analysis of the subjective element of the test for self defence is lacking in the judgment.
- [22] Further, the learned trial magistrate's direction that the appellant was unable to create a reasonable doubt when advancing self defence as her defence was an erroneous qualification of the burden of proof. The appellant was not required to "create" anything. Self defence exonerates an accused when the prosecution fails to establish beyond reasonable doubt that the belief of the accused that the use of force was necessary, based on the circumstances as she perceived them to be, was reasonable.
- [23] In considering the issue of self defence, the learned trial magistrate should have considered the whole evidence, instead of approaching the issue on the credibility of the

complainant and the appellant. While the complainant may have been a truthful witness, it was probable that the appellant was also telling the truth about her belief that it was necessary to use physical force to stop the complainant from hurting Suliano who was also a child under her care and responsibility as a teacher. Her version was supported by Suliano's evidence. For these reasons, I am not satisfied that had the error in question not occurred, the appellant would still have been convicted.

[24] The error made by the learned trial magistrate in relation to the issue of self defence leads me to conclude that an injustice had occurred and the appeal against conviction must be allowed. Given the seriousness of the allegation by a child against a teacher and the strength of the prosecution case, it is in the interest of justice to order a retrial.

[25] Since the appeal against conviction is allowed, there is no need to deal with the appeal against sentence.

The orders of the Court are:

[26] Conviction and sentence are set aside.

[27] The case is remitted to the Magistrates' Court for a retrial before another magistrate.

[28] The appellant is to appear before the Chief Magistrate on 8 June 2020 9.30am for a new magistrate to be assigned to hear the retrial.



A handwritten signature in black ink, appearing to be 'D. Goundar'.

Hon. Mr Justice Daniel Goundar

Solicitors: Shelvin Singh Lawyers for the Appellant
Office of the Director of Public Prosecutions for the Respondent