

IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
APPELLATE JURISDICTION

Criminal Appeal No. HAA 05 of 2018

Lautoka Magistrates Court case No. 788 of 2015

BETWEEN: RAMENDRA KUMAR

Appellant

AND: STATE

Respondent

Counsel: Ms. K. Vulimainadave for the Appellant

Mr J. Niudamu for the Respondent

Date of Hearing: 13th June, 2018

Date of Judgment: 10th July 2018

JUDGMENT

1. This is an appeal against sentence imposed by the Learned Magistrate at Lautoka in criminal case No. 788 of 2015.
2. The Appellant was charged with two counts of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act, one count of Breach of Domestic Violence Restraining Order contrary to Section 77 (1) of the Domestic Violence Act,

2009 and one count of Breach of Suspended Sentence contrary to Section 28 (1) (2) and 26 of the Sentencing and Penalties Act, 2009.

3. Before the hearing started, the Appellant pleaded guilty to the above charges on the 13th of March, 2017.
4. The Appellant was convicted accordingly with the above offences and was sentenced on the 14th December 2017 as follows:

for the first count 12 months' imprisonment,

for the second count 12 months' imprisonment to be served concurrently with the sentence for the first count.

for the third count 8 months' imprisonment and a fine of 2 penalty units (\$200) in default 20 days imprisonment and

for the fourth count a fine of 3 penalty units in default 30 days imprisonment.

5. The Court also activated the suspended sentence, 6 months' each for the first and the second counts, to be served concurrently. The Court in its final sentence ordered the Appellant to serve a total of 26 months imprisonment with a non-parole period of 20 months.

Grounds of Appeal

6. The Appellant had filed his appeal on the 17th of January 2018 which was out of time by about 7 days. The State had no objections to the enlargement of time hence leave was granted. The Appellant then applied for legal assistance from the Legal Aid Commission and, through his counsel, sought leave to file his amended grounds of appeal which was filed on the 2nd of May, 2018. The amended petition of

appeal consisted of 6 grounds of appeal against sentence. However, when the Appellant's Counsel filed her submissions they had indicated that they will only prosecute the appeal on two grounds. The Appellant confirmed that he in consultation with his Counsel had abandoned the rest of the grounds.

7. In summary, the Appellant's main grounds of appeal which were included in his submission are as follows:
 - (i) That the learned Magistrate did not take into consideration the time spent in remand.
 - (ii) That the learned sentencing Magistrate failed to consider that there were no permanent injuries sustained by the complainant and thus the sentence was excessive.
8. To support these grounds the Appellant, through his Counsel, has filed submissions. State also filed submissions in reply.
9. The Appellant agreed the following summary of facts prepared by the prosecution.

On 27th day of November, 2014, at about 1.00 am and 6.00 pm at 4 Baletia Street, Lautoka, accused Ramendra Kumar aged 41 years, driver of 4 Baletia Street, Lautoka assaulted the complainant Sunita Devi aged 44 years, Domestic Duties of same address as accused caused her injuries on two occasions. Accused breached his Domestic Violence Restraining Order and also breached his suspended sentence. Complainant and accused were legally married at the time of the offence.

On 27th day of November, 2014 at about 1.00 am the accused came back home after driving carrier in town. Complainant asked accused to pay maintenance of their daughter when accused got annoyed and punched complainant on her chest and head. Later on same day accused again at about 6.00 pm assaulted complainant with a timing belt and umbrella. On both occasions she received injuries as per the medical report. In committing above offences, accused breached his Domestic Violence Restraining Order No. 124/12 of Lautoka Magistrates Court by assaulting complainant, the protected person. Accused also breached his suspended sentence vide Lautoka CF 493/12 whilst committing above offences. The matter was reported to police and later accused was arrested and interviewed under caution and charged for above mentioned offences.

Ground 1: That the learned Magistrate did not take into consideration the time spent in remand

10. The Appellant submits that the learned Magistrate had erred in law by failing to take into account the period he spent in remand.

11. Section 24 of the Sentencing and Penalties Act states:

“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”.

12. The learned Magistrate is obliged to comply with Section 24 of the Sentencing and Penalties Act by making appropriate reduction in the sentence to reflect the

Appellant's remand period. Justice Goundar in Samuela Baravi v State Criminal Appeal No: HAA020 of 2012 stated that:

"Remand period is not a special circumstance. Remand period is a form of imprisonment, pending trial. If a remanded suspect is subsequently convicted of the alleged offence and sentenced to an imprisonment term, the only sensible and fair approach to punishment is to make a downward adjustment to the sentence to reflect the remand period." This procedure has been endorsed by the Court of Appeal in Basa v the State [2006] FJCA 23; AAU0024.2005 (24 March 2006) and the Supreme Court in Ledua v State [2008] FJSC 31; CAV0004.2007 (17 October 2008).

