

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 14 OF 2013

BETWEEN: SHANTI DEVI

APPELLANT

AND: STATE

RESPONDENT

Counsels : **Mr Naidu for the Appellant**
 Mr T Qalinauci for the Respondent

Date of Judgment : 11 October 2013

JUDGMENT

1. The appellant was charged before the Magistrate Court with one count of Assault occasioning actual body harm contrary to Section 245 of the Penal Code and Damaging Property contrary to Section 324 (1) of the Penal Code.
2. After trial appellant was convicted by the Magistrate on 31st January, 2013. On 8th March 2013 she was sentenced for 6 months for the 1st count and 4 months for the 2nd count with both sentences to run concurrently and suspended for 3 years. In addition appellant was ordered to pay a fine of \$200 with default term of 20 days imprisonment. Appellant had paid the fine.
3. An appeal against the conviction and sentence was lodged on 13th March 2013. The grounds of appeal are:

- (i) That the learned Magistrate erred in law and in fact by failing to give sufficient weight to the accused's character and the mitigating factors in imposing the sentence
 - (ii) That the learned Magistrate failed to direct his mind to the fact that the complainant in this case was the accused in a cross complaint wherein the said complainant pleaded guilty before another Magistrate and was given a conditional discharge on 19th February 2009
 - (iii) That the learned Magistrate erred in law and in fact by convicting the accused on uncorroborated evidence of the accused and her husband
 - (iv) That the learned Magistrate erred in law and in fact in failing to give sufficient weight to the evidence of the independent witness for the defence.
 - (v) That the learned Magistrate erred in law and in fact in failing to take into account the sentence imposed on the complainant on her plea of guilty arising from a cross complaint involving the same parties and the same set of facts before imposing sentence on the appellant
 - (vi) That the learned Magistrate erred in law and in fact in failing to direct his mind to the discrepancy in the conviction and sentence of the appellant
 - (vii) That the conviction and sentence of the Appellant by the learned Magistrate is contrary to the weight of evidence against the appellant and is dangerous and unsafe
4. At the time of hearing on 13th September 2013, counsel for the appellant abandoned the appeal against the conviction and argued only on the sentence. Therefore in this judgment only the ground of appeal against the sentence will be considered.
 5. The facts of the case are on 2nd October 2008 when complainant was coming out of the MH super market in Namaka, she had seen the appellant and had asked for the money due to her. Then appellant had held the top of the complainant and pushed her causing bruises and scratches.
 6. The offence of assault occasioning actual bodily harm carries a maximum penalty of 5 years imprisonment.
 7. Tariff for the offence of assault occasioning actual bodily harm is well settled.

In **State v Tugalala** [2008] FJHC 78; HAC 025S.2008S (29 April 2008) Justice Shameem identified the tariff as follows:

*"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months imprisonment. The High Court said in **Elizabeth Joseph v The State** [2004] HAA 030/04S and **State v Tevita Alafi** [2004] HAA 073/04S, that it is the extent of the injury which determines sentence. The use of a pen knife for instance, justifies a higher starting point. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not*

appropriate. In domestic violence cases, sentence of 18 months imprisonment have been upheld.”

In **Sereka v State** [2008] FJHC 88; HAC 027.2008 (25 April 2008) Justice Gounder held that:

“The tariff for assault occasioning actual bodily harm ranges from a suspended sentence where there is a degree of provocation and no weapon is used, to 9 months imprisonment for the more serious cases of assault.”

8. Damaging property carries a maximum penalty of 2 years imprisonment.

9. In **State v Baleinabodua** [2012] FJHC 981; HAC 145.2010 (21 March 2012) Justice Temo held that:

“Damaging property is a summary offence, and it carries a maximum sentence of 2 years imprisonment. No tariff was supplied to the court by the parties. However, in my view, a suitable tariff would be a sentence between 3 months prison to 12 months prison. Serious cases should attract penalties in the upper range, while less serious cases attract the sentences at the lower end of the scale, including a non-custodial sentence.”

10. The Magistrate in this case had identified the following aggravating factors in paragraph 4.

“You traumatized the complainant by assaulting the complainant in a public place, you caused loss to the complainant by damaging her top and you did not respect the law. These factors had aggravated the offending.”

11. Then in paragraph 5 the Magistrate had given the mitigating factors. Those are:

“In mitigation your counsel told that: you are 38 years of age, mother of two children. Your children are attending school. You are divorced, unemployed and getting \$200 from your ex-husband as maintenance. You are first offender and remorseful. Your counsel further told that the complainant didn’t want to reconcile although you attempted to reconcile. You seek leniency and forgiveness.”

12. Then in paragraph 9 Magistrate had given the sentence as follows:

“I therefore considering all the facts and circumstances, fix a sharp sentence of 06 months imprisonment for the offence of assault and 4 months for damaging property. In fixing the sentences I have considered aggravating and mitigating factors. These sentences are to be served concurrently with each other hence in total you must serve 6 months imprisonment. In addition you must pay a fine of \$200. In default of payment of fine 20 days imprisonment.”

13. The Magistrate had fell into error by not considering the back ground of the case and the fact there was another case on the same incident where the complainant of this case pleaded guilty to the charge of assault occasioning actual bodily harm. The victim in that case was the appellant. The sentence in that case was a conditional discharge. Therefore this sentence in not in parity with that sentence. Further there is no indication as to which charge the fine is ordered.
14. Considering all above, I am of the view that this is a fit case to impose a non-custodial sentence. Therefore I order to record a conviction and discharge the appellant in respect of the first count. The fine paid to stand as the sentence for the 2nd count.
15. Appeal is allowed for the variation of sentence.

Sudharshana De Silva
JUDGE

**At Lautoka
11th October 2013**

**Solicitors for the Appellant: Pillay Naidu and Associates
Solicitors for the Respondent: Office of the Director of Public Prosecution**