IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 58 OF 2016

BETWEEN: RAJNESH SINGH

APPELLANT

AND: THE STATE

RESPONDENT

Counsel : Ms S. Dunn for Appellant

: Ms S. Kiran for Respondent

Date of Hearing : 09th February, 2017

Date of Judgment : 28th February, 2017

JUDGMENT

Introduction

1. The Appellant, Rajnesh Singh has filed this appeal against his sentence imposed by the Magistrates at Lautoka.

2. The Appellant was charged with one count of Assault Occasioning Actual Bodily Harm contrary to Section 275 of the Crimes Act 2009 and one count of Breach of

Suspended Sentence contrary to Section 28 (1) (2) and 26 of the Sentencing and Penalties Decree 2009.

3. The Appellant pleaded guilty to the charge. After admitting the summary of facts and his previous conviction, he was sentenced to 6 months imprisonment on the first count and fined two penalty units in default of which 20 days' imprisonment on the second count. In addition to that sentencing Magistrate activated the suspended sentence of six months. Both sentences were ordered to be served consecutively hence the Appellant was sentenced to 12 months' imprisonment in total.

4. Appellant filed this timely appeal on following grounds.

Grounds of Appeal

5. 1. Learned Magistrate erred in law in ordering the sentence of 6 months to run consecutively to the suspended sentence of 6 months restored when it should have been made concurrent;

2. The Learned Magistrate erred in law in failing to discount the remand period spent by the Appellant.

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.

Facts

8. Complainant in this case is the wife of the Appellant. She had requested the Appellant to take her to the clinic at the hospital. Appellant woke up and started to get angry. Then complainant said that she will go by herself. Appellant got out of bed and slapped on both sides of her face and pressed her neck causing her injuries. Matter was reported to police whereupon complainant was sent for a medical examination.

Appellant also admitted having breached an order suspending a sentence of six months imprisonment suspended for three years.

Analysis

Ground 1

9. Maximum sentence for Assault Causing Actual Bodily Harm is five years' imprisonment. Tariff ranges from a suspended sentence to a nine months' imprisonment. Sentence for Breach of Suspended Sentence is a fine not exceeding 100 penalty units and in addition the court must restore the sentence or part sentence held in suspense.

10. The Appellant received a sentence of 6 months' imprisonment for the assault charge. When considered the nature of the offence, he has received a lenient sentence. The Appellant's complaint is that he was ordered to serve the sentence

consecutively to the restored suspended sentence when it should have been concurrent. He relies on Section 22 of the Sentencing and Penalties Decree.

11. Section 22 of the Sentencing and Penalties Decree 2009 provides as follows:

> *22 (1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.*
>
> *(2) Sub-section (1) does not apply to a term of imprisonment imposed—*
>
> *(a) in default of payment of a fine or sum of money;*
>
> *(b) on a prisoner in respect of a prison offence or as a result of an escape from custody;*
>
> *(c) on a habitual offender under Part III;*
>
> *(d) on any person for an offence committed while released on parole; or*
>
> *(e) on any person for an offence committed while released on bail in relation to another offence.*
>
> *(3) Every term of imprisonment imposed on a person in default of payment of a fine or sum of money shall, unless otherwise directed by a court, be served —*

(a) consecutively on any uncompleted sentence imposed on the person in default of payment of a fine or sum of money; but

(b) concurrently with any other uncompleted sentence imposed on that person.

(4) Every term of imprisonment imposed on a prisoner by a court in respect of a prison offence or an escape offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.

(5) Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on parole in relation to another sentence of imprisonment imposed on that person must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment which the offender may be required to serve in custody on cancellation of the parole order.

(6) Every term of imprisonment imposed on a prisoner by a court in respect of an offence committed while released on bail in relation to any other offence must, unless otherwise directed by the court based on exceptional circumstances, be served consecutively on any uncompleted sentence of imprisonment.

12. On the face of Section 22 of the Sentencing and Penalties Decree, the Appellant should have received a sentence of imprisonment to be served concurrently with

the restored suspended sentence. However, a breach of an order suspending a sentence is governed by Section 28 of the same Decree.

13. Section 28 of the Sentencing and Penalties Decree 2009 makes it clear that the sentencing Magistrate had the powers to order a consecutive sentence in this case.

