IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 65 OF 2016

BETWEEN : **SAMUELA SADRIU**

APPELLANT

A N D : **STATE**

RESPONDENT

Counsel	:	Appellant in Person
	:	Mr. A. Singh for the Respondent
Date of Hearing	:	8 March, 2017
Date of Judgment	:	15 March, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellant was charged in the Magistrate's Court with one count of Indecent Assault contrary to section 212 (1) of the Crimes Decree and one count of Criminal Intimidation contrary to section 375 (1) (a) (i) (iv) of the Crimes Decree.

[2] On 30 May, 2016 the Appellant who was represented by Legal Aid Counsel pleaded guilty to the count of Criminal Intimidation thereafter

the Appellant admitted the summary of facts. Upon been satisfied that the Appellant had entered an unequivocal plea the learned Magistrate convicted the Appellant.

[3] After hearing mitigation the learned Magistrate sentenced the Appellant to 16 months imprisonment on 17 October, 2016.

[4] The Appellant being dissatisfied with the sentence of the Magistrate's Court has filed a timely appeal against his sentence on the following grounds:-

"1. That the learned Sentencing Magistrate erred in law by failing to precisely state whether the guilty plea entered is unequivocal or not.

2. That the starting point of 18 months is excessive having regards to the facts of the case.

3. That the learned Sentencing Magistrate erred in law and in fact by failing to consider the Appellant's previous good character for the past 10 years.

4. That the learned Sentencing Magistrate erred in law by failing to give a cogent reason for not suspending the sentence."

[5] Both the Appellant and the Respondent have filed written submissions and also made oral submissions during the hearing. I note that the Appellant has served nearly 5 months of his sentence.

SUMMARY OF FACTS

[6] The following summary of facts was read to the Appellant who understood and admitted the same.

"On the 16th day of August, 2015 between 5.00am and 8.00am at Navakai, Nadi Samuela Sadriu (accused), 33 years, Unemployed of Navakai Housing, Nadi threatened Sereima Salele (victim), 23 years,

Unemployed of Navakai Settlement, Nadi with a cane knife to injure her. Victim saw accused coming to her house with a cane knife and accused hit the blade of the knife on the walls of victim's house repeatedly saying he will chop her hands and legs. Victims sister Kitiana Burelevu (A-4), 18 years, Unemployed of Navakai, Nadi was standing outside the house and accused thought she was victim and started threatening her that he will chop off her legs and hands but later stop when victims brother-in-law threatened he will call the Police and accused fled the scene. Subsequently, accused returned to victim's house about three times with the cane knife still threatening to chop off her hands and legs.

Matter was reported at Nadi Police Station whereby accused was arrested with the help of Epeli Saukuru (A-5), 41 years, Fire Authority worker of Navoci, Nadi. On 17/08/15 accused was caution interviewed in which he denied assaulting (A-1) ref to Q&A 30 to 33 but admitted to the allegation of Criminal Intimidation, ref to Q&A 39 to 45. (B-1) was charged for one count of Indecent Assault and one count of Criminal Intimidation in which he made statement, confirming he only threatened victim and her friends with the cane knife as they threw beer bottles and stones at him without any reason. Accused denied touching victim at any time."

[7] Section 375 (1) (a) (i) (iv) of the Crimes Decree is committed where a person without lawful excuse threatens another person with any injury with intent to cause alarm to the person is a lesser offence compared to section 375 (2) where the threat is to cause death or grievous hurt.

[8] The summary of facts which has been admitted by the Appellant contains threats of grievous hurt to the effect that "he will chop her hands and legs". The Appellant is lucky not to be charged under section 375 (2) of the Crimes Decree.

GROUNDS OF APPEAL

GROUND ONE

The learned Magistrate erred in law by failing to precisely state whether the guilty plea was unequivocal or not.

[9] The Appellant submits that the learned Magistrate should have clearly stated in his sentence whether the plea was unequivocal or not he further states that the learned Magistrate should have also noted in his sentence that he asked the Appellant whether he was pleading guilty on his own freewill or not.

