

**IN THE HIGH COURT OF FIJI AT SUVA**

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

[APPELLATE JURISDICTION]

**SAKEASI TUINARO**

**Appellant**

**CASE NO: HAA. 25 of 2022**  
[Criminal. Case No. 643 of 2022]

**Vs.**

**STATE**

**Respondent**

**Counsel** : Appellant In Person  
Ms. B. Kantharia for the Respondent

**Hearing on** : 18<sup>th</sup> January, 2023

**Judgment on** : 01<sup>st</sup> February, 2023

**JUDGMENT**

**Introduction**

1. The Appellant has preferred this appeal against the sentence imposed by the Learned Magistrate of Suva on the 4<sup>th</sup> May 2022.
  
2. The appellant was charged before the Magistrate Court of Suva with a count of Criminal Intimidation contrary to section 375 (1) (a) (ii) (iv) of the Criminal Act of 2009 and of a count of Breach of Domestic Violence Restraining Order contrary to section 77 (1) (a) of

the Domestic Violence Act of 2009, both of which he pleaded guilty to and was convicted on his own plea on 14<sup>th</sup> April 2022. Then an aggregate sentence of 2 years imprisonment was imposed setting off 14 days spent in remand. A non-parole period of 11 months too was ordered. The charge reads thus;

*Statement of Offence (a)*

**CRIMINAL INTIMIDATION:** Contrary to section 375 (1) (a) (ii) (iv) of the Crimes Act of 2009.

**Particulars of Offence (b)**

**SAKEASI TUINARO**, on the 14<sup>th</sup> day of April, 2022 at Nabua in the Central Division without lawful excuse threatened **Kara Jane Campbel** by saying that he will burn the house when she was sleeping with her son with intent to cause alarm to the said **Kara Jane Campbel**.

*Statement of Offence (a)*

**BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER:** Contrary to section 77 (1) (a) of the Domestic Violence Act of 2009.

**Particulars of Offence (b)**

**SAKEASI TUINARO**, on the 14<sup>th</sup> day of April, 2022 at Nabua in the Central Division having being notified of Domestic Violence Restraining Order Number 95/19 by the Nadi Magistrate Court, without reasonable excuse contravened part (d) of the order by threatening **Kara Jane Campbel** without reasonable cause.

Facts

3. On the 22<sup>nd</sup> April, 2022 when this matter was called in the Magistrate Court, the charge sheet and the disclosures have been served on the Appellant. As the Appellant informed that he is ready to plea the charges were read out and he pleaded guilty to both the counts. He was unrepresented. However he had exercised his option to represent himself.

4. Upon so pleading guilty immediately the summary of facts have been read out and the Appellant has admitted the same. The Learned Magistrate then found him guilty and convicted him. It is recorded in the transcript of the 22<sup>nd</sup> April, 2022 that the Accused is ‘36 years old, married, one child, property officer at Vatuwaqa Primary School \$380 fortnight;’ and ‘Seeking court’s forgiveness and tried to reconcile; In custody’. Upon these been so recorded the sentencing was set for 04/05/2022. On which day it is also recorded that the *Appellant knew of the Domestic Violence Restraining Order when he committed the crime*. The prosecutor has then informed that, *he is a first offender*, upon which the sentence ruling had been pronounced.
5. The Appellant being dissatisfied has preferred this appeal against the said sentence. The Appellant’s grounds of appeal as gathered and elicited from his pleadings and submissions are as follows;
  - (i) That he was not represented by counsel and was not granted an opportunity to make his submissions in mitigation and the Learned Magistrate failed erred in failing to consider relevant facts in sentencing.
  - (ii) That the sentence is harsh and excessive and the Learned Magistrate erred in failing to relevant consider the principles and guidelines of sentencing.
  - (iii) The Learned Magistrate erred in not suspending the sentence.

#### The Appellate Powers and Functions;

6. It is now well established that an appellate court may not re-visit and substitute its opinion as to sentencing for that of the sentencing judge merely because it would have exercised the discretion in a different manner. However, an appellate court may intervene where the appellant can establish that the trial judge made an express or implied material error of law or fact. That is when a sentencing judge acts upon a wrong principle, considers extraneous or irrelevant matters or fails to consider relevant facts in the determination of the sentence. In such a case, the sentencing judge's discretion has miscarried. It is the appellate court's duty to exercise the discretion afresh, subject to the applicable criminal appeals statute, the provisions of the applicable sentencing legislation and any other statute or rule of law, as required or permitted. (*Bae v State*

[1999] FJCA 21; AAU0015u.98s (26 February 1999; House v The King [1936] HCA 40; (1936) 55 CLR 499 and Kentwell v R).

