

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION**

Criminal Case No: 139 - 2015

STATE

-v-

ARSEN KUMAR NAND

For Prosecution : Inspector Lenaitasi S. [Police Prosecution]
Accused : Ms. Tavaiqia L. [Legal Aid Commission]
Date of Trial : 12th August 2019
Date of Judgment : 15th October 2019

JUDGMENT

BACKGROUND

1. The Defendant denies the following charge preferred by the prosecution :

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 of the **Crimes Act 2009**.

Particulars of Offence

ARSEN KUMAR NAND between the 9th day of May, 2015 and 10th day of May, 2015 at Tavua in the Western Division unlawfully and indecently assaulted the female victim.

2. Details or information that may lead an oblivious reader to identify the defendant or the alleged victim, must be redacted before any publication is to be made of this judgment.
3. The purpose of that exercise is to protect the identities of the parties, that the alleged victim was a juvenile at the material time, that an allegation of a sexual nature is alleged, that the parties are related and to encourage genuine victims to come forward knowing that their identities will not be publicised.

4. The defendant first appeared on the 8th of June 2015 and was released on bail. He was given time to apply to the Legal Aid Commission for legal representation.
5. Having secured legal representation, the defendant pleaded not guilty to the charge on the 24th of August 2015.
6. A trial was held on the 4th of September 2017 where the prosecution adduced their evidence and closed their case.
7. The matter was adjourned for a No Case To Answer ruling but that did not eventuate before my brother Magistrate who presided over the trial left the judiciary.
8. A retrial was ordered before me.
9. I received the evidence on the 12th of August 2019.
10. As usual, the prosecution adduced their evidence first.

PW1

11. Prosecution witness 1 [PW1] is the alleged female victim who I shall refer to as PW1.
12. She was 14 years old at the material time.
13. The defendant is her uncle.
14. She was staying with the defendant and her aunty [or the defendant's wife] in 2015.
15. On the 9th of May 2015 at about 11.30pm, PW1 was sleeping beside her aunty or the defendant's wife in one of the rooms. They were sleeping on the bed.
16. The defendant normally sleeps on the floor with others.
17. PW1 describes that her uncle came and started touching her. She did not like it.
18. She knew it was her uncle as the solar light was on and the light was about 2 meters away.
19. She said that her uncle touched her on her forearm, bicep and her private area which she showed in court which was her chest.
20. She felt bad and told the uncle to go away.

21. He first touched her hand and then her chest.
22. She told her aunty what happened in the morning.
23. PW1 was not having a sexual relationship with the defendant.
24. In cross examination, PW1 accepts that she was sleeping next to her sister and not her aunty. She accepts that she made a mistake after reading her police statement in court or refreshing her memory.
25. PW1 also accepts she was sleeping next to the wall.
26. PW1 accepts that the defendant would have to go past her sister and her aunty who was sleeping on the floor in-order to reach PW1.
27. The bed they were sleeping on was a double bed.
28. PW1 denied fabricating the allegation that the defendant touched her in-order that they get money from the defendant.
29. That was the case for the prosecution.
30. The court found that there was a case to answer.
31. Having explained his options to him, the defendant indicated that he wished to give evidence. He had no other witness.

DW1

32. Defence witness 1 [DW1] is the defendant himself Mr. Arsen Kumar Nand.
33. He is 41 years old.
34. PW1 is his niece.
35. The defendant describes that there were 2 single beds inside the room and the beds were set close to each other in an ' L ' shape and the beds were placed parallel to the wall of the house.

36. The house has a width of about 7 meters and the cooking, dining and sleeping will be inside the house. The toilet and bathroom is outside the house.
37. The defendant remembers the day PW1 visited in 2015.
38. The defendant explains that he was working at the market until 5pm and at 7.30pm he mixed and drank grog.
39. He went to sleep at 2am as he was 'doped' by then. He woke up at 6am and went to buy grog again.
40. The defendant describes that in one bed, his brother in law and son slept on.
41. In the other bed, PW1 and her sister slept on.
42. The defendant, his wife and daughter slept on the floor.
43. Nothing happened when they went to sleep.
44. He was informed by PW1, PW1's father and mother that the defendant was touching PW1 about 4 times in the night.
45. The defendant said that he felt very bad.
46. The defendant explains that PW1's father had asked for \$500 from him in-order to start a poultry farm. PW1's father had asked the defendant for the money before the incident and also asked after the incident.
47. PW1's father told the defendant that if he paid the money, no report will be made.
48. The defendant said that his wife left him because of the allegation and they are now separated.
49. In cross examination the defendant accepts that PW1 was asleep when the defendant returned from grog.
50. The defendant and PW1's father were drinking grog and they both went to sleep together.
51. The defendant explains that the light that was on was electric powered and not a solar light. The electric light is usually on because the defendant's daughter does not like sleeping in the dark.

52. That was the case for the defence.

ANALYSIS

Burden and Standard of Proof

- 53. I remind myself that the defendant is presumed innocent until proven guilty.
- 54. The prosecution carries the burden of proving his guilt.
- 55. I also remind myself that I must be convinced beyond a reasonable doubt or I must be sure that the defendant committed the offence before I find him guilty.
- 56. The defendant has elected to give evidence. His evidence can be used for him and even against him.
- 57. If for example, I accept the defendant's denial that he did not touch PW1's forearm, bicep or chest, then he is entitled to an acquittal. Even if he did touch PW1 and there was a lawful reason to do so, he is entitled to an acquittal. There are other ways in which the defendant can be exonerated.
- 58. Even if I don't believe the defendant, it does not necessarily mean that he is guilty.

Elements Of the Offence

- 59. The elements of the offence all of which the prosecution must prove beyond a reasonable doubt are:
 - i. **The defendant;**
 - ii. **Unlawfully and indecently**
 - iii. **Assaulted;**
 - iv. **The victim**

60. Unlawful is anything that is without legal justification.
61. An assault is an act which intentionally or recklessly causes someone else to apprehend immediate and unlawful personal violence [Fagan v Metropolitan Police Commissioner [1968] 3 All E.R 442] .
62. What is indecent is relative or depends on factors such as the act itself, the context in which it was done, the relationship of the parties amongst other factors and whether they would lead a right thinking person to conclude that it was indecent.
63. Under the Crimes Act 2009, generally, there is no defence to committing an act of indecency on a girl or child under the age of 16 years.
64. If the girl or child under 16 years is involved and gave consent and that the defendant had reasonable cause to believe and did in fact believe that the person was not a child, then the defendant is not guilty.
65. It is inevitable in many cases that there would be circumstantial evidence.
66. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but that also the facts must negative any other reasonable conclusion that may exonerate the defendant. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [Varasiko Tuwai v.The State Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53.
67. Evidence of recent complaint is not corroboration. It is evidence tending to show consistency and to negative consent. What is recent is relative. Also, the complaint by the alleged victim to another person need not necessarily be detailed or outline every element of the offence Senikarawa v State [2006] FJCA 25; AAU0005.2004S (24 March 2006).

Findings

68. I found the evidence of PW1 or the alleged victim credible.
69. I found her forthright. For instance, when her memory was refreshed in court after she read her police statement again, she openly admitted that she made a mistake about the sleeping arrangement in the house on the night in question.

70. I believe her that the defendant on the night in question, touched her on her forearm, bicep and her chest. Her chest is what she refers to as her private part.
71. I accept her evidence that she felt bad and told the defendant to go away. Although PW1 did not express in her own words [nor do I expect her to do so] that she apprehended immediate unlawful personal violence, I find that to be the case.
72. I accept her evidence that she later told her aunty in the morning. Although the aunty did not give evidence, I find that PW1's evidence that she told her aunty is sufficient for me to believe that she complained about it and which supports PW1's sensitivity at the time that she did not like what the defendant did.
73. I do not find or accept that PW1 is motivated by money to fabricate the allegation that the defendant touched her.
74. I accept and believe the defendant's evidence that he was drinking grog that night with PW1's father and they retired together to the same room to sleep. I accept the defendant's evidence that he was as he puts it, grog doped before going to the room.
75. The evidence given by both PW1 and the defendant, the description of the house and the sleeping arrangement gives me the impression that this was a small or modest house. Several people were sharing or sleeping in close proximity to each other.
76. I accept the evidence of the parties that there was a light on that night [whether it be solar or electric powered] and that is how PW1 is able to identify the defendant as the person touching her.
77. I accept that PW1's description of the defendant touching her and her identification of the defendant is reliable.
78. Although there is circumstantial evidence that the defendant carried great risk if he was caught because there were a lot of people sleeping in the same room, I find that he still touched PW1 on her body as she described.
79. The defendant came over to where PW1 was sleeping. He was aware of what he was doing and with the light on, aware of who he was touching.
80. I do not find that this was accidental or that the defendant was mistaken about what he was doing. He was not doped to the extent that he did not understand what he was doing.

81. I find that what the defendant did, touching PW1 in the way described by PW1 and their relationship would lead a right thinking person to conclude that it was indecent.

CONCLUSION

82. I find all the elements of the allegation proven by the prosecution beyond a reasonable doubt.
83. For the reasons I have outlined above, I find the defendant guilty of the charge of indecent assault contrary to section 212 of the **Crimes Act 2009**.
84. I will take further evidence or information in relation to sentence after this from the parties before sentence is passed.



LISIATE T.V FOTOFILI
Resident Magistrate

At Tavua this 15th day of October, 2019.