IN THE COURT OF APPEAL, FIJI

[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU 098 of 2019

[In the Magistrates Court at Nadi Case No. 135 of 2016]

BETWEEN : **SAVENACA MUDUNAKACI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. V. Narara for the Appellant**

: **Mr. A. Jack for the Respondent**

Date of Hearing : **08 June 2020**

Date of Ruling : **18 June 2020**

RULING

[1] The appellant had been charged in the High Court on a single count of Act with intent to cause grievous harm contrary to section 255(b) of the Crimes Act, 2009. However, the High Court had invested the Magistrates Court with jurisdiction to try the appellant in terms of section 4(2) of the Criminal Procedure Act, 2009 ('extended jurisdiction').

[2] The information read as follows.

> ***'Statement of Offence***
>
> ***ACT WITH INTENT TO CAUSE DRIEVOUS HARM*** *contrary to section 255(a) of the Crimes Act.*
>
> ***Particulars of Offence***
>
> ***SAVENACA MUDUNAKACI*** *on the 3rd day of February, 2016 at Mulomulo, Nadi in the Western Division with intent to cause grievous harm to BRYAN MUDUNAKACI unlawfully wounded the said BRYAN MUDUNAKACI with an electric wire.'*

[3] On 21.08.2018 the appellant had pleaded guilty to the charge and the learned Magistrate had sentenced him on 27 February 2019 to 03 years and 06 months of imprisonment with a non-parole period of 02 years. The appellant was served with a permanent domestic violence restraining order as well.

[4] The appellant being dissatisfied with the sentence had signed a timely notice of appeal on 21 March 2019. Legal Aid Commission had thereafter filed amended grounds of appeal against sentence and written submissions on behalf of the appellant on 29 April 2020 and the State had replied on 26 May 2020.

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim**

Nam Bae v The State Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For an timely ground of appeal against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[7] Grounds of appeal urged on behalf of the appellant are as follows

Ground One
The learned Magistrate had double counted by picking the starting point at the higher end of the tariff and also when it subsumed certain aggravating factors when such factors were already existent in the offence of 'Act with intent to cause grievous harm.'

Ground Two

The learned Magistrate erred in law when he failed to discount the term of 02 months which was the period the appellant spent in remand from the final sentence.

[8] The summary of evidence admitted by the appellant is as follows.

The complainant in this matter is Bryan Mudunakaci, 6 year old and Class 1 student of Mulomulo, Nadi (at the time of offence).

The accused in this matter is Savenaca Mudunakaci, 47 years old, carpenter of Mulomulo, Nadi (at the time offence).

The accused is the biological father of the complainant.

On the 3rd of February 2016 at about 4 pm, the complainant had finished school and went to the Nadi Bus Stand to catch the bus home. While on his way to the bus stand with his friends, the complainant met his father whom he noticed to be drunk. The accused called the complainant to go to him but the complainant refuse because he was scared that he might beat him.

The complainant then went to an i-taukei lady and asked her to take him to the Nadi bus stand. The accused informed the i-taukei lady that the complainant

was his son but the i-taukei lady got in a can with the complainant and took him to his house in Mulomulo, Nadi.

The complainant was watching TV at home, when the accused arrived at 6 pm. The accused told the complainant to stand up, grabbed an extension cord and whipped the complainant several times on the legs causing him grievous harm. A medical report was compiled and the findings are as follows:-

- *Multiple belt like marks on the left butt, cheek and back – lesions are quite tender*
- *10 cent. Bump left side of the head-tender*

The complainant's mother had arrived from work and the complainant opened the door crying, telling her that the accused had whipped him with an extension cord.
After noticing the complainant's injuries, she reported the matter to the Nadi Police Station and the accused was arrested. During the record of the interview the accused admitted whacking the complainant 4 times with the extension cord.
After several attempts, the complainant told the accused if he open the door, for him to pack his clothes and leave. While walking back to the mango tree, the complainant turned around and the accused punched her on the forehead. The complainant fell and felt a sharp pain on her abdomen. She then saw the accused raising his hand to stab her with the knife he was holding and as he did so, the complainant tried to avoid the knife but it hit the right side of her upper lip and right side of her nose.
The accused was then charged for one count of an act intended to cause grievous bodily harms contrary to section 255 (a) of the Crimes Act 2009.

01st ground of appeal

[9] The appellant's complaint is that the learned Magistrate had started the sentencing process at the higher end of 04 years thereby factoring the aggravating features into the starting point and therefore, by adding another 02 years on account of the same aggravating factors had committed a sentencing error. The appellant further submits that some aggravating factors identified by the learned Magistrate are inbuilt into the offence and should not have been counted as aggravating features.

