

IN THE HIGH COURT
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 27 of 2023

BETWEEN: **SAIMONE TUNAQASE**

AND: **STATE**

For the Appellant: **Ms R Raj**

For the Respondent: **Ms A Vavadakua**

Date of Hearing: **7th July 2023**

Date of Ruling: **25th July 2023**

RULING ON APPEAL

1. The Appellant was initially charged in the Labasa Magistrate's Court on two counts of Defilement contrary to section 215 (1) of the Crimes Act 2009.
2. The Appellant pleaded not guilty and the matter went to Trial. On the 15th of October 2021 he was convicted on both counts of Defilement.
3. Later, on the 18th of July 2022, he was sentenced to 23 months and 26 days imprisonment for count 1 and 18 months imprisonment for count 2, both counts to be served concurrently and a non-parole period of 15 months to be served.
4. Initially the Appellant appealed against conviction only, the appeal was filed on the 12th of August 2022. He was unsuccessful however and the High Court confirmed his conviction on the 5th of December 2022.

5. He has now filed an application for Leave to Appeal out of Time, with proposed Grounds of Appeal – filed on the 8th of May 2023.
6. He explains that he is now out of time in his appeal because he had been assured by his former counsel that his appeal against conviction would be successful. This was also the reason why he did not appeal against sentence.
7. When the appeal against conviction was dismissed, he was disappointed and opted not to engage private counsel again and he now has applied for Legal Aid to pursue his appeal against sentence.

Proposed Grounds of Appeal

8. That the Learned Magistrate erred in calculating the time period spent in remand. He contends that he spent three months twenty five days in remand and not the four days set out in the sentence.

The State's submissions

9. The State has filed submissions in response. In essence, the State is not resisting the application for enlargement of time and the substantive appeal as well.
10. The State submits that the appeal against sentence is out of time by 5 months and the reasons advanced by the appellant for the delay do not meet the criteria set out for the consideration for such applications (Kumar –v- State ; Sinu –v- State [2012] FJSC; CAV 001 of 2009 (21 August 2012).
11. The State nevertheless concedes that the Learned Magistrate did not properly account for the period that the Appellant spent in remand therefore the appeal has merits and the application for enlargement must be allowed.
12. In the sentence, the Learned Magistrate had deducted only 4 days as time served even though the actual time spent in remand was three months and 25 days. The State submits the authority of Vasuca –v- State [2015] FJCA 65 which mandates that the time already spent in remand must be deducted from the sentence.

13. The State submits that at the time of the sentencing, the Accused was a first offender and the tariff for the offence of Defilement ranged from a non-custodial sentence to 4 years imprisonment (Koroivuki –v- State [2013] FJCA 15; AAU 0018 of 2010 (5th March 2013).
14. In conclusion the State submits that the time for appeal must be enlarged even though it is out of time by 5 months.
15. The State also submits that the appeal has merits as the sentencing Magistrate failed to account for the actual time spent in remand – 3 months and 25 days. The State further submits that the Court must quash the sentence and impose another sentence on the Appellant with the proper adjustments for time spent in remand.

Analysis

16. The State has conceded the application for enlargement therefore the application for enlargement of time for appeal is granted.
17. In considering the appeal, the State has properly conceded that the Learned Magistrate fell into error when she did not deduct the actual time spent in remand – 3 months and 25 days. She only deducted 4 days and in doing so, she fell into error.
18. The State has invited me to quash the current sentence and to proceed to sentence the Appellant with the proper deduction to be made for the actual time spent in remand. This Court has this power as provided by section 256 (3) of the Criminal Procedure Act.
19. The relevant section provides as follows: -

“(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.”
20. The sentence handed down on 18th July 2022 is hereby quashed and the Court will proceed to sentence the Appellant again.

Sentence

1. At the time of his conviction, his counsel offered the following plea in mitigation
 - He is 45 year of age
 - He is married with 3 children aged 15, 13 and 11 years old respectively
 - He also looks after his elderly father in law
 - He is the sole breadwinner in the family
 - He is a bee farmer earning \$200 per week
 - He is genuinely remorseful and promises not to reoffend
 - He seeks forgiveness from the Court
 - He is a first offender.

21. Saimoni Tunaqase, in sentencing you the Court notes that you were found guilty after a full trial. The complainant had to testify and relieve her ordeal in Court under cross examination. The offending in this case falls into the medium level of seriousness for such offences. There was no violence used and the complainant did not suffer any injuries in the offending.

22. The aggravating factors in this instance are the age difference and the breach of trust as you are an elder relative and you abused that trust in committing the offence against the complainant.

23. The only mitigating factor in your favour is your previous good conduct as a first offender. The other matters set out above are your personal circumstances and do not mitigate the offending.

24. The offending in this case was on two separate occasions although they can be said to be part of the same transaction and as the Learned Magistrate stated, it is appropriate to impose an aggregate sentence on you as stipulated at section 17 of the Sentencing and Penalties Act.

25. You have spent 3 months and 25 days in remand for this matter therefore this period in remand will be deducted as time already served.


26. In sentencing you I adopt a starting point of 18 months imprisonment. For the breach of trust your sentence is enhanced by 12 months. For your guilty plea I deduct 10 months from the sentence leaving you with an interim sentence of 20 months imprisonment.
27. For this case, you were remanded for 3 months and 25 days therefore this period of remand, rounded off to 3 months, will be deducted as time already served leaving you with a final aggregate sentence of 17 months imprisonment on each count of Defilement.
28. This is a sentence under 2 years therefore it may be suspended pursuant to section 26 of the Sentencing and Penalties Act. I have considered the facts of the case as set out in the record and I am not convinced that it is appropriate to do so in the circumstances of this case. The sentence will be custodial.

This then is the Court's Ruling in this matter: -

- 1. The application for enlargement of time is granted.**
- 2. The sentence dated 18th July 2022 is quashed and this Court substitutes the following sentence – an aggregate sentence of 17 months imprisonment on each count of Defilement, to be served concurrently.**
- 3. The sentence is backdated to the 18th of July 2022.**

So ordered




.....
Mr. Justice U. Ratuveli
Acting Puisne Judge

Solicitors:

Office of Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent