IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No: HAM 45 of 2015

BETWEEN : **ROBERT KAMOE**

Appellant

AND : **THE STATE**

Respondent

Counsel : **Appellant in person**
Ms J.Fatiaki for the State

Date of Hearing : **19th June, 2015**
Date of Judgment : **29th June, 2015**

JUDGMENT

1. On the 09th of August 2013 the Appellant entered a plea of guilty to one count of causing Grievous Harm contrary to Section 258 of the Crimes Decree of 2009 in the Magistrate's Court at Nadi. He was sentenced on the 10th of February 2015 to a term of imprisonment of 18 months while six months of which was suspended for two years. It is against this sentence that the appeal is made on the grounds that;

   i. *That the learned Magistrate had erred in law and in fact in that he failed to apply Section 23 (1) of the Sentencing & Penalties Decree of 2009.*

   - *The learned Magistrate had imposed the sentence on the 7th of October 2014 after the Appellant pleaded guilty in November 2012, yet sentence was activated on the 10th of February 2015.*

   ii. *That the learned Magistrate had erred in law and in fact in that he failed to apply and follow proper sentencing guidelines as stipulated under Section 48 (1) (2) and (3) of the Sentencing & Penalties Decree.*

   - *The learned Magistrate had failed to state in his sentencing the reasons for deferring sentence for more than 2 years after the Appellant had pleaded guilty on the 16th of November 2012.*

- *That the aforementioned Section 48 (1) of the Sentencing & Penalties Decree states the Magistrates Court may differ sentencing but not exceeding 6 months.*

iii. *The Sentence of 18 months is excessive in all circumstances and wrong in principal. Whereas the learned Magistrates Court should have given a suspended sentence taking regards to the character and past good behaviour of the offender, and the impact of a conviction on the offenders economic or social well-being and on his employment prospect.*

iv. *That the learned Magistrates Court erred in law and fact, by way of admitting the charge itself as aggravating factors and the complainant as is his wife in which Restraining Order was also administered by the Court.*

v. *That the Court had failed to give favourable discount of sentence both in mitigation and guilty plea respectively. That the Appellant being advised by the Police Officers to plead guilty as first offender a suspended sentence will be passed which the Appellant did.*

vi. *That the learned Magistrate failed to consider that the Complainant who is the sister-in-law came the very next morning after the incident and reconciled yet this Court did not accept.*

vii. *That the learned Magistrate had failed to consider when being informed that the Complainant still stayed with the Appellant's family from the day of incident until this very moment.*

viii. *That the learned Magistrate took wrong mitigating factors in enhancing the sentence to 3 years and not giving sufficient weight to other mitigating factors and a past clean record.*

ix. *That the learned Magistrate did failed to take other necessary and appropriate measures such as other sentencing ordered after the Appellant again appeared just to be sentenced on the 7th of October 2014 and activated on 10th February 2015.*

2. The accused pleaded guilty to the offence and he is not appealing conviction.

3. The summary of facts agreed by the appellant was that;

At about 7.20 on the 14th of November 2012, complainant woke up and heard accused scolding one of her children and also verbally abusing her. The complainant then approached accused and asked him

why he swore at her son. The argument developed whereby accused threw a hot water thermos bottle directly at complainant causing the lid to break and hot water to spill on her thighs causing external burns. Complainant sustained several cuts on left arm and burn injuries on the left thigh. Complainant and her three children are staying with the accused who is living in a de facto relationship with complainant's sister. The accused was arrested when the matter was reported to Namaka Police Station. He made admissions under caution.

4. The Appellant contends that the learned Magistrate failed to take Sections 23(1) and Section 48(1), (2) and (3) of the Sentencing and Penalties Decree of 2009 into consideration when he was sentenced.

5. Section 23(1) of the Sentencing and Penalties Decree states as follows;

   "..A sentence of imprisonment commences on the day that it is imposed.."

6. According to the copy record of the Magistrates Court, the sentence had been pronounced on the 10th of February 2015 although it is dated 7th October 2014. The Appellant's term of imprisonment has in fact commenced on the 10th of February 2015, and not on 7th of October 2014. The date of pronouncement of the sentence is deemed to be the date that it is imposed. There is no merit for the 1st Ground of Appeal.

7. The Second Ground is concerned with Sections 48 (1), (2) and (3) of the Sentencing and Penalties Decree. Those Sections deal with 'deferral' of sentence. The copy record of the Magistrates Court does not indicate that the learned Magistrate who accepted the plea of the Appellant had considered 'deferral' of sentence in terms of Section 48. The delay in sentencing had been due to various other reasons, including Appellant's non- appearance in Court.

8. The copy record indicates that after the Appellant pleaded guilty to the charge on the 11th of March 2013 the matter was adjourned for the Prosecution to submit the Summary of Facts on the 9th of August 2013. Such was done and the matter was then adjourned again for mitigation.

9. On the 26th of November 2013 the matter was again adjourned as the learned Magistrate was not sitting. The matter was called again on the 4th of March 2014 and the Appellant was not present.

