

IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION

Criminal Case No: 237 - 2015

STATE

-v-

RAM JATTAN

Before : RM Fotofili L.
For Prosecution : Inspector Lenaitasi S. [Police Prosecution]
Accused : Mr Samy A. and Ms. Tavaiqia L. [Legal Aid Commission]
Date of Trial : 20th August 2019
Date of Judgment : 4th February 2020

JUDGMENT

BACKGROUND

1. The prosecution initially preferred six counts of offences against the defendant. The defendant pleaded not guilty to the six counts on the 14th of June 2016 in the presence of his counsel.
2. On the trial date held on the 20th of August 2019, the prosecution offered no evidence in relation to five of the counts and I have acquitted the defendant accordingly of those five counts pursuant to section 178 of the **Criminal Procedure Act 2009**.
3. The prosecution then amended the remaining count which reflects the following allegation:

Statement of Offence (a)

INDECENT ASSAULT: contrary to section 212 (1) of the Crimes Act 2009

Particulars of Offence (b)

RAM JATTAN on the 12th day of October, 2015 at Dakavono, Vatukoula in the Western Division unlawfully and indecently assaulted the female victim.

4. The defendant maintains his not guilty plea to this remaining amended count.
5. I have generalized some of the information in this judgment intentionally. The evidence will remain largely undiluted.
6. The primary purpose of that exercise is to encourage genuine victims in cases where an allegation of a sexual nature is alleged, to make complaints without worrying about their identities being publicised.
7. On the trial date, the prosecution indicated that they will not rely upon the police caution interview of the defendant. As a result, a *voir dire* hearing was not necessitated to deal with its admissibility.
8. The prosecution relied upon oral evidence. The prosecution called only one witness.
9. I summarise the oral evidence adduced by prosecution below:

PW1

10. Prosecution witness 1 [PW1] is the alleged female victim. She is now 40 years old.
11. I will refer to her as PW1.
12. PW1 is the defendant's daughter in law. She is married to the defendant's son. She got married in July 2015.
13. In 2015 PW1 was residing with the defendant.
14. On the 12th of October 2015 at 3pm, PW1 was at home with the defendant. They were the only ones at home at the time.
15. PW1 had awoken from sleeping and when the defendant questioned her, PW1 told the defendant that she had a headache and her stomach was paining.
16. The defendant started massaging PW1's head and her back.
17. PW1 was wearing a blue top at the time.
18. The defendant then put his inside her top and grabbed her breast and squeezed her breast.

19. PW1 did not ask the defendant for a massage. It was the defendant who came to her.
20. PW1 did not see anything abnormal with the defendant at the time he massaged her.
21. PW1 then ran to her neighbours place as she was frightened. She was also angry.
22. She treated or looked up to the defendant as a father.
23. PW1 rang her husband and told him what happened.
24. In cross examination, PW1 described that the defendant looked much healthier in 2015. He was 'fresh' and does not look like what he does now.
25. The defendant was taking some medication back then but PW1 does not know whether the defendant had high blood pressure. PW1 is not aware of what type of medication the defendant was also taking.
26. The defendant usually had a medical check in hospital once a week.
27. PW1 denied that the defendant confronted her husband about PW1 running away from home.
28. She came to know the defendant in 2015 when she came to reside with the defendant and her husband.
29. PW1's relationship with the defendant was good until what happened on that day.
30. PW1 was looking after the defendant such as by washing the defendant's clothes.
31. The defendant will bathe himself or visit the toilet on his own.
32. PW1's husband will provide the groceries.
33. PW1 denied ill-treating the defendant when they were together.
34. Sometimes the defendant would say that he was not able to see anything.
35. PW1 described that she had body pains after waking up from sleeping.
36. The defendant came to her and sat on a table.

37. PW1 told the defendant that she had a headache and backache.
38. PW1 denied that the defendant was about to fall and denied that the defendant grabbed her during that time.
39. PW1 said that she has never seen the defendant fall.
40. PW1 repeated that the defendant massaged her back, stomach and then he held her breast.
41. She told him that ' you are my father, why are you doing this?'
42. PW1 told the defendant that she will tell on him. In reply, the defendant said 'sorry'.
43. PW1 ran to her neighbour the same day.
44. PW1 reported to police.
45. That was the end of the prosecution's case.
46. I found that there was a case to answer and after having explained the options available to the defendant and giving the defendant time to discuss with his counsel, the defendant opted not to give evidence and did not call any witness.
47. However, the defendant elected to make submissions from the dock.
48. The weight to be attached to his submission would be a matter for the court bearing in mind for example that he was not cross-examined. It is also understandable why the defence would not want him to give evidence as it can be mentally and physically draining in light of his seemingly frail physical condition and age.
49. The defendant in his submission, says that he fell down from the bed. He denies grabbing PW1. He denies doing anything wrong. He cannot remember the details. He is almost 80 years old and has high blood pressure and kidney and lung problems. His eyesight is failing him and he needs to be close to what he is reading, in-order to read. Things are shaky in his perspective.
50. That was the case for the defence.

59. 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.
60. 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.
61. 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.
62. No person in a position of control or trust can rely on the above defence.
63. It is inevitable in many cases that there would be circumstantial evidence.
64. 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 the facts must also 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.

Findings

65. I accept that the defendant is now approximately 80 years old and has health concerns as he raises in his submission during the trial.
66. But that is the limit of my acceptance of the defendant's case.
67. Generally, we have to be sceptical when the prosecution files a charge or makes an allegation.
68. This is a reasonable and logical standard default position as the party that make the claim, generally should carry the burden.
69. The standard of persuasion too is rightly a high one [beyond a reasonable doubt] for instance, bearing in mind the potential consequence for a defendant charged with a serious crime.

70. It is undisputed and well established that the parties are acquainted with each other.
71. I found PW1 the daughter in law of the defendant, to be a credible and reliable witness.
72. Having observed her and listened to her evidence and in light of the evidence and case as a whole, my scepticism is removed.
73. I am convinced that she is telling the truth and is not mistaken.
74. She was forthright and natural in her answers and demeanour.
75. I also did not find any evidence that would persuade me to believe that she would fabricate the allegation against the defendant.
76. I gave the benefit to the defence, that maybe the defendant was affected by some medication or had an onset of blindness or that he was mistaken about what he was doing or that he was falling down as he claimed, that would give him a lawful justification for grabbing or holding PW1's breast.
77. I did not find that be the case.
78. I accept PW1's description that the defendant was normal on that day. The defendant enquired with PW1 and came over to PW1 and massaged her head and back and then put his hand inside her top and grabbed her breast. The defendant even said sorry when PW1 told him that she was going to tell on him.
79. I accept that PW1 was both frightened and angry with the defendant for what he did and she ran over to her neighbour's house.
80. It is obvious that she did not consent to what the defendant did in holding or squeezing her breast.
81. She treats the defendant as a father.
82. I am sure that any right thinking person would consider what the defendant did to be indecent.
83. It was also an assault.
84. I do not see any defence succeeding here.

CONCLUSION

85. The prosecution have discharged their burden. I find all the elements of the allegation proven by the prosecution beyond a reasonable doubt.
86. I find the defendant guilty of the charge of indecent assault contrary to section 212 (1) of the Crimes Act 2009.
87. 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 4th day of February, 2020