

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 27 OF 2013

BETWEEN: POASA MANAKIWAI

Appellant

AND: STATE

Respondent

Counsels : Appellant in person
Mr. F. Lacanivalu for the Respondent

Date of Judgment : 28 January 2014

JUDGMENT

1. The appellant was charged before the Sigatoka Magistrate under following counts:

First Count
Statement of Offence

ABDUCTION WITH INTENT TO CONFINE PERSON:- Contrary to Section 281 of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

POASA MANAKIWAI on the 30th day of July to 2nd day of August, 2013 at Naidovi, Sigatoka in the Western Division, abducted LEILANI AGNUS with intent to cause that person to be secretly and wrongfully confined.

Second Count
Statement of Offence

DISOBEDIENCE OF LAWFUL ORDER:- Contrary to Section 202 of the Crimes Decree No. 44 of 2009.

Particulars of the offence

POASA MANAKIWAI on the 30th day of July, 2013 at Naidovi, Sigatoka in the Western Division disobeyed the order of the Interim Domestic Violence Restraining Order Application No. 48/13 with effective from 25th July, 2013 issued by the Sigatoka Magistrates Court.

2. The appellant pleaded guilty and after waiving his right to counsel on 05th August, 2013 and admitted the summary of facts the same day. He was sentenced for 2 years imprisonment for the first count and 12 months imprisonment for the 2nd count to run concurrently on 07th August, 2013.
3. The facts of the case are the appellant on the 30th day of July 2013 at about 1600 hours at Naidovi, Sigatoka abduct the victim with intent to secretly and wrongfully confine her and in disobedience of lawful order of the domestic violence restraining order in effect from 25th July, 2013.

Both parties are known to each other since 2010 as boyfriend and girlfriend. However, they had on and off relationship. Appellant was explained the domestic violence restraining order on 25th July, 2013. On 30th July, 2013 when the complainant was on her way to shop with her cousin, appellant who came in a carrier, grabbed the complainant into that vehicle and abducted her to a friend's house.

They had spent two nights and complainant was threatened not to contact with anyone about their whereabouts.

After matter was reported, appellant was arrested and he admitted the offence in caution interview statement.

4. This appeal against the sentence was filed on 15 August, 2013 within time.
5. The grounds of appeal are :
 - (i) That the sentence imposed by the sentencing Magistrate is harsh and excessive.
 - (ii) That the learned Magistrate failed to consider the prompt early guilty plea on the very first instance in saving the courts time and resources in a defended trial.
 - (iii) That the learned Magistrate failed to consider FOUR CLASSICAL PRINCIPLES OF SENTENCING.
 - (iv) That no regard was given to the Section 4 (1) (d) of the Sentencing and Penalties Decree, as to the rehabilitation of the appellant and the sentence should have been suspended.
 - (v) That the learned Magistrate failed to consider Section 4 (2) (c) of the Sentencing and Penalties Decree in regards to the nature and gravity of this particular offence.

- (vi) That the learned Magistrate erred in law and fact, in taking irrelevant matters into consideration.
- (vii) That the sentence is neither wrong in principle nor excessive in length but because of the impact of the sentence on the appellant.

6. On 31st October, 2013 appellant requested to amend the grounds of appeal.

7. Accordingly he wants to maintain only one ground that is:

That the learned Magistrate erred when his lordship took into account as an aggravating factor the fact “that you have breached the DVRO” and by doing so resulted in the three years enhance of sentence being harsh and excessive.

8. However, in the written submissions filed by the appellant on 21st January, 2013 he had stated that he maintains the following grounds of appeal:

- (i) That the sentence is harsh and excessive in exceeding the starting point tariff of 12 months.
- (ii) Failure to give proper credit of a reduction a third of the sentence to reflect the early guilty plea.
- (iii) Breach of DVRO as an aggravating factor was wrongly considered and taken into account.

Grounds (i) - Sentence harsh and excessive and exceeding the starting point tariff

9. The learned Magistrate had selected a starting point of three years. He had not mentioned any guideline judgment he had followed.

