

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 28 of 2017

BETWEEN : **VINESH KUMAR**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. K. Tunidau for the Appellant.
: Ms. L. Latu for the Respondent.

Date of Hearing : 16 May, 2017
Date of Judgment : 17 May, 2017

JUDGMENT

BACKGROUND INFORMATION

- [1] The Appellant was charged in the Magistrate's Court with one count of Common Assault contrary to section 274 of the Crimes Act.
- [2] It was alleged that the Appellant on the 20th day of December, 2016 at Toko, Vatukoula, unlawfully assaulted VIKANSHYA KUMAR.

- [3] On 7 March, 2017 the Appellant pleaded guilty to the charge after it was read and explained to him.
- [4] Thereafter the Appellant was read the summary of facts which was understood and admitted by him.

SUMMARY OF FACTS

- [5] The following summary of facts was read to the Appellant who admitted the same:

“On the 20th day of December, 2016, at Toko, Tavua one VINESH KUMAR PRAHAKAR (B-1), 42 yrs, Heavy Vehicle Operator of Toko, Tavua assaulted one VIKANSHYA KUMAR (A-1), 11 yrs, Student of Toko, Tavua on his Private Part in which he sustained injuries.

On the abovementioned date, time and place (A-1) was in his mother’s room playing billiard on his Phone when (B-1) called (A-1) to bring the phone to him. (A-1) then left out from his mother’s room to his room to give the phone to his father (B-1) where he was lying on the bed. As (A-1) gave the phone to (B-1), (B-1) hit (A-1) on his private part. After that (A-1) went running to his mother DOREEN RANJANI MALA (A-2), 38 yrs, Domestic Duties of Toko, Tavua and complained to her that what his father did to him. Also at the time of the incident (A-1) sister ROUSHAL VIKASHNI (A-3), 15 yrs, student of Toko, Tavua heard (A-1) shouting at his father not to do it and ran away. Also according to (A-1) [this] is not the first time (B-1) has done [this] to him. Even once (B-1) took (A-1) to the Farm and pulled his penis saying [this] is how it will get big and long. That time (A-1) was also in pain and complained to (A-3).

(A-3) then reported the matter to police whereby after investigation (B-1) was arrested, interviewed under caution and charged for the offence of

common assault contrary to section 274 of Crimes [Act] no. 44 of 2009. (B-1) in custody and will appear at Tavua Magistrate Court on the 22nd day of December, 2016 at 9.00am.”

[6] Upon being satisfied that the Appellant had entered an unequivocal plea the learned Magistrate convicted the Appellant.

[7] After hearing mitigation on 10th March 2017 the Appellant was sentenced to six months imprisonment with a permanent non-molestation Domestic Violence Restraining Order issued against the Appellant.

[8] The Appellant through his counsel has filed a timely appeal against sentence. The grounds of appeal are as follows:-

“1. The sentence is harsh and excessive upon the following grounds:

1.1 The Learned Magistrate failed to give proper weight to the fact that:

(a) The appellant is the sole breadwinner in the family;

(b) Has a permanent work with the Vatukoula Goldmine a Team Leader whereby the Appellant has worked for the past 25 years;

(c) The appellant's spouse does domestic duties;

(d) The appellant have his wife and three children to look after. The eldest daughter is a student nurse in Labasa under the Tertiary Education Loans Scheme (TELS) whom the appellant pays for her tertiary allowance including airfares and accommodation; the second daughter is in Form 5 at Tavua College; and the complainant, a student of Toko Sanatan Primary School.

2. *The Learned Magistrate failed to properly evaluate and assess that the nature and circumstances of the assault was very minor with no injury at all to the complainant.*
3. *The Learned Magistrate failed to properly exercise his discretion by not suspending the sentence if the previous conviction became a factor in his sentencing discretion.*

[9] Both counsel have filed written submissions and also made oral submissions for which the court is grateful. Counsel for the Appellant withdrew grounds two and three of the appeal at the hearing.

LAW

[10] In sentencing an offender the sentencing court exercises a judicial discretion. An Appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

[11] 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.”*

[12] The maximum sentence for the offence of Common Assault under section 274 of the Crimes Act is 1 year imprisonment.

[13] The accepted tariff for the offence of Common Assault is between a fine to a term of imprisonment (*see Rajnil Kumar vs The State, Criminal Appeal No. HAA 010 of 2012 (25 July, 2012)* and *The State vs Kissun Sami Krishna, Criminal Appeal No. HAA 040 of 2007 (10 September 2007)*)

GROUND OF APPEAL

GROUND ONE

“The sentence is harsh and excessive.”

[14] The learned counsel for the Appellant submits that the learned Magistrate did not guide himself in accordance with sections 4 (2), (3) and 15 (3) of the Sentencing and Penalties Act.

