IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAA 18 OF 2016

BETWEEN : **PAULIASI TASERE**

Appellant

AND : **STATE**

Respondent

Counsel : **Mrs. Litia Vateitei for the Appellant**

Ms. L. Latu for the Respondent

Date of Hearing : **9th June, 2016**

Date of Judgment : **17th June, 2016**

JUDGMENT

Background

1. On the 12th of January 2016, the Appellant entered a plea of guilty to one count of Assault Occasioning Actual Bodily Harm and one count of Damaging Property contrary to Section 275 and 369(1) respectively of the Crimes Decree 2009.

2. Upon conviction, Appellant was sentenced on the 18th of April 2016 to a term of 07 months' imprisonment.

3. Being aggrieved by the sentence, Appellant filed this appeal within appealable time.

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

i. Sentence is harsh and excessive considering the circumstances surrounding the offence in totality;

ii. The learned Magistrate erred when he states that there was no special factors or circumstances that would justify a suspension of sentence; and

iii. The learned Magistrate did not give adequate discounts to the mitigating factors;

5. The Summary of Facts placed before the learned Magistrate was as follows:-

> *On the 19th of April at day of March, 2015, between 100 hrs to 100 hrs Pauliasi Tasere (B-1) aged 40 years dispatched clerk of Tavakubu, Lautoka hired the taxi Reg. No. LT 184 driven by Monish Gounder (A-1) aged 27 years old Taxi driver of Tavakubu, Lautoka from Yasawa Street with two others.*
>
> *(A-1) was told to go to Banaras and returned to town. At Banaras two passengers got off and boarded the taxi after twenty minutes to go to Commissioners drive. Whilst going to Commissioners drive through Drasa Avenue one Passenger got off. The remaining two passengers went to Commissioners drive and returned to town and they spoke to each other that they had no fare so the taxi driver stopped at Namoli avenue. One of the passenger fled from there leave (B-1) behind.*
>
> *(B-1) was sitting in the rear seat started punching the driver on the head. (A-1) drove towards the police station and on the way (B-1) was punching him and damaged his T-shirt valued at $35.00 whilst the taxi was in motion. The taxi fare was also not paid to (A-1) amounting to $15.00.*
>
> *Matter was reported to police (A-1) was sent for medical examination. (B-1) was arrested and charged for Assault Causing Actual Bodily Harm and Damaging Property and is appearing in custody.*

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.

7. 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).

8. 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) Sentence is Harsh and Excessive

9. The Appellant was charged with one count of Assault Causing Actual Bodily Harm and one count of Damaging Property. The offence of Assault Causing Actual Bodily Harm carries a maximum penalty of 5 years' imprisonment and the offence of Damaging Property carries maximum penalty of 2 years' imprisonment.

10. Established tariff for Assault Causing Actual Bodily Harm, as correctly mentioned by the learned Magistrate, ranges from a suspended sentence where there is degree of provocation and no weapon used to 9 months imprisonment for more serious cases of assault: ***Sereka v. State*** [2008] FJHC 88; HAA027.2008 and ***State v. Etonia Bose*** Criminal Case HAC 71 of 2015. For Damaging Property, the learned Magistrate rightly highlighted the tariff established in ***State v. Baleinabodua*** [2012] FJHC 981; HAC 145.2010 that is between 3 months to 12 months imprisonment.

11. For the offence of Assault Causing Actual Bodily Harm, the learned Magistrate selected the starting point within the tariff that is 6 months which is in the middle range of the tariff band. For the aggravating factors he added 8 months bringing the sentence to 14 months. He then deducted 3 months for the mitigating factors.

12. The learned Magistrate did in fact consider that the Appellant was a first offender as per paragraph (3) of the sentence whereby he stated:

> *"You have expressed remorse and have begged forgiveness from court. You have cooperated with the police at the time of investigation. You are a first offender thus boasting a previous good character. You have further pleaded guilty at your earliest."*

13. In addition, it is evident that the learned Magistrate in sentencing the Appellant considered his position as a first offender when he selected the starting points for both the offences. Furthermore, the learned Magistrate took into account the fact that the Appellant pleaded guilty at the earliest opportunity, and in keeping with sentencing guidelines, he deducted 1/3 of the sentence separately from the appellants mitigating factors which amounted to 4 months, in reaching the final sentence of 7 months imprisonment.

14. For the offence of Damaging Property, the learned Magistrate selected a starting point within the tariff that is 5 months imprisonment and, in applying the totality principle, ordered the sentence to run concurrently to the head sentence that is 7 months imprisonment. The sentence imposed by the learned magistrate is not harsh in the circumstances of the case. This ground lacks merit and is dismissed.