10. On the 12th of March 2014 the matter was again called and the Appellant was present and his mitigation was recorded by the Court.

The matter was again called on the 11th of July 2014 and adjourned till 21st of November 2014. When the matter was subsequently called on the 21st of November 2014 it was again adjourned as the learned Magistrate was on annual leave. It was thereafter adjourned for Sentence on the 10th of February 2015.

11. Accordingly, the Ground ii is also without merit.

12. I now consider Grounds iii to ix and see whether the learned Magistrate had erred in law or was unreasonable in imposing the sentence appealed.

13. The learned Magistrate has considered the maximum sentence (15 years of imprisonment) for the offence and has correctly identified the existing tariff of 2 to 6 years of imprisonment set by the guideline judgment, **State v Patel** (2011) FJHC669; HAA030.2011(27 October 2011).

14. He has then set the starting point, quite correctly, at 2 years imprisonment, the bottom edge of the tariff band set by the guideline judgment.

15. In **Koroivuki v State** (2013) FJCA 15 their Lordships of the Court of Appeal made the following remarks at paragraph 27;

> *"...In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of tariff..."*

16. The learned Magistrate, at paragraph 6 and 7 of the sentence, then identified the aggravating factors in his own words as follows;

> *"...The aggravating factors is (sic) that the complainant suffered injuries, you had no respect for the complainant's children, you had no respect for the complainant and the complainant was vulnerable.*
>
> *For aggravating factors, a further 12 months is added. The interim balance is now 3 years imprisonment."*

17. Causing of injuries is rather an element to be proved or admitted in order to find an accused charged with the offence of causing Grievous Harm guilty, and could not be an aggravating factor. However, the Appellant had not shown any respect to children of the complainant when he committed the offence in the presence of her child and that

can be considered as an aggravating factor in view of the Section 3(b) of the Sentencing and Penalties Decree. I am unable to agree with the learned Magistrate when he categorised the adult complainant as a vulnerable victim, as she was neither pregnant nor disabled at the time of offending.

18. I find an addition of full one year period to the prison term is harsh and unreasonable in view of somewhat wrong consideration of aggravation.

19. The learned Magistrate then considered the mitigating factors submitted and stated as follows;

> *"...Your oral mitigation submitted in Court is considered. It lacks genuine remorse for wrongful conduct.*
>
> *For mitigation inclusive of past clean record, 6 months is reduced. The interim balance is now 2 years and 6 months imprisonment..."*

20. The learned Magistrate has given a further discount of 12 months on account of the early guilty plea at the first available opportunity.

21. There is nothing on the record to show that the oral mitigation of remorse, as the learned Magistrate finds, is not genuine. The Appellant had pleaded guilty to the charge at the first available opportunity and that conduct is also suggestive of his remorse; whereas the learned Magistrate has considered his early guilty plea as an 'indication of honesty'.

22. Although there is no evidence of reconciliation on record, as stated by the Appellant in his petition, the facts admitted by the Appellant reveal that the Complainant and her children are living with the Appellant under one roof and sequence of events that led to the offending is suggestive of provocation.

> *.."Accused scolding one of her children and also verbally abusing her. The Complainant then approached Accused and asked him why he swore at her son. The argument developed whereby Accused threw a hot water thermos bottle directly at Complainant".*

23. The appellant in his submission states that he was suddenly provoked by his sister-in-law's conduct when he was trying to correct her son. In his own words, this is what he has said;

"...What happened between my sister-in-law and me was a result of her not accepting the best thing her son should do...."

24. The Medical Examination Form attached to the Summary of Facts revealed only several small cuts on the left arm and burns on the left thigh of the victim requiring no in-ward treatments.

25. The learned Magistrate should have, in sentencing, considered the offender's culpability and degree of responsibility for the offence, and also the impact of the offence on the victim and the injury, loss or damage resulting from the offence.

26. The appellant, at the time of offending, was 34 years old. He lives in a *de facto* relationship with Complainant's sister. The Complainant and her three children are also living with him. He earned his living as a receptionist at a hotel and the sole breadwinner of the family. He was remorseful and asked for forgiveness and leniency from the Court. He said that he alone was responsible for the care of the children and his wife.

27. Having considered all the facts placed before me by both the parties in respect of the appeal against the sentence, I ventured into examine the copy record of the Magistrates Court pursuant to Revision powers conferred on this Court under Section 260 of the Criminal Procedure Decree.

28. Section 260 (1) provides as follows;

    The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to –

    (a). the correctness, legality or propriety of any finding, sentence or order recorded or passed; and

    (b). the regularity of any proceedings of any Magistrates Court.

29. I am surprised to find that the sentence appealed has been imposed without the Appellant had first been convicted. The sentence is tainted with illegality and no sentence can be imposed on an accused without a conviction been first recorded.

30. And also, the offence with which the Appellant was charged in the Magistracy is that of an indictable offence triable summarily by the Magistrate. According to Section 4 of the Criminal Procedure Decree, the Magistrate has no jurisdiction to try an accused charged with

such an offence without the right of election been given to the Accused or sanction received from the High Court pursuant to Section 4(2).

31. There is nothing on the record to show that the Appellant had elected to be tried by the Magistrate or the jurisdiction was extended by the High Court to the Magistracy.

32. According to Section 193 (1) of the Criminal Procedure Decree, a Magistrate has jurisdiction to accept a guilty plea for any offence, including indictable offence, before a case is transferred to the High Court.

33. However, according to Section 193(2) of the Criminal Procedure Decree, when accepting a guilty plea under Sub-Section (1) of Section 193 the Magistrate shall not proceed to conviction, but the same shall be reserved for the High Court after the transfer of the case.

34. Section 194 of the Criminal Procedure Decree further provides that if an accused person has entered a plea of guilty to an indictable offence and the plea has been recorded by the Magistrates Court, then the Magistrate shall order the transfer of the charges or proceedings to the High Court for sentencing or for trial.

35. Justice Temo in **Aca Koroi v State** HAM 186 OF 2012 (21st June, 2013); said.

> *Burglary, contrary to section 312 (1) of the Crimes Decree 2009 is* ***an indictable offence, which is triable summarily****. As such, section 4 (1) (b) of the Criminal Procedure Decree 2009 mandates that the offence shall be tried in the High Court or Magistrate Court at the election of the accused.* ***Without the election been put to the accused before the plea was put to him, the Magistrate Court, in this case, did not have the jurisdiction to deal with the matter at all. In proceeding with the matter without complying with the mandatory requirement of section 4 (1) (b) of the Criminal Procedure Decree 2009, the conviction and sentence, were in effect, a nullity.*** *(Emphasis is mine)*

36. It is apparent that when a Magistrate records a guilty plea in respect of an indictable offence, the case is to be transferred to the High Court. It is for the Judge in the High Court to proceed to record the conviction and to impose the sentence.

37. In the present case, the Magistrate before whom the plea was recorded has not proceeded to conviction. However, by an oversight or inadvertence, the Magistrates who succeeded him have proceeded to write a sentencing ruling and pronounced the same without a conviction.

38. The proceedings in the Magistrates Court with regard to sentencing have miscarried due to illegality and to an irregularity.

39. I now pose the same question posed by Justice Temo in **Aca Koroi v State** (supra) and his recommendation as follows;

> *Should the court declare the Magistrate Court proceedings a nullity, and order that the accused be re-tried? This will depend on whether or not, the sentence on the applicant was harsh and excessive, given the circumstance of this case.*

40. In the circumstances of this case, I am satisfied that the plea has been recorded properly by the learned Magistrate, though he has failed, at that time, to transfer the case to this Court for conviction and sentence.

41. Having considered the guilty plea on Appellant's own free will and the facts agreed by the Appellant, I proceed to convict the Appellant under Section 196(2) of the Criminal Procedure Decree.

42. I find the Appellant guilty of charge of causing Grievous Harm contrary to Section 258 of the Crimes Decree.

43. Pursuant to Section 256(3) read with Section 262 (1) of the Criminal Procedure Decree, I quash the sentence imposed by the learned Magistrate of Nadi on 10th February 2015 and sentence afresh.

44. I take a starting point of 2 years for the offence. From this 2 year term, I add six months for the Appellant's disregard for the child who was present when he committed the crime. I deduct 18 months for the appellant's mitigation of caring for his family as the sole breadwinner, his early guilty plea and clear record. Now his sentence is 12 months imprisonment.

45. The Appellant has already served nearly five months in prison. Having considered the offender's culpability and degree of responsibility for the offence I suspend the balance part of the sentence for a period of two years and order the release of the Appellant forthwith.

46. Should the Appellant reoffend during the operational period of suspended sentence, the suspended sentence may be activated and be served consecutive to the sentence for new offending.

47. The learned Magistrate has ordered a Permanent Domestic Violence Restraining Order with Non Molestation Conditions in following terms.

> *"It is further ordered that a Permanent Domestic Violence Restraining Order with Non Molestation Conditions is imposed against you for the safety of your wife"*

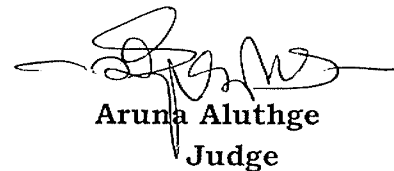
48. There is no basis for this order as the victim of this crime is not the wife of the Appellant but his wife's sister. So I vary the order to read as follows.

    "It is further ordered that a Permanent Domestic Violence Restraining Order with Non Molestation Conditions is imposed against you for the safety of the victim".

Summary

49. I quash the sentence imposed by the learned Magistrate of Nadi on 10th February 2015 and sentence afresh.

50. Now the sentence of the Appellant is 12 months imprisonment. The Appellant has already served nearly five months in prison. I suspend the balance part of the sentence for a period of two years and order the release of the Appellant forthwith.



Aruna Aluthge
Judge

At Lautoka
29th June 2015

Counsels:

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