

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 09/2014

BETWEEN:

SOLOMONE TUPOU

APPELLANT

AND:

STATE

RESPONDENT

COUNSEL:

Mr. P. R. Lomaloma for the Appellant

Mr. S. Vodokisolomone for the Respondent/State

JUDGMENT

01. Solomone Tupou (hereinafter "the appellant") was charged for Assault Causing Actual Bodily Harm contrary to section 275 of the Crime Decree No: 44 of 2009. The Charge was filed at the Labasa Magistrates Court on 20th day of November 2013.
02. The particulars of offence were:

"Solomone Tupou on the 19th day of October, 2013 at Total Service Station, Labasa in the Northern Division assaulted one Nalesh Kumar thereby causing him actual bodily harm"
03. On 10th February 2014, the charge in respect of Criminal Case No: 596/2013 was read out to the Appellant. He pleaded guilty to the charge and admitted the summary of facts.

04. On 10th February 2014, he was sentenced to a prison term of 02 years with a non-parole period of 01 year and 06 months.
05. Being aggrieved by above sentence the appellant has appealed against the conviction and sentence. At the hearing learned counsel for the Appellant informed this court that the Appellant now only pursue appeal against the sentence only. The Appellant appealed against the sentence on the following ground:
 - (i) That the leaned Magistrate erred in failing to take into account the seriousness of the offending when compared to other assaults and as a result, picked the wrong starting point.
06. The general principle of sentencing under section 15(3) of the Sentencing and Penalties Decree No: 42 of 2009 States:

"As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentence of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in this part"

07. The objectives of sentencing, as set-out in Section 4(1) of the Decree, are as follows:
 - (i) *To punish offenders to an extend and in a manner, which is just in all the circumstances;*
 - (ii) *To protect the community from offenders;*
 - (iii) *To deter offenders or other persons from committing offences of the same or similar nature;*
 - (iv) *To establish conditions so that rehabilitation of offenders may be promoted or facilitated;*
 - (v) *To signify that the court and the community denounce the commission of such offences; or*
 - (vi) *Any combination of these purposes.*

08. Section 26 (1) of the Sentencing & Penalties Degree 2009 states:-

"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances"

09. The Learned Magistrate, after considering the aggravating factors and mitigating submissions has imposed 02 years imprisonment with a non-parole period of 01 year and 06 months.
10. The tariff for this offence varies from an absolute discharge to 12 months imprisonment. **Elizabeth v The State** (2004 HAA 073/04) and **State v Salote Tugalala** (HAA 025/2008).
11. In **Sareka v State** FJHC 88; HAM 027, **State v Nayacalagilagi** (Crim. Case No.HAC 165 of 2007), and **State v Mohammed Mustafa Hakim** (HAC 022 of 20090, the tariff was identified to be suspended sentence to 9 months imprisonment, depending on the seriousness of the case.
12. The state counsel submitted that the sentence of 2 years imprisonment with non-parole period of 1 year and 6 months by learned magistrate is well above the tariff for this particular type of offending. The sentence should fall within absolute discharge to 12 months imprisonment. Hence he submitted that the appeal ground of the appellant has merits and to be allowed.
13. The appellant has no previous convictions. He is a first offender. He pleaded guilty at very first opportunity. Thus he saved courts' time. He is remorseful on what he did and promised that he would not reoffend under any circumstances. He has already spent 2 months and 18 days of the sentence.
14. The mitigating factors were the appellant's guilty plea, cooperation with police, express of remorse and 1st offender. Although he reconciled with the victim, it was not considered when the sentence was passed by the learned magistrate.
15. The aggravating factors were that victim assaulted while driving a carrier that was hired by the victim. Victim received tenderness over his face.

16. In the circumstances, the sentence of 2 years imprisonment is excessive. The starting point should have been picked from the correct end of the tariff. As the sentence imposed by the learned magistrate is well above the tariff, I set aside the sentence of 2 years imprisonment imposed by the learned magistrate.
17. I take a starting point of 08 months imprisonment and add 04 months for the aggravating factors and deduct 04 for the mitigating factors. The resultant sentence is 8 months imprisonment which commence from 10/02/2014.
18. The remaining period of imprisonment will be suspended for three years from 28/04/2014. Suspended sentence explained.
19. Appellant has 30 days to appeal.



P. Kumararatnam
JUDGE



At Labasa
28/04/2014