

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 8 OF 2014

BETWEEN: NIRAJ SANDEEP SINGH

AND: STATE

Appellant
Respondent

Counsels : Mr. R. Kumar for the Appellant
Mr. Semi Babitu for the Respondent

Date of Judgment : 3 July 2014

JUDGMENT

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

FIRST COUNT
Statement of Offence

Using Obscene and Threatening Language in a Public Place:- Contrary to Section 7 (1) of the Minor Offences Act, Cap.18.

Particulars of the Offence

Niraj Sandeep Singh s/o Ramend Prasad on the 18th day of August 2010 at Lautoka in the Western Division, used obscene and threatening language in a public place, namely Narara Parade.

SECOND COUNT
Statement of Offence

Serius Assault (Resisting Arrest):- Contrary to Section 277 (b) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Niraj Sandeep Singh s/o Ramend Prasad on the 18th day of August 2010 at Lautoka in the Western Division, resisted Police Constable No. 3177 Nitesh Prasad, whilst effecting arrest in the due execution of his duty.

THIRD COUNT
Statement of Offence

Reckless or Negligent Act:- Contrary to Section 268 (a) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Niraj Sandeep Singh s/o Ramend Prasad on the 18th day of August 2010 at Lautoka in the Western Division, in a manner so rash or negligent as to endanger human life or to be likely to cause harm to **Police Constable No. 3177 Nitesh Prasad**, drove a motor vehicle registration number LT 5960 on Narara Parade, a public road.

2. The appellant pleaded not guilty and after trial he was convicted and sentenced for 9 months imprisonment for the 2nd and 3rd Counts to run concurrently on 19.2.2014. He was also ordered to pay a fine of \$40 for the 1st Count with 10 days imprisonment for default.
3. The facts of the case are that PC 3177 Nitesh Chand was on traffic control duty had seen the appellant stopped his taxi at a no parking area and upon enquiry the appellant had used abusive words and pushed the police officer. When other police officers came, the appellant had driven away the taxi in a way that he could hit the complainant.
4. This appeal was filed on 18th March 2014 within time.
5. The grounds of appeal against the conviction is :
 - (i) That the learned Magistrate erred in law and in fact when he recorded a conviction based on the fact that the accused did not give any evidence in his defence.
6. Grounds of appeal against the sentence are:
 - (i) The term of imprisonment is harsh and excessive for the following reasons.
 - (a) Appellant did not use a weapon,
 - (b) No physical violence on the victim,
 - (c) Minimal fear caused to the victim,
 - (d) Appellant was a first offender,
 - (e) Appellant was a young offender.

7. Both parties have filed written submissions.

Ground against the conviction

8. The appellant chose to remain silent. That is his right. Appellant had produced following passage of the Judgment.

"...and his stage the accused did not deny the evidence of the prosecution witnesses and also he did not give any evidence on that point."

This portion was taken from the evaluation of evidence on the first count. The learned Magistrate had evaluated the evidence on behalf of the prosecution on this count and the position of the defence on the same count. This cannot be considered as the learned Magistrate based his conviction on the fact that the accused did not give evidence.

Further reference is drawn to the following sentence.

"Thus the evidence of the defence witness failed to establish any doubt in the prosecution case."

This reference is made after sentence *"The document produced by the defence witness was a photocopy. The defence also failed to produce the original. Therefore the defence had failed to prove the authenticity of the document. Thus the evidence of the defence witness failed to establish any doubt in the prosecution case."*

This portion was taken from evaluation of the evidence of the defence witness by the learned Magistrate. It was the duty of the learned Magistrate to evaluate the evidence of both prosecution and defence witnesses.

This Court had carefully perused the Judgment of the learned Magistrate. There is nothing in that Judgment to indicate that he had placed any burden on the defence.

There is no merit in this ground and it fails.

Ground against the sentence

9. The learned Magistrate had selected a starting point of 9 months and added 4 months for the aggravating factors. He had deducted 4 months for the previous good character.
10. The aggravating factors identified by the learned Magistrate are in the paragraph 3 of the sentence.

"According to the evidence, it was revealed that you have, used obscene and threatening language in a public place, namely, Narara Parade, and resisted Police Constable, No.1377 Nitesh Prasad, whilst effecting arrest in execution of his duty. It was also revealed that on the same cause of action you have acted in a manner so rash or negligent as to endanger human life or to be likely to cause harm to Police Constable No.3177 Nitesh Prasad, drove a motor vehicle registration number LT-5960 on Narara Parade, a public road. I consider those facts as aggravating circumstances for your sentence."