13. It is clear that the Appellant was remanded for about 2 months from 8th December 2015 to February 2018. The learned Magistrate had not considered the remand period of the Appellant and thus failed to give a discount.
14. The learned Magistrate had erred in his sentence. Ground one succeeds.

Ground 2: That the learned sentencing Magistrate failed to consider that there were no permanent injuries sustained by the complainant and thus the sentence was excessive.

15. The maximum sentence for Assault Causing Actual Bodily Harm is 5 years' imprisonment. The tariff in a domestic violence case is 9- 12 months' imprisonment and if the assault is serious the decision in State v Prasad [2015] 493 justifies a sentence up to 18 months' imprisonment.
16. The learned sentencing Magistrate had applied the correct tariff for the offence of Assault Causing Actual Bodily Harm in this case.

17. The learned Magistrate had picked a starting point of 10 months imprisonment for the offence of Assault Causing Actual Bodily Harm considering the surrounding circumstances of the offending and the nature and seriousness of the injuries caused.
18. The complainant who is Appellant's wife had offered no provocation at all when she asked for money for daughter's maintenance. He had punched complainant on the head and chest in the first incident. It is a significant aggravating feature that the accused focused on the head of the complainant. In the second incident the Appellant had used a timing belt and an umbrella to attack the complainant. On both occasions, the complainant had received injuries albeit of no permanent nature. The medical report does note multiple scratch marks on bruised upper right chest and abrasions on lower limb. Any attack to the head is dangerous in the highest degree although the injuries are not immediately visible. Under these circumstances, starting point of 10 months in a recurrent domestic violence scenario is quite justified.
19. Having picked the starting point the learned Magistrate then added another 5 months for aggravating factors. He considered the repetition of violence at home as an aggravating factor. The learned Magistrate was quite correct in taking into account the repetition of violence in blatant disregard of the breach of DVRO.
20. The learned Magistrate had considered Appellant's personal circumstances, his early guilty plea and the so called reconciliation although no specific discount on each mitigating factor was given. For all mitigating factors including the early guilty plea, the learned Magistrate had given a discount of 3 months when he arrived at the final sentence of 12 months' imprisonment for each count of Assault Causing Actual Bodily Harm.

21. Generally, an early guilty plea is considered an indication of contrition and from the case management perspective the Appellant had saved precious time and resources of court. He prevented the complainant from giving evidence and recalling the ordeal she had to undergo. However, the Appellant had a previous conviction of a similar nature and therefore the learned Magistrate's decision not to give the full 1/3rd discount to the early guilty cannot be questioned.

22. The question of reconciliation in a Domestic Violence is a difficult one. In Botaki v State [2012] FJHC 1250; HAA015.2012 (1 August 2012) Madigan J observed:

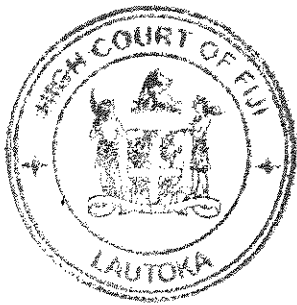
"It is quite clear that it is not reconcilable offence, it being a domestic violence case and that being so, reconciliation as a mitigating factor is of very dubious value. A female victim will nearly always say that the parties are reconciled because she will fear the loss of the family breadwinner and supporter or she is forced to say it by her accused husband. A sentencing tribunal should always therefore look at a submission of reconciliation with great caution and suspicion. In this case, although the Magistrate has listed reconciliation as a mitigating factor, he later expresses doubts whether it was voluntary or not because the victim did not confirm it in Court. It was a submission of the accused"

23. In view of offences committed repeatedly by the Appellant in violation of DVRO, the claim of reconciliation is of dubious value and it should not be regarded as a strong mitigating factor. In a country where the domestic violence has caused cracks in the social fabric, strong punishments are needed to send a clear message to the offender and potential offenders.

24. While the discount allowed (3 months) for all mitigating factors may not be adequate, when taken in its totality, the final sentence for each count of Assault Causing Actual Bodily Harm fell within the established tariff. Therefore, the learned Magistrate had not fallen into an error in imposing a sentence of 12 months imprisonment (to be served concurrently) for each count of Assault Causing Actual Bodily Harm.

Conclusion

25. In the result, the appeal is partially allowed.
26. The sentence imposed by the learned Magistrate at Lautoka on 14th December, 2017 is varied to give effect to the remand period. The time spent in remand (2 months) is deducted from the overall sentence to reach a term of 24 months' imprisonment with effect from 14th December, 2017. The non-parole period is also adjusted. The Appellant is eligible for parole after serving 18 months in prison.
27. The penalty units and default sentences imposed by the learned Magistrate will remain intact.




Aruna Aluthge

Judge

At Lautoka

10th July, 2018

Solicitors: Legal Aid Commission for the Appellant

Office of the Director of Public Prosecution for the Respondent