

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 31 OF 2020**

**BETWEEN** : **ANAND KUMAR**  
**APPELLANT**

**A N D** : **STATE**  
**RESPONDENT**

**Counsel** : ***Ms. Bilivalu for the Appellant***  
: ***Ms. L. Latu for the Respondent.***

**Date of Hearing** : ***20<sup>th</sup> of November, 2020***

**Date of Judgement** : ***03<sup>rd</sup> of December, 2020***

**JUDGMENT**

**Background**

1. The Appellant (will be referred to as the accused sometimes) was charged with a count of '*Common Assault*' contrary to Section 274 of the Crimes Act of 2009, in the Magistrates' Court of Ba. The statement and particulars of the offences states;

**COUNT 1**

***Statement of offence***

**Common Assault**: Contrary to Section 274 of the Crimes Act of 2009.

***Particulars of Offence***

**Anand Kumar**, On the 04<sup>th</sup> day of August, 2018 at Rarawai, Ba in the Western Division unlawfully assaulted Sanjeshni Devi.

2. The accused has pleaded not guilty to the said charge and the matter has proceeded to trial.
3. The learned Magistrate of Ba, by Judgment dated 30<sup>th</sup> of April 2020, has convicted the accused of the alleged offence and proceeded to sentence him on the 07<sup>th</sup> of May 2020.
4. Being dissatisfied of the said judgment and the sentence, the accused (The Appellant) has submitted this appeal on the 27<sup>th</sup> of May 2020, within the allocated time.

### **Grounds of Appeal**

5. Though the Appellant has initially submitted one ground against the conviction and two grounds against the sentence, the appeal against the conviction was withdrawn on the 09<sup>th</sup> of July, in open court. The learned Counsel has already undertaken to submit the amended grounds against the sentence together with the appellants written submissions. However, on perusal of the filed written submissions of the appellant, the submissions were only on the alleged first ground of appeal against the sentence. Since there are no submissions made on the alleged 2<sup>nd</sup> ground of appeal against the sentence, I am compelled to consider the said 2<sup>nd</sup> ground of appeal against the sentence as abandoned. I will set them out below for clarity.

#### **6. Appeal against the conviction**

1. *That the learned Magistrate erred in law and principal when not giving weight to the evidence adduced by the second defence witness resulting in an unfair conviction. (Withdrawn on the 09<sup>th</sup> of July 2020)*

#### **Appeal against the sentence**

1. *That the learned Magistrate erred in law and the principle in not taking into account extenuating circumstances submitted by the appellant for a non-conviction.*
2. *That the learned Magistrate erred in law and in principle when taking into account extraneous factors as aggravating factors was never considered at any stage of the trial. (Abandoned by the written submissions of the appellant)*

7. Therefore the only ground to be considered remains to be;  
*'That the learned Magistrate erred in law and the principle in not taking into account extenuating circumstances submitted by the appellant for a non-conviction.'*
8. In this case the learned Magistrate has imposed a sentence of 3 ½ months of imprisonment and suspended it for a period of 18 months in addition to imposing a permanent restraining order contrary to section 27(2) of the Domestic violence Act of 2009.
9. The maximum sentence prescribed is 1 year of imprisonment and the accepted tariff for the alleged offence would range from an absolute or conditional discharge to 12 months of imprisonment.
10. It is never contended that the imposed sentence is not within the given tariff or excessive in any way. The sole contention of the appellant is that the learned Magistrate has erred in convicting the accused.

### **Analysis**

11. It would be pertinent to note that in the case of **Kim Nam Bae v State** [AAU0015 of 1998S(26 February 1999)] the Court of Appeal has held that;

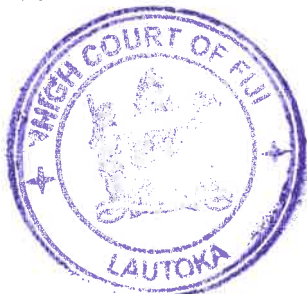
*"It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial judge acts on a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, 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)".*

Therefore in order for this court to disturb the impugned sentence, the appellant should demonstrate that the learned Magistrate in arriving at the sentence had;

- (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.
12. When considering the submissions made by the appellant, the cited two cases, namely **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December

2015) and **Saqinavalu v State** [2015] FJCA 168; AAU0093.2010, do not support the contention of the appellant.

13. The case of **Naiveli v State** [2020] FJHC 420; HAA11.2020 (12 June 2020) cited by the appellant in paragraph 1.4 of his submission, is on the issue whether the Magistrate should consider a non-conviction or not. In the present case it is amply evident and clear that the learned Magistrate has considered the issue, whether to enter a conviction or not at length. In the sentence of the learned Magistrate dated 07<sup>th</sup> May 2020, paragraph 08 to 15 deals with the said issue nearly over 3 ½ pages.
14. The learned counsel for the appellant has aptly cited the case of **State v Batiratu** [2012] FJHC 864; HAR 1 of 2012 (13 February 2012), where his Lordship Gates CJ (as he was then) has given the criteria to be considered in entering a non-conviction. The learned sentencing Magistrate has considered this case as well as the given criteria in arriving at his conclusion. The fact that appellant being an employee of the Judicial Department should not earn him an undue advantage over the others. The employees of the Judicial Department should set an example to the rest of the community by not violating the law. If they are dealt exceptionally, it would bound to pass an incorrect message to the community.
15. Therefore, I am of the view that the learned Magistrate was correct in convicting him.
16. In result, I disallow the appeal, and affirm the conviction entered by the learned Magistrate.
17. The appeal is dismissed.



  
**Chamath S. Morais**  
Judge

**At Lautoka**  
03<sup>rd</sup> December 2020

*Solicitors:*      *Legal Aid Commission, Lautoka for the Appellant*  
                         *Office of the Director of Public Prosecutions for the Respondent*