11. All these facts which were identified by the learned Magistrate are elements of the three offences. Therefore to identify the same as aggravating factors is wrong.
12. The tariff for Serious Assault (Resisting Arrest) is discussed in several cases.
13. In Lalagavesi v State [2010] FJHC 386; HAA 017.2010 (8 September 2010) Hon. Mr. Justice Paul Madigan held:

"A review of the authorities provides scant assistance in setting the proper tariff for assaulting Police Officers. In Peni Tuidaviko v R – Criminal Appeal No. 74 of 1977, Acting C.J. Mishra found that a 12 month sentence for an assault on an officer whose jaw was broken as a result of the assault was "anything but excessive".

[8] The maximum penalty for the offence being a term of five years, the proper range of sentence where no substantial injuries are inflicted should be between nine to twelve months, in recognition of the seriousness of disregard for authority. The term of fifteen months in this case where the injury to the officer was "tenderness to the central part of upper chest" is rather excessive and I would reduce the sentence accordingly to a term of nine months. For the reasons given above the appeal against conviction and sentence is dismissed."

14. In State v Batiratu [2012] FJHC; HAR 001.2012 (13 February 2012) His Lordship Hon. Chief Justice A.H.C.T. Gates held:

[35] Assault on police has always been regarded by the courts in Fiji as a serious offence. In Division 5 of the Crimes Decree are listed 4 types of assault. They are:

Sections 274 Common Assault

275 Assault causing actual bodily harm

276 Assaults on authorised persons protecting wrecks

277 Serious assaults

[36] Assault on a police officer is listed under section 277 – headed "Serious Assaults". Serious assaults under this section attract a maximum sentence of 5 years imprisonment. These offences under section 277 are to provide protection for those persons with specific duties to perform, such as to arrest a suspect, or for a police officer to carry out his or her duty, or for anyone aiding a police officer in that regard, and they cover assaults committed during unlawful combinations to raise wages or respecting trade, business or manufacturing matters, or assaults against court process servers, those executing lawful distress, or assaults on persons carrying out duties imposed on them by law.

[37] These offences are included in the Crimes Decree to give enhanced protection to persons acting for the community at large when carrying out their lawful duties. The Magistrate in his sentencing remarks rightly recognised that the Accused had violated "the accepted norms of society" in doing so, the failure to pay the taxi fare and then the assault on the police officer carrying out his duty. The Accused was not charged before the Magistrate with failing to pay the taxi fare. I have no information as to whether or not

he has been separately charged with that offence. But for the assault on police, as with all assaults on officials performing lawful duties, the circumstance of aggravation is the fact that the victim was at the time of the assault, performing important duties on behalf of the community for which the law accords special protection.

[38] In *R v Bell* [1973] Crim. LR 318 the Accused aged 22 had no prior convictions and pleaded guilty to assaulting a police officer. The Accused had been running away when apprehended by a police officer. He had kned the officer in the groin causing him to fall. The sentencing court had imposed an immediate custodial sentence of 2 months. The Court of Appeal referred to the defence suggestion that the offence was merely technical because the Accused was only struggling to escape. The court said that: "The sooner people being arrested appreciated that if they struggled they might be charged with assault, and that a custodial sentence was normal for a deliberate assault on a police officer, the better. B was exceedingly lucky to receive only 2 months."

[39] In *Reg v David Hill* [2007 EWCA Crim 3188 the Accused had pleaded guilty. He had been sentenced for the count of assaulting a police officer to 4 months imprisonment. He had been arrested for drunken driving, and then pushed one officer out of the way and punched a female officer in the chest and then in the eye. Eventually the male officer with a member of the public subdued the Accused. The Accused at first denied the offence and he had previous convictions for violence. The Court of Appeal upheld the sentence of 4 months.

[40] In *Herbert Wise v The State* [2005] FJHC 411; HAA0117J.2005S (4th November 2005) the Appellant had pleaded not guilty to several counts one of which was assault on police. He had pulled the officer's shirt, and punched him. The shirt was damaged. The Constable received injuries – tenderness on right chest and a bruise on the left knee. For this offence he was sentenced to 6 months imprisonment concurrent with other sentences. Shameem J said:

"There are no reasons to quash the conviction. The sentence passed in total was not harsh or excessive. Although the injury received by PW2 is minimal, the act of assaulting a police officer is a serious one because it strikes at the authority of law enforcers. The charges justified a short custodial term of imprisonment."

