

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal No: HAA 10 of 2013

BETWEEN : **MANOA RAIKA**
Appellant

AND : **THE STATE**
Respondent

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. A. Sen for the appellant
Mr. S. Vodokisolomone for State

Dates of hearing : 2, 5 August 2013
Date of Judgment : 9 August 2013

JUDGMENT

[1] On the 8th July 2013 in the Magistrates Court at Labasa, the Appellant was convicted on his own plea of one charge of assault occasioning actual bodily harm, contrary to section 275 of the Crimes Decree 2009. After hearing evidence of the complainant in mitigation, the Magistrate then sentenced the accused to a term of 6 months imprisonment.

Facts

[2] The facts agreed by the Appellant in the Court below were as follows:

On the 16th June 2013, at about 10pm at the Labasa Hospital Quarters, the accused aged 26 and a medical officer at that hospital, assaulted a named victim, aged 22 and a student. They were boyfriend and girlfriend and they were at the time arguing over a previous relationship

the young lady once had. In the course of this argument, the accused became angry and punched her on the back, pushed her on the floor and kicked her on the back and on the shoulder. She received injuries. The matter was reported to the Police and a medical report was obtained. The accused was later arrested and interviewed under caution.

Proceedings below

- [3] The Court record shows that the charge was read and explained to the accused. He elected to defend himself and entered a plea of guilty which he said was not induced or forced from him. On agreement to the facts and on his plea the accused was convicted. The Magistrate then noted that the accused had no previous convictions and he then considered the medical report.
- [4] The medical report attached to the Summary of Facts shows abrasions and bruising along with a deformed shoulder. An x-ray showed that the right clavicle bone had been fractured and the victim's arm was placed in a sling.
- [5] At this stage the accused mitigated in his own behalf. He said that he was still living with the victim in a de facto relationship. He had apologised to her family members and they had forgiven him. He is 26 years old and a medical officer. He called the victim to give sworn evidence in mitigation for him. The record doesn't say, but Mr. Sen assures me that the accused had called the lady to give evidence in his mitigation, but the Magistrate himself examined her.
- [6] In her evidence the victim said that the accused was her boyfriend and had been for 8 months. She said he was a violent man and violent with her, slapping her on occasions. He cannot control his anger. She said that he had made a "matanigasau" (traditional apology) to her grandparents and to her whole family.

- [7] The Magistrate then proceeded to sentence. He quite properly recognized that the offence was one of domestic violence. He found the offence was aggravated by a breach of trust between the parties and by the nature of the violence. He recognized the mitigating factors of an early plea, that he is a first offender and that he had "reconciled with the victim and her families." He took a starting point of 9 months imprisonment increasing that by 3 months for the aggravating features and deducting 6 months for the mitigation of early plea, good character and personal circumstances; arriving at a total term of 6 months which he declined to suspend. In addition he made a Domestic Violence Restraining Order.
- [8] Counsel for the appellant submits that a gross injustice has been done to his client because the learned Magistrate did not give his client the opportunity to cross-examine the lady who was called to give character evidence, and furthermore that he took into account matters that she said in her evidence when he was passing sentence. In this regard counsel places heavy reliance on the case of **Mohammed Riyaz** HAA 126 of 2007, decided by Goundar J. In that case the learned Judge allowed an appeal and quashed a conviction of a man who had pleaded guilty to assaulting his wife because the Magistrate had not taken into account the fact that the parties had reconciled. If she had considered it, it would have enabled her to terminate the proceedings, the offence then being a reconcilable offence.
- [9] In addition, and also in support of the appeal against conviction, Counsel submits that the Magistrate had taken matters into account which he was not entitled to, that being the mitigating evidence of the victim that the accused had assaulted her in the past.

Discussion of the Appeal against Conviction

- [10] Counsel for the accused appears unfortunately to be under the misapprehension that this offence is still a reconcilable offence. He also appears to have failed to appreciate the finer terms of the Domestic Violence Decree. That Decree specifically states that offences of Domestic Violence are not reconcilable. The ***Riyaz*** case, which Mr. Sen says is "on all fours" with this instant case has no relevance to this case at all, it being decided when an assault occasioning actual bodily harm offence was reconcilable and before the implementation of the Domestic Violence Decree. All of the other cases cited by Mr. Sen are pre-Domestic Violence Decree and are therefore of no authority.
- [11] The victim's evidence was given by way of mitigation evidence and she was called at the behest of the appellant. She being his witness, he had no right to cross-examine her on the principle that one does not cross-examine one's own witness. The appellant's ground of appeal against conviction on this point is misconceived.
- [12] It is not a matter of concern that the Magistrate took into account what the victim said in her evidence and this cannot be said to stand in the way of a conviction. Whenever a party calls a witness to give evidence on that party's behalf, then it is a matter of satisfaction that the tribunal has taken into account what one's witness has said. The Magistrate did not in any manner err in accepting what the victim said, nor was it prejudicial that he did so. Obviously the appellant's witness below did not say what the appellant expected her to say. This is hardly the fault of the Magistrate.
- [13] When the appellant entered his plea of guilty it was a considered unequivocal plea and he said he was not forced to plea. He agreed the facts put to him without demur and was properly convicted. There is nothing on record to even suggest that the plea was unequivocal and

everything that Mr. Sen complains of happened after the conviction. Reconciliation not being available, there can be no suggestion that the plea should be "re-opened." Even if it were available there is no evidence before the Court that the parties **have** reconciled despite the Magistrate saying so in his sentence. There is evidence that a traditional apology has been made to the parents but that is not reconciliation between the parties. Unfortunately the accused's witness did not really assist him in his mitigation, but that cannot be grounds for an appeal against conviction.

[14] The appeal against conviction is dismissed.

The appeal against sentence

[15] The Appellant's appeal against sentence is again premised on the misconceived notion that account should be taken of the parties' reconciliation. The coming into effect of the Domestic Violence Decree 2009 has precluded the concept of reconciliation being relevant except perhaps, if genuine, to mitigation and even then to a very limited degree. In any event there is **NO** evidence of reconciliation in this affair. The whole purpose of the Domestic Violence Decree is to protect the victim in a domestic violence situation and it certainly would defeat that purpose if a Court were to send an accused with a known history of violence back into the "matrimonial" home, and thereby put the victim at risk of renewed violence.

[16] Counsel's reliance on pre-Domestic Violence case law with its often very reactionary and gender biased dicta on the roles of parties in a relationship cannot in this modern era be sustainable. Harsh sentences will continue to be meted out to perpetrators and protected persons will continue to be protected.

[17] The tariff for this offence is, as the Magistrate says, from suspended sentence to 9 months but in a domestic violence context sentences of up to 18 months are in order.

[18] The appellant is fortunate to have had a lenient sentence passed for his assault, given that he actually broke his partner's clavicle bone. The 6 month sentence is not a day too long and the appeal against sentence is dismissed.

Paul K. Madigan
JUDGE

At Labasa
9 August 2013