

IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION

Criminal Case No: 48 - 2015

STATE

-v-

KRISHNEEL MUDALIAR

For Prosecution : Inspector Lenaitasi S. [Police Prosecution]
Accused : Ms Tavaiqia L. [Legal Aid Commission]
Date of Trial : 22nd November 2019
Date of Judgment : 25th February 2020

JUDGMENT

BACKGROUND

1. The Defendant denied the allegation preferred by the prosecution and consequently, a trial had to be conducted to determine whether he was guilty of the following [amended on the 16th of April 2019]:

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (2) of the **Crimes Act 2009**.

Particulars of Offence

KRISHNEEL MUDALIAR on the 4th day of March, 2015 at Tavua in the Western Division unlawfully and indecently assaulted **SERA HANFIRO** by touching her thigh.

2. During the trial, the prosecution called only one witness.
3. I found that there was a case to answer and after explaining the options available to the defence, the defendant chose to remain silent. He also did not call any witness.
4. I summarise the evidence of the prosecution witness below.

PW1

5. Prosecution witness 1 [PW1] is Ms Sera Hanfiro. She is now 19 years old. Her date of birth is the 25th of March 2000.
6. In 2015 she was residing at Vatukoula and attended a secondary school at Ba.
7. She normally takes a bus in the morning at around 6.30am to school and takes a bus back in the afternoon around 4.30pm.
8. The 4th of March 2015 was a school day and PW1 was returning home from school by bus at around 4.30pm.
9. She was seated on the 'two seater' side of the bus [or on the left side of the bus]. She was seated somewhere in the middle of the bus.
10. She sat beside the defendant in that two seater.
11. That was the first time she had seen the defendant.
12. She described the bus as being full that day.
13. When she was seated, she carried a bag belonging to another student as that student was standing passenger inside the bus.
14. During the trip, PW1 described that 'I felt something coming up my skirt' or her school uniform. It was from her left side or the defendant's side.
15. When passengers got off and people sat down and PW1 returned the bag she was carrying, it was then she realised that the defendant's hand was on her thighs.
16. PW1 felt scared. She did not give permission to the defendant to put his hand on her thigh.
17. They were not in any relationship.
18. PW1 stood up to try and sit in another seat which was empty but the defendant pulled her skirt down for her to sit. This made PW1 sit down again.
19. PW1 did not feel comfortable from then on.

20. PW1 told another student from the same school about what was happening and other students were informed.
21. PW1 then stood up and went and sat in front.
22. When one of the students came to ask her what happened?, PW1 did not say anything.
23. PW1's brother who was also inside the bus enquired with PW1 and PW1 described that she 'explained everything to my brother'. Her brother told her to report the matter to police.
24. One of the students went to confront the defendant and then the bus driver stopped at a police post.
25. In cross-examination, PW1 says that it was not an accident that the defendant touched her. She did not see the defendant pull her skirt but she felt him do it.

ANALYSIS

Burden and Standard of Proof

26. I remind myself that the defendant is presumed innocent until proven guilty.
27. The prosecution carries the burden of proving his guilt.
28. 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.
29. The defendant has elected to remain silent. That is his right and I draw no negative inference in his exercise of that right.

Elements Of the Offence

30. 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 PW1;**
31. Unlawful is anything that is without legal justification.
 32. 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] .
 33. 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 [if any] amongst other factors and whether they would lead a right thinking person to conclude that it was indecent.
 34. 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.
 35. 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.
 36. No person in a position of control or trust can rely on the above defence.
 37. It is inevitable in many cases that there would be circumstantial evidence.
 38. 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.

Findings

39. The case rests on whether or not the court accepts the evidence of PW1 the alleged female victim.
40. Generally, I must be satisfied beyond a reasonable doubt that she is both telling the truth (credible) and that she is not mistaken (reliable).
41. Having observed and listened to her and considering the case in its entirety, I am satisfied that she is intelligent and has the requisite capacity to understand. Her answers during cross examination were particularly insightful.
42. She is now 19 years old and I accept her age and her date of birth as she related in her evidence. She would have been 14 years old around the material time.
43. It certainly calls for care when assessing what happened at the material time as she was recounting what happened approximately 5 years earlier when she was 14 years old.
44. PW1's description of that afternoon is typical of the peak hours in the afternoon when those reporting off work, children finishing off from school and other members of the public are making their way home. Traffic builds up. Some vehicles and buses are full. People standing around waiting for their transport home. People rubbing against each other. Jostling. The noise amongst other factors.
45. I bore that in mind when assessing PW1's evidence and being mindful that she was younger then and may have misread the situation. It could even be the case that her skirt was caught on something or someone else tugged at her skirt, giving her the impression that it was the defendant that pulled her skirt.
46. Having considered the factors, I am convinced that PW1 is not mistaken.
47. I am also satisfied that she is a credible witness. She was un-evasive and natural in her testimony. For instance, she openly accepted during cross examination that it is possible that the defendant putting his hand on her thigh was accidental. She understood the question. She subsequently answered that in the defendant's case, it was not an accident.
48. I find and accept that it was the defendant who put his hand on her thigh. Although PW1's opinion that it was not an accident is not binding on me, I accept that the defendant putting his hand on her thigh was intentional.
49. It was the defendant who pulled her skirt when the victim tried to move to another seat, causing the victim to sit back down.

50. Pulling her skirt to sit down is strong circumstantial evidence that he wanted her to sit with him. It is also circumstantial evidence that his hand being on her thigh was not an accident. As PW1 described in her evidence and which I accept, she felt the defendant's hand 'coming' up her skirt.
51. I accept that the parties are strangers to each other. This was the first time PW1 saw the defendant. They had no relationship.
52. PW1 did not consent to being touched or her skirt pulled.
53. I accept that she did complain to another student inside the bus and to her brother, although they were not called as witnesses. Her complaint and demeanour at the time is indicative of her disapproval of what the defendant did and is indicative of the inappropriateness of the defendant's behaviour.
54. Any right thinking person would agree that the defendant putting his hand on her thigh and pulling her skirt down is indecent.
55. I see no defence succeeding here.

CONCLUSION

56. I find all the elements of the allegation proven by the prosecution beyond a reasonable doubt. They have discharged their burden.
57. I find the defendant guilty of the charge of indecent assault contrary to section 212 (2) of the **Crimes Act 2009** and I convict him accordingly.
58. 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 25th day of February, 2020.