

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Miscellaneous No. HAM 11 of 2009

Between : **SHYAM SHARMA** Applicant

And : **STATE** Respondent

Date of Hearing : 19th March 2009

Date of Judgment: 2nd April 2009

Counsel : Mr. K. Tunidau for the Applicant
Mr. L. Sovau for the Respondent

JUDGMENT

1. The matter came before me as an application for bail pending appeal. Mr. Tunidau told the court that the issue at the Magistrate's Court was a narrow one to which I will allude later. As such counsels agreed to argue the entire appeal within a short space of time. I am grateful to the counsels for having so agreed. They further agreed to conduct the appeal after perusing the Sigatoka

Magistrate's Court un-typed record, the Sigatoka court having no services of a typist at present.

2. Veniana Ratubuli worked at a massage parlour at Vatulele Island Resort. The appellant age 22 is a security officer employed by Sigma Security and worked at the same resort. The two knew each other.
3. The appellant was charged with one count of indecent assault of unlawfully and indecently assaulting a woman namely Veniana Ratubuli.
4. Mr. Tunidau for the appellant in his submissions stated that he does not deny that the appellant committed an assault but the only issue was if it was "indecent". He stated that the court had to consider any explanation given by the accused, I agree.
5. Mr. Tunidau relying on **Regina v Court** (1989) AC 28 submitted that the prosecution must prove both that the assault was indecent and that the appellant intended it to be so. He outlined three possible scenarios which the court could consider in reaching its conclusion:
 - (a) That the assault was either inherently indecent or rendered so by accompanying circumstances
 - (b) The assault is incapable of being considered indecent
 - (c) The assault is at most capable of being considered indecent

6. In the present case the Learned Magistrate was faced with two different versions. The appellant's version of events was that the complainant was walking behind him and she called him "buju" meaning a homosexual. He stated that he spontaneously reacted by trying to strike her on her shoulder but the hand touched her breast. In short that it was an act of chastisement for him being labeled a Buju and he had no indecent intention.
7. The complainant's version of events was that on the evening in question she was going to the massage parlour with a friend who was ahead of her. The accused touched her breast from behind. She picked up a stick and hit him.
8. Given the two different versions the critical issue for the Learned Magistrate was whom to believe. The Learned Magistrate believed the complainant's version of events. He found her forthright in her answers and he also found that she screamed. Opposed to this he found that the accused gave three different answers to the critical question of how he happened to touch her breast. In his caution interview he stated that he swung his hand to hit her shoulder but it landed on her breast. He also told the court on oath that he did not mean to touch her breast and he did not admit he touched her breast.
9. In cross-examination the complainant stated he pressed, squeezed her breast. Squeezing a breast is inherently indecent. Any right minded person considers squeezing a lady's breast without her consent as indecent. I find nothing incorrect about the conclusion of the Learned Magistrate. He saw and heard the witnesses and

therefore best placed to assess their credibility. The appeal against conviction is therefore dismissed.

10. But there is also appeal against the sentence. Indecent assault covers a wide spectrum of cases from the aggressive penetrative assault involving substantial indecency like a person inserting a finger into a vagina to technical type.
11. It is dangerous and wrong to always follow tariffs laid by courts in sentencing. Tariffs can be subject to exceptions and qualifications. When dealing with a case which is on or borders on a custody threshold, the court ought to consider the extent of criminal intent together the extent of injury and the nature of the injury caused to the complainant.
12. An offence which is premeditated or deliberate is dealt with more seriously than one which is spontaneous and unpremeditated. A court never imposes a custodial sentence unless it is absolutely necessary to do so and a court will show a great deal of reluctance to impose a custodial sentence on someone who has not served a prison sentence before.
13. The appellant was sentenced to 15 months imprisonment for a spontaneous fleeting pressing of the breast. There was no evidence of any lasting injury to the complainant. There was no sign of physical harm as distinct from shock or fear from which she quickly recovered and hit him with a stick. She dispensed an immediate punishment, a factor which was not taken into account in sentencing. Mr. Tunidau also pointed out that the complainant worked in a massage parlour and was used to touching bodies. The

applicant is aged 22 and a first offender, with a stable employment history.

14. Given the circumstances of this case, I am of the view that a non custodial sentence could have adequately met the needs of justice. The appellant has spent close to four weeks in custody and that is adequate punishment. I had already ordered his release on 26th March 2009. He is to remain free.

Final Order

15. Appeal against conviction dismissed. Appeal against sentence allowed.

[**Jiten Singh**]
Judge

At Lautoka
2nd April 2009.