[41] In *The Queen v Thomas Cawley* [2008] NICC43 the Accused was charged after a drinking bout which ended with a stabbing. Two police officers were assaulted in separate incidents. He swung a metal bar at one Constable's head which did not connect. From a roof he dropped an attic hatch door on another officer's head. It shattered around him and covered him in debris. Neither officer sustained injuries. It was a difficult arrest. The Accused was remorseful and pleaded guilty. He had been in trouble with the police before. He had a very difficult upbringing in care homes. The sentencing judge said: I take into account your personal circumstances. However in doing so I emphasise that this does not weigh heavily in reduction of penalty." The Accused received two terms of 3 months imprisonment consecutive to the other sentences but concurrent with each other.

[42] In *Nakorolevu v The State* Cr App. AAU0058.2005S (25th June 2007) the

Accused had been convicted of 3 traffic offences after trial including assault on police. He was sentenced to 9 months imprisonment for the assault on police. Shameem J in the High Court had said the sentence was within the tariff, and in that assessment on further appeal, the Court of Appeal agreed.

[43] In The State v Ligatabua Revisional Case HAR09.2010 (18th January 2011) Goundar J considered review of a sentence of 8 months imprisonment suspended for 3 years for a count of assault on a police officer. It arose out of a questioning of the Accused by a police officer of an act of indecent assault which the officer had witnessed. The Accused thereupon punched the officer on the jaw. The officer received muscular skeletal injuries as a result. The Accused had pleaded guilty and had no prior convictions. He was remorseful and apologized. Goundar J said (at p.14):

"[13] In the present case, the indecent assault on a young woman on a street was a serious offence. The offending by the respondent was further aggravated by a second assault on the police officer at the police station following his arrest. This kind of offending should attract an immediate custodial sentence. The offender's previous good character is only relevant to the length of the prison sentence, but it should not be used to justify suspending the sentence.

[14] I would have intervened but for the following circumstances. The respondent pleaded guilty in April 2009 and was released on bail. He was sentenced in August 2009. The State did not see fit to file a timely appeal against the sentence. The review of sentence was heard in December 2009. All these times, the respondent retained his employment with Water Authority of Fiji and had been of good behavior."

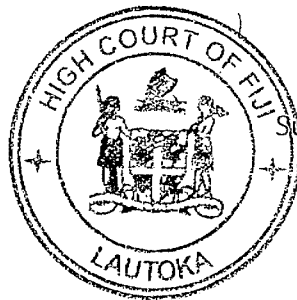
[44] For those reasons Goundar J decided against interfering with the suspended sentence, and the Accused may have been lucky in such an approach. The principle was clear however. Such offences must be met with the imposition of custodial sentences, and satisfactory mitigation is unlikely to change that.

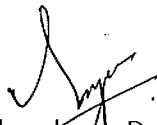
[45] In Gabriel Waqa v The State Cr. App. HAA61 of 2009 the Magistrates Court file had been lost. Though reconstructed the facts do not appear to have been provided in sufficient details to the appeal judge. It is not clear to what extent the assault had been violent and what injuries were caused to the police officer. A binding over order was held by Madigan J to be unsuitable and instead a 1 year's imprisonment suspended for 2 years was substituted. If the assault had been at all serious then 1 year might be considered lenient: per Mishra Acting CJ in Peni Tuidaviko [1977] FJSC 52.

[46] The sentence ordered of binding over, the discharge without conviction, was not within the range and type of sentencing suitable for the offence of assault on police. The range is between 6-9 months imprisonment. The perversity of the offence is its violent challenge to lawful action taken by State servants, not in the extent of the assault. Of course the greater the violence and the injuries caused will lead to enhancement of sentence."

15. Therefore it is clear that the tariff for the offence is 6-9 months.

16. Although the sentence ordered by the learned Magistrate in within the range he fell into error when he identified the elements of the offence as aggravating factors.
17. 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.
18. Accordingly I take a starting point of 8 months. I do not find any aggravating factors. There is no evidence of injuries to the police officer. I deduct 2 months for the mitigating factors. Now the sentence is 6 months. The appellant had served the sentence from 19.2.2014 for a period of 4 months and 14 days. He has to serve the balance of 1 month and 16 days. I order the same sentence for the 3rd charge to run concurrent with the sentence for the 2nd charge. The sentence for the 1st charge is within tariff and just and appropriate.
19. Appeal allowed. Sentence varied.




JUDGE

At Lautoka
03rd July 2014

Solicitors : Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for Respondent