7. That being so, even if a ground of appeal might be decided in favour of the appellant, this court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

#### Consideration of the Grounds of Appeal

8. Firstly, the absence of counsel no doubt has affected the placing of all relevant facts in mitigation before the Magistrate. However, as admitted it is the Appellant himself who had opted to appear in person in the exercise of his Constitutional Right under section 14 (2) (d) of the Constitution. He had the option of obtaining the services of the Legal Aid which he thought otherwise and did not opt for. When the rights of an Accused person is explained or known and he opts to represent himself, a court cannot force upon him the services of a counsel. If done so that by itself may become a ground of appeal and would be viewed as a violation or interference with the rights of such Accused. Accordingly, as the Appellant has voluntarily opted to appear in person and represent himself he cannot be heard to complain of prejudice arising from not having the services of a counsel. It is no more no less his informed choice and the exercise of his right. Thus, the submission and ground of appeal based on not having the services of a counsel is misconceived.
9. Now let's consider if the Appellant was afforded a fair opportunity to make and place his submissions in mitigations. Immediately upon the serving the disclosures the Appellant has pleaded guilty and the summary of facts read on the same day. There does not appear to have been sufficient time or opportunity afforded to the Appellant to consider the disclosures and the summary of facts and to make his mitigation. The only facts in mitigation recorded are that is mentioned above. Thus, it is apparent that the Learned Magistrate has failed to afford the Appellant a fair and meaningful opportunity to place all necessary facts relevant to his mitigation.
10. When an Accused person appears in person and represents himself, to my mind it is prudent and also necessary to explain to such accused his rights as well as the

importance of placing his mitigation and also to grant him sufficient time and a meaningful opportunity. It is incumbent upon and there is an onerous duty cast on the trial judge to be vigilant and so explain. The Appellant has not been granted sufficient time nor a meaningful opportunity and neither does it appear that he was informed of the requirement to make submissions in mitigation. I observe that the facts placed before this court are certainly relevant to the decision of suspending the sentence. Hence, the failure to ascertain and consider relevant migratory facts and circumstances to my mind has caused a substantial miscarriage of justice.

11. The Learned Magistrate has considered and imposed an aggregate sentence. The serious offence of the charges is that of criminal intimidation of which the maximum penalty is 5 years imprisonment. The tariff is between 6 months to 2 years. The final sentence has therefore come within the upper end of the said tariff. I observe no serious flaw in the process of sentencing or the final sentence. However, the Appellants main complaint is the Learned Magistrate's failure and refusal to suspend the sentence.
12. The Learned Magistrate has considered the issue of suspension at paragraph 13 of his Rulings and stated that; "*A short sharp sentence may perhaps best underscore the undesirability of engaging in criminal conduct toward your partner, or anyone else for that matter. I decline to suspend your sentence. You are to serve of 01 year, 11 months and 16 days forthwith*".
13. The Learned Magistrate has adverted his mind to the issue of suspension. However the she has failed to sufficiently inform the Appellant to make adequate submissions in mitigation and also not endeavoured to elicit all relevant material before the sentence was considered. These facts in mitigation are stated in this application and the written submissions tendered in this appeal. These facts so tendered have not been contradicted or denied by the respondent. The facts stated *inter alia* are as follows. '*The words spoken were out of anger as it was due to the provocation of the complainant which was an utterance between spouses. The house belongs to the Appellant and his parents, and his siblings too reside in the same house, and the child of the complainant is in fact a nephew of the Appellant adopted from his sister*'.

14. Further, *on the day of incident the complainant had been in the house after consuming 3 bottles of wine and was intoxicated. She had locked the Appellant out of the house when he returned from work. It is then, that the offending words or the threat had been made. Thereafter, the Appellant had been in the front porch having grog with his family. The complainant is 59 years old and the Appellant is 36 years of age.* (vide-the document annexed to this application dated 09/05/2022 and the written submission).
15. The Learned Magistrate unfortunately had not been possessed of and privy to these very relevant facts and circumstances. This in my view was due to the Appellant not been afforded a meaningful and informed opportunity. In the circumstances of this offending especially the domestic relationship it is necessary that the said facts be considered in deciding the issue of suspension of the sentence. The Applicant and the Complainant have been living in the same house and co-habiting. The DVRO had been issued on the 22<sup>nd</sup> November, 2019. [A copy of this DVRO was not in the copy record however, the same was called for and obtained by this court in considering this Appeal]. Thus, for almost 2½ years the parties appear to have been living subject to the DVRO without complaint. This is quite a substantial period of time. The conduct of the complainant appears to have provided some provocation to the Appellant to make the offending utterance. The parents, siblings of the Appellant and their families too reside in this house. Is it realistic for him to set on fire his own house with all his family and siblings? I think not. A threat to burn down the house when viewed in isolation certainly appears to be serious. However, viewed in the circumstances of this offending and in context, in all it appears to have been made in the heat of passion without an actual intention to carry out such threat. These are relevant matters in determining the suspension or otherwise which unfortunately the Learned Magistrate did not have the benefit of.
16. No doubt in considering the aggregate sentence, the primary and the serious offence was that of criminal intimidation. However, in the circumstances of this offending the complaint has emanated primarily due to the violation of the DVRO which is the 2<sup>nd</sup> count. Thus considering the sentence and the suspension of thereof it was necessary to have considered the guiding principles applicable in relation to violations of such restraining orders.

