

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL APPEAL NO. HAA 001 OF 2023

[Lakeba Magistrates Court CF No: 13/22]

BETWEEN : **WAQABACA GUCAKE**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Mr T Varinava for the Appellant
Mr E Samisoni for the State

Date of Hearing : 3 April 2023

Date of Judgment : 6 April 2023

JUDGMENT

- [1] On 14 March 2022, the appellant was charged with assault causing actual bodily harm and produced in the Magistrates' Court for arraignment. The appellant instantly pleaded guilty to the charge and on the same day the learned magistrate sentenced him to 2 years 8 months imprisonment with a non-parole period of 2 years.
- [2] On 18 January 2022, the registry received a petition of appeal against sentence from the appellant. The handwritten petition is dated 23 December 2022 and was forwarded to the registry by the Department of Corrections. The appeal is late by about nine months.
- [3] Section 248 of the Criminal Procedure Act states that appeals to the Magistrates' Court from the High Court shall be filed within 28 days from the decision appealed

against. However, both the Magistrates' Court and the High Court have discretion to extend the appeal period for a good cause.

[4] The appellant has explained the delay in paragraph 6 of his affidavit as follows:

The reason for the delay is basically due to my lack of knowledge on the possible appeal grounds that could have been advanced against my sentence.

[5] When the delay is substantial, the question for the court is whether there is a ground of appeal that is probably going to succeed (*Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012)).

[6] The main complaint against sentence is that it is manifestly excessive.

[7] In this case the appellant and the victim were in a domestic relationship. He is the victim's stepfather. The victim is 3 years old and has Down syndrome.

[8] On the day of the incident the appellant pinched the victim on his abdomen several times while giving him a bath. The medical report stated that the victim sustained multiple bruises.

[9] An appellate court reviews sentence for error in the exercise of the sentencing discretion (*Saqainaivalu v State* [2015] FJCA 168; AAU0093.2010 (3 December 2015)). The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (*Rex v Ball* 35 Cr. App. R. 164 at 165).

- [10] In her reasons the learned magistrate did not refer to any tariff for the offence. She referred to the maximum sentence for assault causing actual bodily harm and then picked 9 months imprisonment as a starting point. She added 4 years for the grave breach of trust, the special vulnerabilities of the victim and the infliction of serious physical injuries. She then gave a discount of 3 months for the appellant's personal circumstances, 6 months for cooperation with the police and 1 year 4 months for the early guilty plea before arriving at a final sentence of 2 years and 8 months imprisonment. She did not consider that the appellant was a first time offender and was genuinely remorseful.
- [11] The maximum sentence prescribed for the offence of assault causing actual bodily harm is 5 years imprisonment. The tariff ranges from a suspended sentence to 9 months imprisonment (*Jonetani Sereka v State* [2008] HAA 2708s, 25 April 2008)
- [12] The fact that the victim was a child with a special need made him a vulnerable victim. The appellant being his stepfather was in a position of trust to care for the victim. The learned magistrate was correct to treat the breach of trust and the vulnerability of the victim as aggravating factors. But she erred in considering the physical injuries as the aggravating factor. The fact that bodily injury was caused was an element of the offence. The injuries were bruises and not open wound. No weapon was used. The medical report indicated that the injuries were not serious. The learned magistrate mistook the injuries to be serious. She erred in her sentencing discretion to enhance the sentence by 4 years by giving undue weight to the aggravating factors.
- [13] The learned magistrate also erred in her sentencing discretion by not giving any weight to the appellant's previous good character and to his expression of genuine remorse. The appellant pleaded guilty at the first opportunity. He was genuinely remorseful.

[14] The appellant has nearly served 13 months imprisonment for pinching and causing bruises to his step-child. A just outcome can be achieved by substituting the sentence with the period already served.

[15] **Result**

Extension of time to appeal is allowed.

The appeal against sentence is allowed.

The sentence imposed in the magistrates' court is set aside and substituted with a sentence of 13 months imprisonment effective from 14 March 2022.

The DVRO remains.



A handwritten signature in black ink, appearing to read "D. Goundar", is written above a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Appellant