IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO: HAA 11 OF 2016

BETWEEN	**:**	**ENERI ABBAS ALI**	**Appellant**
AND	**:**	**STATE**	**Respondent**
Counsel	**:**	**Ms. P. Chand for the Appellant** **Ms. J. Fatiaki for the Respondent**	
Date of Hearing	**:**	**6th May, 2016**	
Date of Judgment	**:**	**3rd June, 2016**	

JUDGMENT

Background

1. On the 29th of September 2015 the Appellant pleaded guilty to one count of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Decree No. 44 of 2009 in the Magistrates Court at Nadi.

2. Upon his conviction he was sentenced on the 12th of January 2016 to a term of 9 months' imprisonment. In addition to the sentence, a permanent Domestic Violence Restraining Order (with a non-molestation order) was issued for the protection of the complainant.

3. The Appellant filed his appeal against the sentence on the 4th of February 2016, and therefore the said appeal is within time.

4. The grounds of appeal filed by Counsel for the Appellant are as follows:

   (i) *The sentence is harsh and excessive in the circumstances of the case*

   (ii) *The learned Magistrate erred in law and fact in taking irrelevant matters into consideration while sentencing the Petitioner*

   (iii) *The Petitioner was just a first offender and had a previous clean record Therefore, a suspended sentence would have been appropriate in the circumstances*

   (iv) *That the sentence imposed on the appellant is manifestly harsh and excessive and most unfair in comparison to other cases for the same or similar offences*

(v) *That the sentencing Magistrate erred in law and in fact to demand for a written mitigation from the Petitioner, when he should have allowed the Petitioner to orally mitigate before the sentencing date.*

5. Summary of Facts read to the Appellant was as follows:-

> *"On the 23rd day of July 2013 at about 12.30am at Navakai, Nadi one Eneri Abbas Ali 21 yrs (accused) barman of Navakai Nadi assaulted Asinate Ledua 20 yrs (complainant), Domestic Duties of Navakai Nadi thereby causing him actual bodily harm.*
>
> *Both the complainant and the accused are living in a defacto relationship at the accused's house in Navakai, Nadi for about 2 years.*
>
> *On the abovementioned date and time, both had been drinking beer at their home together with some of the accused workmates. Later on they then went on and continued drinking at the Deep Sea Night Club in Nadi Town. Both could not control of themselves and came out and left off to Navakai in a van.*
>
> *After reaching Navakai they then finished the left over bottle of beer that was at their home and later on an argument broke out between the two on some allegation made by the accused on the complainant that she was having an affair in the night club with another boy. The accused than started slapping the complainant on the face and then punched her several times on the face and stomach and also dragged her as a result she received visible injuries to her body as per medical report.*
>
> *The complainant then managed to escape from the assailant and ran to the Navakai hart where her mother is staying. The complainant was then taken cared by her mother and called into the Nadi Police Station at about 11 am and lodged an official complain to the Police. The complainant was then medically examined by doctor at the Nadi Hospital and was admitted for observation.*
>
> *The accused was then later arrested and caution interviewed and admitted the facts of the case as in Q.35 – 38 of his interview. He was then formally charged for the offence of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Decree No. 44 of 2009".*

Law

6. It is well settled that sentence imposed by a lower court should be varied or substituted with a different sentence on appeal only if it is shown that the sentencing judge had erred in principle or where the sentence imposed is excessive in all the circumstances.

> The Fiji Court of Appeal in **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) observed:

"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499).

7. In **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the proper approach to be taken by an appellate court when called upon to review the sentencing discretion of a court below:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust".*

Analysis

Ground (i)

8. The Appellant contends that the sentence imposed by the learned Magistrate is harsh and excessive in the circumstances if the case. The Courts in Fiji now view assaults arising within a domestic setting very seriously. This sentencing fashion is reflected in Justice Madigan's comments in the recent case of ***State v. Prasad*** [2015] FJHC 493; HAA 010.2015 (3 July 2015), where his Lordship stated at paragraph [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."*

9. The term of 9 months' imprisonment imposed by the learned Magistrate was neither harsh nor excessive as it is clearly within the tariff band.

10. Be that as it may, the learned Magistrate, in light of the circumstances revealed in the summary of facts, should have considered the possibility of rehabilitating the offender since he was a young and first offender. Sections 4(2) (Appellant's previous good character) and the Section 4 (1) d (possibility of rehabilitation) of the Sentencing and Penalties Decree need to be considered before imposing a custodial sentence.

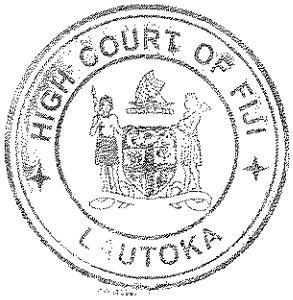
11. The Respondent concedes that the learned Magistrate erred in law when he failed to take into account a relevant consideration namely that the appellant was a first offender.

12. In **Singh v State** [200] FJHC 264: 2FLR 127 Madam Justice Shameem said:

> *"However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse"*

13. Although there was no mitigation filed on the part of the Appellant, this factor (that he was a first offender) was made known to the learned Magistrate on the 29th of September 2015 when the Appellant changed his plea from Not Guilty to Guilty ***(Page 40 of the Court Record).***

14. Appellant has already served more than four months in prison. Therefore I vary the sentence imposed by the learned Magistrate and suspend the rest of the imprisonment period for a period of two years. I order the release of the Appellant forthwith. Consequence of violation of the suspended sentence explained to the Appellant.



Aruna Aluthge
Judge

AT LAUTOKA
03rd June 2016

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