17. Denunciation and punishment are certainly important purposes in sentencing for contravention of a restraining order. The dynamics of domestic and family violence may mean the imposition of even of a fine may have the unintended consequence of also punishing the victim. Thus appropriately balancing the purposes of sentencing is a delicate task in family violence cases. As the function of a restraining order is to protect the victim from future harm, an important purpose of sentencing for breach of an order should be to deter non-compliance with such order or future orders to ensure the safety and protection of the victim. This may be more effectively achieved by having the threat of an impending sentence hanging over the head of the perpetrator.
18. In assessing the degree to which it may mitigate the seriousness of the offence it is important to consider the history of the relationship between the parties and the nature of their contact. This may require some consideration of the dynamics of the relationship between the victim and the offender. In considering the offender's culpability in a breach of restraining order offence, the court should consider whether the offence was committed intentionally, recklessly or negligently and the offender's level of understanding of the order.
19. As all relevant migratory facts were not before him the Learned Magistrate failed to consider such relevant facts when deciding against suspending the sentence. As such the issue of suspension will be considered afresh.

### Suspending the Punishment

20. As per Section 26(2) of the Sentencing and Penalties Act, the discretion to suspend a sentence may be exercised by a High Court where the custodial sentence does not exceed 2 years and as opined in **State v Aiding Zhang** [2017] HAC 061 if there be circumstance which are exceptional. In **DPP v Jolame Pita** (1974) 20 FLR 5 at p.7:, Grant Acting CJ (as he was then) explained what special circumstances that warrant and justify the suspension of a sentence thus;

*"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a*

*breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."*

21. Fernando JA., in **State v Din** [2019] FJCA 200; AAU41.2012 (3 October 2019) quoted with approval the following passages from the case of *Petersen* as factors needing to be weighed in deciding to suspend a sentence.

*"Thomas at pp. 245-247 lists certain categories of cases with which **suspended sentences** have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period of free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrent the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list."*

### Conclusion

22. In view of the circumstances of this offending the offending utterance was made in the spur of the moment within the domestic relationship between the parties. The Appellant is a first offender and relatively young. I am of the view that a just balance between denunciation and the protection of the victim from future harm to ensure the safety and protection of the victim may be achieved by the suspension of at least a part of the sentence in this matter. In these circumstances I am satisfied that a partial suspension is justified. Accordingly, I vary the sentence ruling of the Learned Magistrate and order that the first 12 months of the sentence imposed be served as ordered and remainder of the 12 months be suspended for a period of 7 years.



23. The final sentence after giving credit to the time spent in remand is 1 year; 11 months and 16 days. As such it is hereby directed that the active sentence (custodial term) is 11 months and 16 days from 4<sup>th</sup> May, 2022 to the 20<sup>th</sup> April, 2023. The balance period of 12 months sentence is hereby suspended for 7 years commencing from 20<sup>th</sup> April, 2023.
24. Subject to this variation the rest of the sentence dated 4<sup>th</sup> May 2022 is affirmed.
25. The following orders are accordingly made:
- i. The appeal against the sentence is partially allowed;
  - ii. The Appellant is to serve 11 months and 16 days of his sentence of imprisonment from 4<sup>th</sup> May, 2022 to 20<sup>th</sup> April, 2023;
  - iii. The remainder of 12 months of the sentence is suspended for 7 years with effect from 20<sup>th</sup> April, 2023; and
  - iv. A copy of this Judgment to be sent to Magistrates' Court.



**At Suva**

01<sup>st</sup> February, 2023

**Solicitors:**

Appellant In Person

Office of the Director of Public Prosecutions for the State