Ground (ii): Custodial Sentence

15. The learned Magistrate has not suspended the sentence of imprisonment. Appellant contends that the learned Magistrate erred when he failed to consider the facts that he was a first offender; he pleaded guilty at the earliest opportunity and his personal circumstances when he ordered a custodial sentence.

16. Section 26 of the Sentencing & Penalties Decree provides as follows:

> *26. – (1) 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.*

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence, -

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

17. The term of imprisonment imposed by the learned Magistrate on the Appellant is for a period of 07 months. Therefore, in light of the abovementioned provision, the learned Magistrate had discretion to suspend the sentence if he was satisfied, given the circumstances of the case, that it was appropriate for him to do so. The learned Magistrate in exercising his discretion opted not to suspend the sentence.

18. It is now trite law that a Magistrate's failure to suspend a sentence can only be overturned on an appeal, if it is shown that the sentencing judge failed to exercise his or her discretion judiciously.

19. In exercising his discretion, sentencing judge is expected to consider the sentencing guidelines set out in Section 4 of the Sentencing and Penalties Decree 2009 as well as various case authorities pertaining to suspended sentences.

20. The learned Magistrate turned his mind to the issue of suspension and decided against it for the following reason:

> *"Upon the above line of authorities court finds that the only fact that can be considered is the fact that you are a first offender. The court has already made a discount from your sentence considering this fact in mitigation. The offences you stand convicted are serious and the court consider that the objective of deterrence is more appealing in this sentence compared with the objective of rehabilitation, when considering the circumstances of the offending. The back drop of above findings this court concludes that there are no special factors or circumstances that would justify a suspension of sentence. Court therefore refrains from suspending your sentence. You shall serve this sentence in custody". (Para 15).*

21. Taxi drivers provide an essential and important community service. They should be specially protected to ensure that public transport system functions smoothly. The learned Magistrate had directed his mind to the provisions of the Sentencing and Penalties Decree when he imposed a custodial sentence. Suspended sentence is not an "absolute right". The discretion is upon the court as per the provisions of the Decree. The custodial sentence is justified under following circumstances:

> *"Further you have assaulted the complainant to prevent him going to the police station as you had no money to pay the complainant. Therefore, this is clearly an*

attempt to prevent the complainant exercising his right to receive the protection of the law. Moreover, you have exploited the complainant by using his taxi services to your benefit when you had no money to pay for same. The complainant been (sic) a taxi driver is bound to drive his passengers to their destinations without first requesting for money. He is thus a vulnerable victim. You had therefore clearly committed these offences on a vulnerable victim".(Para. 8)

22. In ***DPP v Jolame Pita*** (1974) 20 FLR 5, the Supreme Court held:

> *"Once a court has reached the decision that a sentence of imprisonment is warranted there must* ***be special circumstances to justify a suspension****, such as an offender of comparatively good character who is considered suitable for, or in need of probation, and who commits relatively isolated offence of a moderately serious nature but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender or the circumstances of the offence as for example, the misappropriation of a modest sum not involving a breach of trust or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."*

23. In ***Sereka v State*** *(supra)* above, a suspended sentence was warranted because there was a degree of provocation, and as per the circumstances of the offending in that case. The complainant in this case never provoked the Appellant. He simply asked for his taxi fare and got assaulted, received injuries and damaged his t-shirt. There is no evidence that the Appellant was charged for the taxi fare.

24. Appellant had referred to ***State v David Batiratu*** HAR 001/2012, the facts of this case is more serious than the factual scenario of ***Batiratu***. Hence, it is not applicable for this appeal.

25. The learned Magistrate having considered the nature of the offending and the term of imprisonment exercised his discretion judiciously and lawfully. He imposed a custodial sentence considering Section 4(1) of the Sentencing and Penalties Decree 2009 and struck a right balance between rehabilitation and deterrence.

Ground (iii): Inadequacy of Discount

26. The learned Magistrate in paragraph 9 has given a discount of 8 months to reach a sentence of 7 months. He has separately discounted for early guilty plea. The discount given is adequate in the circumstance of the case. This ground has no merit and fails.

Order

27. Sentence imposed by the learned Magistrate is neither excessive nor unreasonable. Imposition of the custodial sentence is justified in the circumstances of the case. Therefore, I affirm the sentence imposed by the learned Magistrate. The appeal against sentence is dismissed.

HIGH COURT OF FIJI
LAUTOKA

Aruna Aluthge
Judge

At Lautoka
17th June, 2016

Solicitors: **Asta's Law for the Appellant**
Office of the Director of Public Prosecution for the Respondent