14. Section 28 reads as follows:

> 28. — *(1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits another offence punishable by imprisonment, the offender is guilty of an offence against this section.*
>
> *(2) .....*
>
> *(3) .....*
>
> *(4) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a* ***fine not exceeding 100 penalty units and in addition the court must restore the sentence or part sentence held in suspense and order the offender to serve it,*** *but of the court considers that exceptional circumstances exist that make this unjust, the court may instead—*
>
> *(a) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or*
>
> *(b) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or*

(c) make no order with respect to the suspended sentence.

(5) Any order for an offender to serve a term of imprisonment under sub-section (4) must be served —

(a) immediately; and

(b) ***unless the court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that court or any other court.*** *(emphasis added)*

15. It is therefore clear that lawmakers have treated a breach of a suspended sentence in a different way. Even Sections 22 (2) (d) and (5) (d) recommend a consecutive sentence to a person who has committed an offence while being released on parole. Even though the Appellant was not on parole, rationale for both suspended sentence and parole is the same – rehabilitation of the offender. Therefore imposing a consecutive sentence instead of a concurrent sentence on a person who has breached a suspended sentence is lawful and not unreasonable.

16. Furthermore, the circumstances of the case are serious: Appellant assaulted the complainant who at the time was pregnant and this happened when the Appellant was already on a suspended sentence for assaulting the complainant. There was also an interim DVRO issued against him as per his previous conviction record attached to page 19 of the Copy Record.

17. Learned Magistrate has given reasons for his sentence and pointed out that the Appellant has been repeatedly abusive towards the complainant. He had also

pointed out that this Appellant had not learnt a lesson hence there was no reason not to activate the suspended sentence.

18. It appears that the complainant had informed the sentencing Magistrate that she reconciled with the Appellant. However the apparent reason for reconciliation is her dependency on financial support of her husband who was the sole breadwinner of the family. Sentencing Court had every right to doubt the genuineness of a reconciliation effort of this kind. Appellant as the husband cannot be abusive to the complainant just because he provides for her.

19. Although complainant said that it was due to her fault that the fight started, as per the summary of facts, complainant was waking up the Appellant to accompany her to the clinic. It cannot be said that she had provoked the Appellant. There was nothing wrong in asking the husband of a pregnant wife to accompany her to the clinic; she cannot be assaulted for that. It simply shows that he showed no respect for her safety and wellbeing.

20. Furthermore, this is an offence committed in a domestic environment. At a time when all eyes are focused on the judiciary as to what actions are being taken to eradicate this menace of domestic violence in Fiji, it cannot be said that the sentence imposed by the learned Magistrate is either harsh or excessive.

21. In ***State v Vasutoga*** [2015] FJHC 289; HAR005.2014 (27 April 2015) Madigan J observed at paragraphs 8,9,10 & 11:

> *"The maximum penalty for assault causing actual bodily harm is 5 years imprisonment. The tariff was set by Goundar J in Jonetani Sereka HAA 27/2008 (25 April 2008) where he held that the tariff ranges from a suspended sentence*

where there is a high degree of provocation to 9 months imprisonment for serious assaults that cause harm. That tariff was set for the offence under the Penal Code where the maximum penalty was the same.

That tariff (suspended to 9 months) is still appropriate except as to say that in a domestic violence context the sentence can rise above the 9 months mark to allow for breach of trust and a consideration of the factors which must be considered as set out in section 4 (3) of the Sentencing & Penalties Decree 2009.

The sentence imposed by the learned Magistrate although lenient is not wrong in law or principle and will not be disturbed.

It is to be noted however that sentences for assaults occasioning harm in domestic violence cases will very rarely result in suspended sentences, because of the breach of trust and to send the perpetrator back into the family home is probably courting disaster without a "cooling off" period".

22. In light of the above, I find that there was no error in law or principle in this sentence. Therefore this ground is dismissed.

Ground 2

23. The Appellant was in remand from the 26th of February 2016 to 16th of March 2016. He was in remand for 18 days.

24. There is no mention of remand period in the sentencing Ruling. However this does not make the sentence incorrect or wrong.