10. In **Sasau v State** [2012] FJHC 1301; HAC 111.2009 Hon. Mr. Justice Paul Madigan had held:

*“The maximum penalty for abduction is seven years imprisonment. There has been no tariff set in this jurisdiction for the offence. Thurairaja J purported to set the tariff at six months to 18 months in the case of **Sadrugu** HAC 116 of 2011, where the learned Judge said that tariff has been set in **Sanoka** [2009] FJHC 91. This is incorrect. **Sanoka** did not set such a tariff.”*

*Sentencing for abduction has been discussed by the English Court of Appeal in **Spence and Thomas** 5 Cr. App. R (S) 413 where the Court said that a top end of sentencing range should be reserved for cases where the victim is taken hostage or a ransom has been demanded, and at the maximum if undue violence or firearms are used. The bottom end of the tariff can be appropriate in cases of family disputes or lovers’ tiffs.*

As the maximum penalty for this offence is seven years both under the Penal Code and the Crimes Decree 2009, an appropriate tariff for the offence would be between 18 months and four years, depending on the violence, length of detention, use of weapons, etc.”

11. Although the learned Magistrate had not mentioned about this judgment, the starting point taken by the Magistrate is 3 years, which is within the tariff. However, considering the facts and circumstances of this case, it falls in the midline of the tariff and correct starting point should have been 2 years. This ground has to be considered with the other grounds.

Ground (ii) - Failure to give proper credit of a reduction a third of the sentence to reflect the early Guilty plea

12. The learned Magistrate had reached an interim sentence of 6 years after adding 3 years for aggravating factors. Then he had stated “Considering your compelling mitigation, I deduct 1/3 of the interim sentence of 6 years.” Then he had stated that “Final sentence is 2 years imprisonment.” It is not clear as how he arrived at this final figure as he had only deducted 2 years for mitigation. To arrive at a final sentence of 2 years another 2 years has to be deducted. However, it is not recorded as to why this 2 years period is deducted.
13. In **Basa v State** [2006] FJCA 23; AAU 0024.2005 (24 March 2006) the Court of Appeal held that:

“The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.”

14. At was held in **Naikелеkelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) that *“Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.”*

15. The learned Magistrate had erred by not awarding the appellant separate deduction for his guilty plea. There is merit in this ground and it succeeds.

Ground (iii) - Breach of DVRO as an aggravating factor was wrongly considered and taken into account

16. The learned Magistrate had added 3 years for the aggravating factors. He had stated that;

“The aggravating factor is your full knowledge that you have breached the DVRO, which you had consented to and that two nights you had kept the victim against her will. I add 3 years.”

17. When the appellant is also charged for disobedience of DVRO, it is an error to consider the same as aggravating factor for the other charge. The state in their submission had conceded this position. Therefore there is merit in this ground and it succeeds.

Conclusion

18. This background warrants this Court to exercise its powers in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the Magistrate and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff.
19. Accordingly, I take a starting point of 2 years and add 1 year for the aggravating factor that the victim was kept away for two nights. I deduct 6 months for the mitigating factors and another 1 year for the guilty plea. The final sentence for the 1st charge is 1 year and 6 months.
20. The sentence for the 2nd charge to stand at 12 months as the appellant had seriously violated the DVRO within short period of time.
21. Considering totality principle, I order both sentences to run concurrently.
22. Appellant was in remand since 05th August, 2013 for a period of 5 months and 23 days. That period to be deducted from the final sentence.
23. I order a permanent Domestic Violence Restraining Order in place, identifying Leilani Agnus as the protected person. The appellant is hereby ordered not to have any sort of contact with the said victim directly or by any other means, unless otherwise directed by this Court.

24. Therefore appellant to serve 1 year and 7 days from today. Suspension of your sentence is not appropriate as you have nine previous convictions.

25. Appeal is allowed. Sentence is varied.

Sudharshana De Silva
JUDGE

**At Lautoka
28th January 2014**

**Solicitors : Appellant in Person
Office of the Director of Public Prosecution for Respondent**