

Particulars of Offence (b)

ONISIVORO BALEISUVA, on the 23rd day of February 2013, at Lot 4 Damu Place, Namadi Heights in the Central Division, assaulted **FANE NAUASERAWA**, thereby occasioning her actual bodily harm.

2. The Petition of Appeal was lodged 19 days after the prescribed appealable period of 28 days. Nevertheless, the State conceded to grant leave to appeal out of time based on two grounds; the appellant is new to the Criminal Justice system and the appellant has a strong ground of appeal as the learned Magistrate misconceived the facts in sentencing the appellant.
3. This court thought it fit to entertain the appeal out of time in terms of section 248 (2) of the Criminal Procedure Decree 2009 for the interests of justice and in fairness to the appellant.
4. The grounds of appeal can be itemized as follows:
 - The learned Magistrate failed to fully consider the appellant's early guilty plea and reconciliation with the complainant or his wife and;
 - The learned Magistrate heavily relied on the injuries to the victim with the mistaken belief of that she spent two months in the hospital.
5. The maximum penalty for the offence of Assault Causing Actual Bodily Harm is 5 years imprisonment. This is the same situation with the said offence under the old Penal Code as well. The tariff identified under the Penal Code for this offence ranged from absolute or conditional discharge to 12 months imprisonment. (**Elizabeth Joseph v. The State** (2004 HAA 073/04) and **State v. Salote Tugalala** (HAC 025/2008). In **Sareka v. State** (2008) FJHC 88; HAM 027, **State v. Nayacalagilagi** (Crim. Case No. HAC 165 of 2007), and **State v. Mohammed Mustafa Hakim** (HAC 022 of 2009), the tariff was identified to be suspended sentence to 9 months imprisonment, depending on the seriousness of the case.

6. The Agreed Summary of Facts by the appellant in the Magistrate's Court proceedings says that on 23rd of February 2013 the appellant punched his wife/victim on her face and body and kicked her after fallen on cement floor as he got angry with her when she told him to stop drinking liquor. The victim was taken to the hospital as she sustained injuries on her body.
7. The learned Magistrate in his typed sentence in paragraph 11 (should have been 13) and paragraph 14 (should have been 16) made the following observations:

Paragraph 11 -

"Under the Crimes Decree No. 44 of 2009, the maximum penalty for the offence of assault causing actual bodily harm is imprisonment for five years."

Paragraph 14 -

*"Having considered the summary of facts, mitigation and aggravating factors, the court sentences the Accused, **ONISIVORO BALEISUVA**, to two years imprisonment. He will serve a period of one (1) year's imprisonment before any possibility of parole."*

8. The learned Magistrate had not mentioned anything about the 'tariff' pertaining to the offence and the 'starting point' of the sentence that he opted to select in this instance. The learned Magistrate has not stated the discount that he is ready to grant for the mitigating factors such as reconciliation between the parties and the previous good character of the appellant. The learned Magistrate has not specified the period that he is going to add to the interim sentence for the aggravating factors. Finally, it is not visible whether or not the learned Magistrate had given any concession to the appellant for his early plea of guilty.
9. It has to be borne in mind that the sentence is of 2 years imprisonment with a non-parole period of 1 year. In such a situation, the accused person should be properly notified as to how his final sentence was assessed as it will be a fairly long period that the accused has to spend in a correctional centre with a

restricted liberty. Unfortunately, in this instance, the learned Magistrate has not followed the accepted procedure of 'sentencing'.

10. On the other hand, it is apparent that the learned Magistrate had misdirected himself by assuming that the victim had spent 2 months in the hospital getting treatments for the injuries sustained during the incident in issue. The charge and the Summary of Facts are very clear that the date of incident was 23rd of February 2013. Instead, the learned Magistrate had taken up the date of incident as 20th of December 2012. This misdirection is visible throughout the typed sentence.

Paragraph 2 -

"On the 20th December, 2012, the accused punched and kicked his wife, Fane Nauaserawa several times on the face and body. She sustained injuries to her face and body and spent several days in hospital as a result."

"The accused's wife was admitted to hospital injuries to her face and body. She was to spend at least two months in hospital."

Paragraph 12 -

*"Mention had been made of the submission by Police Prosecution that in the absence of the medical report, the appearance in court of the victim and the obvious injuries to her face were enough to preclude the need for a report. The court agrees. The victim appeared in court with her face still swollen and eyes almost shut by the swelling. **Almost two months after the assault by her husband, the evidence on her face of the assault was overwhelming.** That she spent several days in hospital is also strong evidence of the degree of injuries she sustained in the assault."*

Paragraph 13 (should have been 15)

"To inflict injuries so that she spent at least two months in hospital is an aggravating factor of the highest degree."

11. The “seriousness” of injuries sustained by the victim with 2 months hospitalization seems to be the reason for the learned Magistrate to say that the ‘reconciliation’ reached between the husband and wife carries no weight. On the other hand, it is visible from the original case record of the Magistrate’s Court that the court had proceeded to sentence the appellant without a proper Medical Examination form submitted by a medical practitioner in respect of the injuries sustained by the victim. It is always a healthy practice to obtain the Medical Report before coming to any conclusions about the seriousness and the nature of the injuries. It will further clarify the duration that the injured was hospitalized and the treatments he/she received. In this instance the victim/complainant herself had written to the Divisional Prosecuting Officer (*a copy is attached to the original case record*) saying that she spent only 3 days in the hospital. These types of ambiguities could have been simply avoided by obtaining the medial report of the victim.

12. In the light of the above, the appellant did manage to convince the court that the learned Magistrate had exercised his sentencing discretion based on wrong facts. Thus, this court concedes that had the learned Magistrate grasped the proper facts of the case, the final sentence would have been totally different. Therefore, this court will exercise its appellate powers in terms of section 256 (3) of the Criminal Procedure Decree and quash the sentence of 2 years imprisonment imposed by the lower court. Instead, it is hereby ordered a 9 months imprisonment to substitute the same. That will reflect the gravity of the offence and the seriousness of the conduct of the appellant while recognising the fact that the appellant is a first offender and pleaded guilty to the charge on his 1st appearance in court, showing true colours of remorse.

13. This court endorses the move of the learned Magistrate to issue a Domestic Violence Restraining Order with standard non-molestation conditions for the safety and well-being of the victim. The appellant is warned that a breach of the already existing DVRO would amount to a Criminal offence.

14. Appeal is dismissed subject to the above variations.

Janaka Bandara
Judge

At Suva

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecution for the Respondent