

IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section
246(1) of the Criminal Procedure Act
2009.

ANAIASA NAQIALAWA

Appellant

CASE NO: HAA. 15 of 2017
[MC Suva, Crim. Case No. 104 of 2016]

Vs.

STATE

Respondent

Counsel : Ms. K. Cavubati for Appellant
Mr. E. Samisoni for Respondent

Date of Hearing : 31st May, 2017

Date of Judgment : 29th June, 2017

JUDGMENT

1. The appellant was convicted by the magistrate court upon pleading guilty to one count of assault causing actual bodily harm contrary to section 275 of the Crimes Decree 2009 (now Crimes Act). The Learned Magistrate sentenced the appellant for a term of 12 months imprisonment.

2. The appellant assails the sentence imposed by the Learned Magistrate on the following grounds of appeal;
 - a) *The learned magistrates sentencing is harsh and excessive in the circumstances of the case; and*

b) *The petitioner was just a first offender and had a previous clean record in his whole life of 42 years and therefore a suspended sentence or a partially suspended sentence would have been appropriate in this circumstance.*

3. The summary of facts filed before the Learned Magistrate reads as follows;

- *On Friday 18.12.15 between 6pm to 6.30pm Anaiasa Naqialawa (B-1) 43 years, Painter at Cool Tech Refrigeration, Samabula, punched his wife namely Seruwaia Vuki (A-1) 32 years, domestic duties of Lomolomo, Vuda, Lautoka.*
- *On the above date and time (A-1) informed (B-1) that she will have to go back to Lautoka that afternoon as agreed.*
- *The agreement was for (A-1) to visit (B-1) on 12.12.15 and return to Lautoka on 18.12.15.*
- *Unfortunately (B-1) told (A-1) not to go back but (A-1) replied that she would like to spend Christmas with her mother.*
- *(B-1) then got angry, took a stick and hit (A-1) with it on her back. (B-1) after hitting (A-1) with a stick, took the electricity wire and also hit her back with it. (A-1) received injuries on her back, hand and left arm. (B-1) also punched (A-1) on her left ear and head.*
- *The matter was reported at Nadi Police station whereby (A-1) was sent to the hospital to be medically examined.*
- *(B-1) was arrested and interviewed under caution in which he admitted committing the offence. [Refer to Q & A No. 14-18].*
- *Later accused was charged for the offence of Assault Causing Actual Bodily Harm contrary to section 275 of Crimes Decree No. 44 of 2009.*
- *Accused was bailed to appear in court on 03.02.16.*

4. In the case of *Kim Nam Bae v The State* [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

"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 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) 55 CLR 499)."

5. Therefore, in order for this court to interfere with the impugned sentence, the appellant should satisfy that the Learned Magistrate;
 - a) *acted upon a wrong principle;*
 - b) *allowed extraneous or irrelevant matters to guide or affect him;*
 - c) *mistook the facts; or*
 - d) *did not take into account some relevant consideration.*

Ground one

6. The Learned Magistrate has selected 12 months as the starting point of the sentence, added 12 months in view of the aggravating factors that were identified and deducted 6 months in view of the mitigating factors. Further 6 months was deducted as the discount for the early guilty plea to arrive at the final sentence of 12 months imprisonment.
7. On the first ground of appeal, the appellant argues that the Learned Magistrate erred by selecting a high starting point and that led to a harsh and excessive sentence being imposed on the appellant given the circumstances of the case.
8. In fact the appellant submits that the starting point selected by the Learned Magistrate is outside the higher end of the established tariff for the offence of assault causing actual bodily harm relying on the case of *Jonetani Sereka v State* [2008] FJHC 88; HAA027.2008 (25 April 2008).
9. In *Sereka* (supra) referring to the case *State v Anjula Devi* [Criminal Case No. 04 of 1998 Lab.], the court noted that the tariff for the offence of assault causing actual bodily harm is '*a suspended sentence where there is a degree of provocation and no weapon used, to 9 months imprisonment for the more serious cases of assault*'.
10. The Learned Magistrate has identified '*an absolute or conditional discharge to 12 months imprisonment*' as the applicable tariff in this case relying on the judgment in *State v Tugalala* [2008] FJHC 78. The court held in *Tugalala* (supra) as follows;

"The tariff for this offence appears to range from an absolute or conditional discharge to

12 months imprisonment. The High Court said in Elizabeth Joseph v. The State [2004] HAA 030/04S and State v. TevitaAlafi [2004] HAA073/04S, that it is the extent of the injury which determines sentence."

11. The starting point of 12 months selected by the Learned Magistrate is in fact the higher end of the tariff the Learned Magistrate decided to apply. According to paragraph 9 of the impugned decision, I note that the Learned Magistrate had considered the gravity of the offending and the appellant's culpability when the starting point was selected. Therefore, it is clear that in selecting this starting point of 12 months imprisonment, the Learned Magistrate had overlooked the following principles discussed in the case of *Koroivuki v State* [AAU 0018 of 2010] which the Learned Magistrate had in fact alluded to in the impugned decision;

"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".

12. In order to arrive at a just and a proportionate sentence using the two-tier method of sentencing, the sentencer should not consider the aggravating and mitigating factors of the case at hand in selecting the starting point, but consider the question 'what should be the minimum sentence the offence committed by the accused would attract' as I have discussed in the case of *Gaunavinaka v State* [2017] FJHC 425; HAA 07 of 2017 (13 June 2017). A sentencer who considers the gravity of the actual offending and/or the culpability of the accused to select the starting point will in all probability arrive at an excessive final sentence for the reason that the same aggravating factors are taken into account twice in the sentencing process, unless the sentencer is extremely careful.
13. In the event a sentencer opts to determine the starting point considering certain circumstances of the actual offending, those circumstances that were considered to select the starting point should be clearly indicated in the ruling. This will prevent appeal grounds being raised on the sentence being harsh and excessive due to double counting. But more importantly, such practice would also assist the

sentencer to arrive at a just and an appropriate sentence using the two-tier approach of sentencing by reducing the chances of taking into account the same factors to select a high starting point and then again to further increase the sentence.

14. In the case at hand, the language used in the impugned decision suggests that the same aggravating factors that were taken into account to enhance the sentence by 12 months have been considered by the Learned Magistrate to select the higher end of the tariff as the starting point of the sentence. I am inclined to agree with the appellant that this decision to select a manifestly high starting point had resulted in arriving at a sentence that is harsh and excessive given the circumstances of the case.
15. However, I am unable to agree with the appellant's submission that the starting point selected by the Learned Magistrate is outside the established tariff. This court in several previous decisions including *Kumar v State* [2014] FJHC 592; HAA18.2014 (14 August 2014), *State v Naicker* [2015] FJHC 537; HAC279.2013 (15 July 2015), *State v Jone* [2016] FJHC 517; HAC159.2015 (7 June 2016), and *State v Salayavi* [2017] FJHC 198; HAC203.2016 (17 March 2017) has recognised '*an absolute or conditional discharge to 12 months imprisonment*' as the tariff for the offence of assault causing actual bodily harm.
16. It is pertinent to note that 12 months is only a one fifth of a 5 year imprisonment which is the maximum sentence for the offence of assault causing actual bodily harm under section 275 of the Crimes Act. All in all, I am of the view that it is appropriate to have 12 months imprisonment as the higher end of the tariff for the said offence.
17. Needless to say, the selecting of a starting point is not that difficult where the relevant sentencing tariff indicates the lower end of the imprisonment term applicable to a particular offence as opposed to other sentencing options that may be considered.

18. If the sentencer decides that an imprisonment term is the appropriate punishment for an offender who is convicted of the offence of assault causing actual bodily harm under section 275 of the Crimes Act and not to opt for an absolute or conditional discharge, it is important for the sentencer to have a clear opinion on the minimum imprisonment term the offence should attract considering its objective seriousness. In my view, an imprisonment term of 3 months would appropriately reflect the objective seriousness of the offence of assault causing actual bodily harm under section 275 of the Crimes Act.
19. Though the appellant has not raised any issue concerning the aggravating factors considered by the Learned Magistrate, I wish to make the following observations regarding same. The aggravating factors mentioned in the impugned decision are as follows;
 - a) Abuse of trust and power;
 - b) The victim did not provoke you at all;
 - c) This is a domestic violence offence.
20. The first factor above is indeed an aggravating factor.
21. With regard to the second factor, firstly, I am not satisfied that the relevant summary of facts leads to the conclusion that there was no provocation in this case. Secondly and more importantly, in my view, though the fact that there was provocation may be considered as a mitigating factor, the fact that there was no provocation cannot be considered as an aggravating factor to enhance the sentence in a case of assault.
22. On the face of it, the third aggravating factor alluded to above, that is the fact that the offence was a domestic violence offence seems to overlap with the first. In my view, the domestic relationship between the accused and the victim was the reason to conclude that there was an abuse of trust and power. Moreover, it is pertinent to note that section 4(3) of the Sentencing and Penalties Act provides certain factors a sentencer must have regard to when sentencing offenders for an offence involving

domestic violence. Therefore, I am of the view that a sentence cannot be enhanced for the simple reason that the relevant offence falls under the category of domestic violence offences. However, certain factors listed under section 4(3) of the Sentencing and Penalties Act among others may be considered as aggravating factors when it comes to a domestic violence offence.

23. As highlighted in the case of *Tugalala* (supra), when it comes to the offence of assault causing actual bodily harm, it is the extent of the injury which determines sentence. If the injuries caused to the victim are serious, that is undoubtedly one of the main aggravating factors.
24. The summary of facts filed in this case indicates that the victim was first assaulted with a stick, then with an electricity wire and thereafter she was punched on the left ear and the head. I note that the Learned Magistrate had taken this factor into account only when the issue of suspending the sentence was considered. The manner in which the victim was attacked in this case as revealed in the summary of facts was a factor the Learned Magistrate should have considered as an aggravating factor in determining the appropriate sentence.
25. I had the opportunity to peruse four judgments of this court where the offence involved assaulting the spouse. In all four cases, the offenders had pleaded guilty to the charge.
26. In *Raisoqoni v State* [2011] FJHC 32; HAA 004.2011(7 February 2011) this court held that a sentence of 6 months was appropriate where the injuries sustained by the victim included lumps, bruises, laceration and swellings over her head and face.
27. In *State v Kumar* [2011] FJHC 341; HAA 020.2010 (9 June 2011) a suspended sentence of 6 months imprisonment was considered as the appropriate sentence where the victim had sustained injuries that included a swollen face, bruises around both eyes, swollen lips, superficial cuts on the head and a broken tooth.
28. In *Chand v State* [2011] FJHC 593; HAA 024.2011 (23 September 2011) a sentence

of 4 months was held appropriate where the appellant had pushed and punched his wife causing her to fall and hit her head on the stud of the house.

29. In *Kumar v State* [2014] FJHC 592; HAA18.2014 (14 August 2014) this court concluded that an imprisonment term of 7 months is the appropriate sentence where the appellant had slapped his wife and cut her on the left arm with a cane knife. This offence had been committed while another case was pending against the appellant for assaulting his wife.
30. All in all, I find merit in the first ground of appeal. The error made by the Learned Magistrate as pointed out on behalf of the appellant on ground one justifies this court's intervention to disturb the sentence imposed on the appellant.
31. Having considered the relevant aggravating factors and the mitigating factors including the fact that the appellant was a first offender and the early guilty plea, I hold that a sentence of 6 months imprisonment is appropriate in this case.

Ground two

32. On the second ground of appeal the appellant submits that a suspended sentence or a partially suspended sentence would have been appropriate in the circumstances of the case.
33. Since I have decided to substitute the sentence imposed by the Learned Magistrate with an imprisonment term of 6 months based on the findings on the first ground of appeal, the determination of the above issue raised on the second ground of appeal would now become an academic exercise. The appellant had served almost 5 months in prison as of today which is more than two third of a term of 6 months imprisonment.

Conclusion


34. In the result, I would substitute the sentence imposed by the Learned Magistrate in MC Suva, Crim. Case No. 104 of 2016 with an imprisonment term of 6 months. The order made by the Learned Magistrate granting a permanent domestic

violence restraining order shall remain. Any application for variation, suspension or discharge of this restraining order is to be filed and heard in the Magistrate Court at Suva.

Orders of this court;

- a) The appeal against the sentence is allowed;
- b) The sentence imposed by the Learned Magistrate on 31/01/2017 in Magistrate Court Suva Criminal Case No. 104 of 2016 is set aside; and
- c) The said sentence is substituted with an imprisonment term of 06 months.




Vinsent S. Perera
JUDGE

Solicitor for the Appellant : Emunah Lawyers, Suva.
Solicitor for the State : Office of the Director of Public Prosecutions, Suva.