[10] The learned Magistrate had taken the tariff for the offence of Act with intent to cause grievous harm.' as 06 months to 05 years following **State v Mokubula** [2003] FJHC 164; HAA0052J.2003S (23 December 2003). ***Mokubula*** was a case where the accused had been charged with two offences one of which was Act with intent to

cause grievous harm (the other one was criminal trespass) contrary to section 224 of the Penal Code. In ***Mokubula,*** the High Court exercising appellant jurisdiction held

> *'**On the basis of these authorities, the tariff for sentences under section 224 of the Penal Code, is between 6 months imprisonment to 5 years imprisonment**. In a case of an attack by a weapon, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon. Aggravating factors would be:*
>
> 1. *Seriousness of the injuries;*
> 2. *Evidence of premeditation or planning;*
> 3. *Length and nature of the attack;*
> 4. *Special vulnerability of the victim;*
>
> *Mitigating factors would be:*
>
> 1. *Previous good character;*
> 2. *Guilty plea;*
> 3. *Provocation by the victim;*
> 4. *Apology, reparation or compensation.*
>
> *In general terms, the more serious and permanent the injuries, the higher the sentence should be. As a matter of principle, a suspended sentence is not appropriate for a case of act with intent to cause grievous harm not only because it is contrary to the accepted tariff, but also because section 29(3)(a) of the Penal Code contains a legislative fetter to the section 29 powers to impose a suspended sentence for crimes of violence (**DPP –v- Saviriano Radovu** Crim. App. No. HAA0006 of 1996; **State –v- Senitiki Naqa and Others** Crim. App. No. HAA0023 of 2003S).*

[11] The Learned Magistrate had stated that he was taking the objective seriousness of the crime in fixing the starting point at 04 years. The following matters had been listed by the learned judge as aggravating features before he fixed the starting point (i) The use of an extension cord (ii) Seriousness of the injuries (iii) The victim being a vulnerable person (in fact the appellant's 06 years old biological son) (iv) Lack of respect as a father towards the victim's right to be free from harm (v) Commission of the offence whilst being drunk.

[12] It has to be reasonably assumed that above items (i) to (v) had already been reckoned when the learned Magistrate had fixed 04 years as the starting point which was fully justified except, perhaps item (ii) which might be considered as an integral part of 'grievous harm' in the offence. However, in my view, when a weapon or any other object is used as a weapon to cause grievous harm it constitutes a distinct aggravating factor independent of 'any means' in section 255(a). Therefore, these factors should not have been again counted as aggravating the offence in enhancing the sentence by

02 years because it amounted to double counting (see **Nadavulevu v State** [2020] FJCA 14; AAU119; 115;129 of 2015 (27 February 2020)].

[13] The State has, however, pointed out that the learned Magistrate had missed out several serious aggravating factors from reckoning. They were the number of blows dealt with or multiple strikes, the appellant's serious assault on the victim's mother simply because she was trying to protect the victim (it is a mystery as to why there was no separate charge based on that assault with a knife on his wife) and the fact that the offence was committed in the domestic context violating the trust and security of the family unit being the hallmark of an intimate and family relationship. Therefore, 02 years for aggravating features, perhaps, was an underestimation by the learned Magistrate. Therefore, double counting has not resulted in a miscarriage of justice to the appellant.

[14] No doubt that in the exercise of sentencing, it is a good practice to pick the starting point from the lower or middle range of the tariff based on objective seriousness of the offence [vide **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013)]. If the starting point is taken somewhere within the range (middle or higher) at least some aggravating features are assumed to have been factored into it and the rest of the aggravating and mitigating factors should then be reflected in the ultimate sentence and if the starting point is at the lower end of the tariff all aggravating and mitigating features should be seen to be factored in the reckoning of the final sentence [See **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018)].

[15] In **Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006)** the Supreme held

> *'This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly*

different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence.'.

[16] Therefore, though there had been a sentencing error it has no reasonable prospect of success in appeal for the reasons set out above. Straightjacket approach is not expected in the sentencing process.

02nd ground of appeal

[17] The appellant's contention is that the learned Magistrate had not deducted 02 months for his period of remand prior to the trial from the head sentence of 3 ½ years. In fact the learned Magistrate had stated in the sentencing order that 02 months would be deducted from 3 ½ years but inadvertently not done so.

[18] However, for the reasons pointed out above the sentence of 3 ½ years imposed on the appellant was on the lower side of the appropriate sentence given the aggravated circumstances not considered by the learned Magistrate. The sentence imposed on the appellant should have been a higher sentence. Thus, no miscarriage of justice had occurred due to the said inadvertence by the learned Magistrate.

[19] Though there is a technical error on the part of the sentence under the second appeal ground it has no reasonable prospect of success in the larger picture of the ultimate sentence. Mathematical inaccuracy alone is not a ground for success in appeal.

Order

1. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

S. Prematilaka

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL