

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 010 of 2015**

**STATE**

Appellant

**v.**

**RAJESHWAR PRASAD**

Respondent

Counsel: Ms. J. Prasad for the State.  
Ms V. Lal (LAC) for the respondent.

Dates of hearing: 18 June, 2015

Date of Judgment: 3 July, 2015

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**JUDGMENT**

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[1] On the 28<sup>th</sup> July 2014 in the Magistrates' Court at Suva the Respondent, a serving police officer, entered a plea of guilty to one count of assault causing actual bodily harm. He admitted a summary of facts

[2] On the 20<sup>th</sup> March 2015 he was sentenced as follows:

- No conviction recorded;
- Adjourned for 2 years;
- Bound over in the sum of \$2000 for 2 years to be on good behavior;
- Commit no other offence in 2 years; and
- If no offending and good behavior in 2 years you will be discharged pursuant to s.44 of Sentencing and Penalties Decree.

[3] The State appeals that sentence on two grounds:

1. That the Magistrate erred in law in not imposing a conviction on the grounds that the accused was a police officer when there was no evidence that a conviction would affect his occupation.
2. That the learned Magistrate imposed a sentence that was below tariff for this type of offending and was manifestly lenient.

### **Facts**

[4] The facts of the case were that on the 9<sup>th</sup> March 2014 in the late afternoon the wife of the respondent confronted him asking why he had left their child unattended earlier that day. A heated argument arose, and the respondent assaulted his wife by throwing punches on to her face and the back of her head. A medical examination revealed “bruising and abrasion on the left side of the forehead”. The respondent admitted the assault when interviewed under caution. He entered his plea of guilty at the first opportunity.

### **The Sentence**

- [5] The Magistrate in her discretion, rather than imposing an immediate penalty, made use of section 44 of Sentencing and Penalties Decree. She has followed the provisions of the section almost completely.

### **Analysis**

- [6] In her attempt to treat this accused leniently, the Magistrate unfortunately fell into errors. The provisions of s.44 of the Sentencing & Penalties Decree (“SPD”) only come into play after conviction (s.44(2)). Had she wanted to record no conviction then she could have used s.16 or s.43(d) but then the question arises; would this be an appropriate case to do so?
- [7] A “normal” punishment for a domestic violence assault is a term of imprisonment for a period of between 9 and 12 months with an enhancement up to 18 months if the assault be considered serious. A judicial officer can of course sentence outside that tariff if and only if he or she gives reasons for departing from the tariff.
- [8] In a domestic violence context, a sentencing tribunal must take into account the factors set out in section 4(3) of the SPD. Unfortunately, despite the word must contained in the section, so many judicial officers don’t. In this case, although she does not specifically say so, the Magistrate has considered the factors she should. Section 4(3)(d) is particularly relevant which states:

*S.4(3) A Court must have regard to –*

*(d) the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a victim.*

In attempting to order no conviction and adjourn the matter with conditions, the Magistrate said;

*“after considering s.16 of SPD, this Court takes into account that the offence is a minor one and that you have no previous convictions and that a conviction against you will affect your employment, therefore no conviction is entered against you.”*

- [9] Whether punching your wife’s head, leaving ‘bruises and abrasions’, is a minor offence or not is debateable. The respondent’s counsel refers me to the case of **Kumar** [2001] FJLR 225 where Gates J (as he then was) was determining the fate of a police officer who had assaulted his wife. Gates J ruled that the accused be discharged without conviction, saying:

*“upon the basis that a punishment, if it were to result in the loss of the respondent’s livelihood with the Police, would be disproportionate to the crime committed .....*”

This case runs counter however to the same Judge’s decision in **Batiratu** HAR 001/2012 where the Chief Justice distinguished the **Kumar** case and said *“absolute discharges are appropriate only in a limited number of circumstances such as where no moral blame attaches, where a mere technical breach of the law has occurred perhaps by imprudence without dishonesty.”*

- [10] There can be no doubt that this case is not a technical breach nor one where no moral blame attaches. In these days where domestic violence is very much in the forefront of the public consciousness, police officers who are tasked to uphold the law must be also seen to stay within the law.

- [11] An appellate Court would upset the exercise of judicial discretion in a Court below very rarely, however in balancing here the competing interests of the State and the accused it has to be determined that the strict provisions of the Domestic Violence Decree must flow on to a policeman charged with assaulting his police-woman wife. There is no evidence before the Court either below or here that would say that his future in the Force would be affected but in any event that is a factor that he should have considered before launching a physical attack on his wife who had extended to him very little if any provocation.
- [12] Since **Batiratu** (supra), it is now a well-entrenched truth in our criminal law that nobody is above the law. The Chief Justice there and this Court here give a loud voice of application of human dignity, equality and freedom as enshrined in section 3(1) of the Constitution 2013.
- [13] There is no reason why there should be no conviction recorded in the present case. The Magistrate's order to the contrary is quashed and it is ordered that a conviction be recorded.
- [14] Punches around the head are potentially dangerous and in this case an enormous overreaction to a dispute over babysitting. The accused having been charged with assault causing actual bodily harm must be punished for that crime.
- [15] Given that the hypothetical plumber from Raiwaqa would receive a sentence of at least 9 months (depending on his mitigation), I would attach a high degree of leniency to this accused's sentence, taking him out of the tariff for the offence.
- [16] On any review where a lenient sentence is to be replaced by a harsher penalty, that harsher sentence should be alleviated to

compensate for the accused's reasonable expectation that his case had been dealt with and determined presumably to his satisfaction.

- [17] In addition, the accused had strong mitigation features available to him in that he had entered a plea of guilty to the offence, he was a first offender, he had reconciled with his wife and he was relatively young.
- [18] Pursuant to section 256(2) of the Criminal Procedure Decree 2009, I quash the adjournment orders made in the Court below and would substitute a sentence of 4 months' imprisonment.
- [19] I confirm the Magistrate's Domestic Violence Restraining Order imposed on the accused as perpetrator and the wife and child as protected persons, which will remain in force until further orders.
- [20] This is a sentence passed in special circumstances and is not to be regarded as a precedent sentence for police officers assaulting their wives.



**P. K. Madigan**  
**Judge**

At Suva  
3 July, 2015