[15] Counsel further argues that the starting point of 9 months was on the higher scale of the tariff and the lack of information given on mitigation by the unrepresented Appellant led to a reduction of 1 month only resulting in the sentence being harsh and excessive.

[16] Section 4 (2) (j) of the Sentencing and Penalties Act states:-

(2) *In sentencing offenders a court must have regard to --*

(j) *the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence...*"

[17] At paragraph 7 of the sentence the learned Magistrate stated:-

"For the purpose of sentencing in this case I bear in mind sections 4 (1), 4 (2), 15, 16 and 26 of the SPD, 2009."

[18] In view of the above I accept that the learned Magistrate had directed his mind to sections 4 and 15 of the Sentencing and Penalties Act.

[19] The Appellant had committed a serious offence within a domestic setting on his son who was 11 years of age. There was no evidence of any provocation by the victim the Appellant had called the victim to bring his phone which the victim did. Thereafter the Appellant assaulted the victim on his private part.

[20] The medical report tendered as evidence shows blunt trauma including bruise/swelling/tenderness/visible haematoma on the victim's scrotum.

[21] The victim received serious injuries to his private part as a result of the assault. The Appellant is lucky to be charged with a lesser offence of Common Assault other than Assault Occasioning Actual Bodily Harm.

STARTING POINT

[22] The starting point selected by the learned Magistrate was 6 months imprisonment (see paragraph 10 of the sentence) and not 9 months as stated by counsel for the Appellant in his written submission.

[23] The Appellant argues that the learned Magistrate erred in selecting a high starting point which resulted in excessive punishment for the Appellant. In order to ascertain whether the starting point selected by the learned Magistrate was correct or not I am guided by the Court of Appeal in *Laisiasa Koroiwuki v The State, Criminal Appeal No. AAU0018 of 2010* at paragraphs 26 and 27 the following is stated:

“[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even handedly given in similar cases when punishments are even-handedly given to the offenders, the public’s confidence in the criminal justice system is maintained.

[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

[24] I accept that the learned Magistrate had selected a middle range of the tariff as starting point considering the seriousness of the offending.

[25] For the aggravating factors of lack of provocation, victim was a juvenile and breach of trust the sentence was increased by 3 months. The interim sentence arrived at was 9 months imprisonment. The learned Magistrate identified the following as mitigating factors:-

(a) Guilty plea and remorse;

(b) Family background.

[26] For the mitigating factors the sentence was reduced by 1 month and a further reduction for early guilty plea of 2 months was also allowed separately. The final sentence was 6 months imprisonment.

[27] Since the Appellant had a previous conviction of Assault Occasioning Actual bodily harm dated 7 October, 2013 the learned Magistrate had correctly not given any discount to the Appellant for good character. For the offending in 2013 the Appellant was sentenced to 6 months imprisonment suspended for 2 years and a permanent Domestic Violence Restraining Order was issued against the Appellant. This sentence leads me to the inescapable conclusion that the victim in that case would have been in a family or domestic relationship with the Appellant.

[28] Counsel for the Appellant urges this court to suspend the balance of the Appellant's sentence. In order to suspend the sentence of the Appellant this court has to consider whether the punishment fits the crime committed by the offender. In this regard the guidance offered by Goundar J. in *Balagga vs. State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:-

“Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender’s sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?”

[29] I am satisfied that the sentence given by the learned Magistrate was appropriate and the learned Magistrate correctly refused to suspend the sentence due to the circumstances of the offending and the Appellant’s previous conviction.

[30] There is no error made by the learned Magistrate when he arrived at the final sentence of six months imprisonment. The appeal is dismissed due to lack of merits.

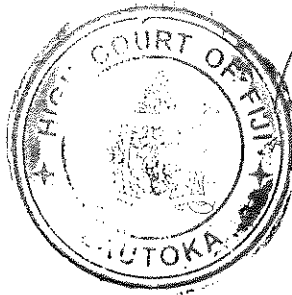
[31] Assaulting a child within a domestic setting for an unprovoked attack as in this case is a very serious offence and no Court is going to condone such attacks on children. This Court endorses the comments made by Winter J. in *The State vs Kissun Sami Krishna (supra)* at paragraph 29 in the following words:-

“...Those who inflict harm on children will be given harsh sentences with imprisonment being the usual consequence of their actions.”

[32] It is obvious to me that the Appellant has a bad temper which he should take care of. The sentence of six months imprisonment in my view will also act as rehabilitation for the Appellant.

ORDERS

1. The appeal against sentence is dismissed.
2. The sentence of the Magistrate's Court is affirmed.
3. 30 days to appeal to the Court of Appeal.



Sunil Sharma
**Sunil Sharma
Judge**

At Lautoka
17 May, 2017

Solicitors

M/s. Kevueli Tunidau Lawyers for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.