25. In ***Vasuca v State*** [2015] FJCA 65; AAU011.2011 (28 May 2015), the Court of Appeal extensively discussed Section 24 of the Sentencing and Penalties Decree, 2009. The Court at paragraphs 14-18 stated:

> *The State concedes that the appellant was in custody on remand for about 2 months, which was not taken into account when he was sentenced in the High Court. Section 24 of the Sentencing and Penalties Decree 2009 requires sentencing courts to regard any pre-trial detention as a period of imprisonment already served by the offender. In this jurisdiction, the practice has been discounting or subtracting the remand period instead of backdating the sentence. There is no exact formula on how the discounting should be made. Some judges incorporate the discounting in the combined quantification for all the mitigating factors while some judges turn to give separate discounting for pre-trial detention. The length of the remand period may vary from case to case, and in each case the discretion lies with the sentencing court to comply with section 24 of the Sentencing and Penalties Decree 2009.*
>
> *In Basa v State (unreported Criminal Appeal No. AAU0024 of 2005; 24 March 20006), the offender had spent one year, one month and fourteen days in custody before the trial but the judge only allowed for one year on remand. On appeal this Court said at para. [12]:*
>
> *"The appellant also points out that he had spent one year, one month and 14 days in custody before the trial but the Judge only allowed for one year*

on remand. When calculating the appropriate sentence for any offence, the Judge should allow for any substantial period in custody but it is not necessary to make a precise calculation. The allowance of a year was a perfectly proper amount."

Although Basa's case was considered before the Sentencing and Penalties Decree 2009 came into effect, the view that was expressed by this Court regarding consideration of the remand period in sentence has not been altered by section 24 of the Decree. Section 24 reads:

> *'Time in custody before trial to be deducted'*
>
> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

The heading to section 24 states 'time in custody before trial to be deducted'. But the section itself does not use the word deduction. The operative word in section 24 is 'regarded'. To regard means to consider or to take into account (Shorter Oxford English Dictionary, 2nd ed. Vol. 1 p. 1690). The use of the word 'shall' in section 24 literally means that sentencing courts have no option but to consider any remand period, even if it is a few days, as a period of imprisonment already served. If this interpretation is correct, then the offenders will be ending with sentences in terms of years, months and days. But the word 'shall' in section 24, is followed by a comma and a phrase 'unless a court otherwise orders', which can mean that it is discretionary as opposed to mandatory for sentencing courts to consider remand period as a period of imprisonment already

served. If the purpose of section 24 is to create a mandatory obligation on sentencing courts to consider any remand period as a period of imprisonment already served, then what is the purpose of giving a residual discretion that defeats the original purpose? The two propositions are clearly in conflict.

So how should sentencing courts consider remand period in sentence. In my opinion, the answer lies with how the remand period was considered under the common law as outlined in Basa's case, that is, when calculating the appropriate sentence for any offence, sentencing courts should allow for any substantial period in custody but it is not necessary to make a precise calculation. What is a substantial period, of course, will depend on the facts of each case and the sentence that has been imposed on the offender.

26 In ***Vasuca*** *(Supra)* it is clearly stated that there is no exact formula in calculating the remand period and the final sentence would generally depend on the circumstances of each case. In concluding remarks, Gounder JA preferred the approach taken in Basa's case, that is, when calculating the appropriate sentence for any offence, sentencing courts should allow for any substantial period in custody but it is not necessary to make a precise calculation.

27. In the present case, there is no issue about calculation; nevertheless there is no mention about the remand period at all in the sentencing Ruling. Therefore, it is not clear whether the sentencing Magistrate had ever considered the remand period in the sentencing process. Unlike mitigating factors, a discount on account of a remand period is a right that a convicted person is entitled to get upon his

conviction. Therefore, a sentencing court has to ensure that the remand period was taken into consideration.

28. In these circumstances, I consider it just and fair to give the benefit of that doubt to the Appellant. I order a deduction of 18 days from Appellant's sentence. Now his sentence is 11 months and 12 days' imprisonment.

29. Appeal succeeds to that extent.

Aruna Aluthge

Judge

At Lautoka

28th February, 2017

Solicitors: **Legal Aid Commission for the Appellant**

Office of the Director of Public Prosecution for the Respondent