[10] At paragraph 1 of the sentence the learned Magistrate states:-

*"You, **Samuela Sadriu** is here, to be sentenced on admission of guilt on your own accord....in count 2 of Criminal Intimidation contrary to Section 375 (1) (a) (i) (iv) of the Crimes Decree No. 44 of 2009."*

[11] The Appellant was represented by counsel when his plea was taken and there is no record of any objection taken by counsel when the plea was taken. Furthermore the mitigation advanced on behalf of the Appellant suggests his admission of guilt as well. There is no requirement for a sentencing court to use the word "unequivocal" when accepting a plea as long as the court is satisfied that the accused understood the nature of the offence he pleaded guilty to and the consequences of such plea (see *Aiyaz Ali v State [2009] AAU 42 of 2005(1 April 2009).*

[12] The learned Magistrate had accepted the guilty plea after been satisfied that the Appellant was pleading guilty on his own freewill. I am mindful that this ground of appeal is to do with appeal against conviction, however, considering the fact that the Appellant is in person I decided to address the issue raised.

[13] This ground of appeal is dismissed due to lack of merits.

GROUND TWO

"That the starting point of 18 months is excessive having regards to the facts of the case".

[14] The Appellant submits that he was charged under section 375(1) (a) of the Crimes Decree where the maximum punishment is 5 years imprisonment.

[15] The Appellant argues that the starting point which the learned Magistrate relied upon is based on the tariff used for offences committed under section 375 (2) of the Crimes Decree which is a serious offending where the maximum punishment is 10 years imprisonment. According to the Appellant this has resulted in excessive sentence.

[16] At paragraph 15 of the sentence the learned Magistrate mentioned as follows:

"In the matter of State v Baleinabodua [2012] FJHC 981 Temo J stated in paragraph 7 of his Ruling:

"Criminal Intimidation" is a serious offence, and it carries a maximum sentence of 10 years imprisonment, if the threat was intended to cause grievous hurt. The parties submit no authorities on the tariff for this offence, but in my view, an acceptable tariff would be a sentence between 12 months and 4 years imprisonment..."

[17] At paragraph 19 of the sentence the learned Magistrate selected a starting point of 18 months after considering the facts admitted by the Appellant.

[18] The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration."

[19] I note that there is no tariff fixed for the offence of Criminal Intimidation under section 375 (1) (a) of the Crimes Decree and the parties have not been able to provide any case authorities on the tariff for this offence. In my view an acceptable tariff would be a sentence between 6 months and 2 years imprisonment. Serious cases should be given a sentence in the upper range whilst less serious cases should be given a sentence at the lower end of the scale.

[20] The learned Magistrate when he selected the starting point had in mind the seriousness of the offence committed by the Appellant based upon the facts admitted by the Appellant. Although the learned Magistrate relied on the tariff of a more serious offending no error can be attributed to the learned Magistrate since the starting point of 18 months falls around the middle range of the tariff for Criminal Intimidation offences committed under section 375 (1) of the Crimes Decree (see *Laisiasa Koroivuki vs. State, Criminal Appeal AAU 0018 of 2010).*

[21] There is no error made by the learned Magistrate when he chose 18 months as a starting point. This ground of appeal is dismissed.

GROUND THREE

The learned Magistrate erred in law and in fact by failing to consider the Appellant's previous good character for the past 10 years.

[22] The Appellant submits that the learned Magistrate did not give him enough reduction for his mitigation which includes the fact that he was a first offender since his convictions were 10 years old.

[23] The learned Magistrate at paragraph 22 of the sentence allowed a deduction of 4 months for the Appellant's mitigation in the exercise of his sentencing discretion. An appellate court will only interfere with the exercise of discretion if it is demonstrated that the court below fell into an error in the exercise of that discretion.

[24] The learned Magistrate took into consideration the mitigation of the Appellant at paragraph 5 of the sentence. The mitigation includes the fact that the Appellant was a first offender and his convictions were more than 10 years old. After taking all the mitigating factors into account the learned Magistrate gave a deduction of 4 months. There is no error on the part of the learned Magistrate in the exercise of his discretion. This ground of appeal is also dismissed.

GROUND FOUR

The learned Magistrate erred in law by failing to give a cogent reason for not suspending the sentence.

[25] The Appellant states that the learned Magistrate did not give any reason whatsoever for not suspending his sentence of imprisonment. Furthermore it was argued that the Magistrate's Court had the power to suspend a sentence which was below 2 years.

[26] At paragraph 24 of the sentence the learned Magistrate stated:

"A cane knife is a lethal weapon. In view of the seriousness of the case, I will order custodial sentence of 16 months imprisonment."

[27] Section 26 (2) (b) of the Sentencing and Penalties Decree states:-

"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed...

(b) does not exceed 2 years in the case of the [Magistrates Court]."

[28] In *State vs. Alipate Sorovanalagi and others, Revisional Case No. HAR 006 of 2012 (31 May 2012),* Justice Goundar reiterated the following guidelines in respect of suspension of a sentence at paragraphs 22 and 23:

"[22] I accept that the Magistrates' Court has discretion to suspend a sentence if the final term imposed is 2 years or less. But that discretion must be exercised judiciously, after identifying special reason to suspend the sentence. The special reason can vary depending on the facts of each case.

[23] In ***DPP v Jolame Pita*** *(1974) 20 FLR 5, Grant Actg CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg CJ laid down guidelines for imposing suspended sentence at p.7:*

"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 not considered suitable for, or in need of probation, and who commits a 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."

[29] The learned Magistrate in the exercise of his discretion under section 26 (2) of the Sentencing and Penalties Decree declined to suspend the term of imprisonment he had arrived at as final sentence. The reason given by the learned Magistrate not to suspend the sentence was that a cane knife was a lethal weapon and the seriousness of the offence committed.

[30] I note that the learned Magistrate had failed to take into account the following relevant special circumstances or special reasons for the suspension of the imprisonment term which in my view needed to be weighed in choosing immediate imprisonment or suspended sentence.

[31] The Appellant is a first offender of comparatively good character, no violence used by the Appellant, isolated offence, some degree of provocation on the part of the victim, he is 34 years of age and there is no evidence of any premeditation. Furthermore the Appellant pleaded guilty at the earliest opportunity, was remorseful, cooperated with Police and takes responsibility for his actions. I consider these special reasons as rendering immediate imprisonment inappropriate.

[32] This ground of appeal is allowed.

[33] Having allowed this ground of appeal it is justified in my view for this court to invoke section 256 (2) (a) of the Criminal Procedure Decree by varying the operation of the sentence.

[34] Since the Appellant has served nearly five months of his sentence I consider it appropriate to suspend the balance of his sentence for two years. This sentence will assist the Appellant in rehabilitation. The effect of the suspended sentence is explained to the Appellant.

ORDERS

1. The appeal is allowed to the extent that the operation of the sentence is varied to a suspended sentence.

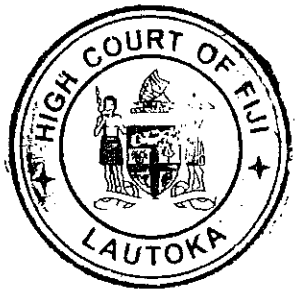
2. The sentence of 16 months imprisonment is affirmed since the Appellant has served nearly 5 months the balance of his sentence is suspended for 2 years.

3. The Appellant is to be immediately released from the Corrections Centre.

4. The Appellant is bailed to appear (on the terms and conditions to be imposed after the delivery of this Judgment) in the Magistrate's Court at Nadi on 17 March, 2017 at 9.30am for mention in respect of his pending charge.

5. The Magistrate's Court is at liberty to review the bail conditions imposed.

6. 30 days to appeal to the Court of Appeal.



Sunil Sharma

Judge

At Lautoka
15 March, 2017

Solicitors

Appellant in person.
Office of the Director of Public Prosecutions for the Respondent.