IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE No. HAA 26 OF 2023
BA MAGISTRATES COURT No. 471 OF 2016

BETWEEN: **EMOSI MAGITIGUSUNA NAISIROKI**
APPELLANT

AND **THE STATE**
RESPONDENT

Counsel: Mr Mohammed Yunus for Appellant
Ms S. Naibe for Respondent

Date of Hearing: 1 September 2023
Date of Judgment: 15 September 2023

JUDGMENT

Background

1. The Appellant was charged with one count of Act with Intent to Cause Grievous Bodily Harm contrary to Section 255(a) of the Crimes Act 2009 and one count of Assault Causing Actual Bodily Harm Contrary to Section 275 of the Crimes Act 2009.

2. The particulars of the offence in count one state that the Appellant on 13 November 2016 at Ba Town with intent to cause grievous harm to Suliana Nawagavula (his wife) unlawfully wounded said Nawagavia by striking her with a piece of wood on her head.

On the second count, it is alleged that the Appellant assaulted Tevita Raibevu, thereby occasioning actual bodily harm to said Tevita Raibevu.

3. The Appellant on 20 September 2017 pleaded not guilty to the first count and pleaded guilty to the second count. On 21 March 2023, he decided to take a progressive approach and pleaded guilty to both counts. On 21 March 2023, the Appellant was convicted and subsequently, on 10 May 2023, sentenced to an aggregate term of 2 years 11 months and 10 days' imprisonment without a non-parole period being imposed.

4. The Appellant being dissatisfied with the sentence, filed this timely appeal on the sole ground that the sentence was manifestly harsh and excessive in all circumstances of the case.

Facts of the Matter

5. On 13 November 2016, at around 4 a.m., the Appellant came home after drinking liquor with his friends. The 1st complainant (his wife) followed the Appellant upstairs and hit the Appellant. The Appellant got furious and retrieved a piece of timber and struck the complainant with the timber on her head. The complainant then ran to the 2nd complainant's house, which is next door, to save herself. The Appellant pursued the 1st complainant to the 2nd complainant's house and when the 2nd complainant tried to stop the Appellant from assaulting the 1st complainant, the Appellant punched the 2nd complainant. The Appellant admitted the allegations under caution. The complainants were taken for a medical examination. Some lacerations were noted in the medical report.

Law on Appeal against Sentence

6. Section 246 (1) of the Criminal Procedure Act 2009 provides that (subject to any provision to the contrary in that Part), any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

7. However, according to Section 247 of the Criminal Procedure Act 2009, no appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.

8. **In Kim Nam Bae v. The State** [1999| FJCA 21; (26 February 19991); the Fiji Court of Appeal held:

> 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 upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he 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 [19361 HCA 40; [19361 55 CLR 499).

9. These principles were endorsed by the Fiji Supreme Court in **Naisua v. The State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013). Therefore, it is well established that, before this Court can interfere with a sentence passed by the Magistrate's Court, the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant considerations.

Analysis

10. The Appellant is entitled to appeal against the sentence as to the extent, appropriateness or legality of the sentence.

11. The Appellant is charged on the first count with Act with Intent to Cause Grievous Bodily Harm - contrary to Section 255(a) of the Crimes Act 2009. The maximum sentence for the offence under the Crimes Act is life imprisonment. The set tariff for the offence ranges from 6 months to 5 years and where the attack is by a weapon the

starting point should range from 2 years to 5 years imprisonment, depending on the weapon (State-v- Maba Mokubula [2003] FJC 164; HAA 52J.2003 (23 December 2003).

12. On the second count, the Appellant is charged with Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act 2009. This offence carries a maximum sentence of 5 years imprisonment and the tariff ranges from 3 months to 12 months imprisonment (**State v Kurukuvui** - Sentence [2021] FJHC 133; HAC296.2019 (24 February 2021). The Learned Magistrate had identified the correct tariff for sentence for each offence in paragraphs 9 and 10 of his sentencing remarks.

13. The Appellant had used a piece of timber to strike the head of the 1st complainant. There can be no doubt that a piece of timber is a weapon. The harm that it could inflict would depend on its nature and the intensity with which it had been used. The nature of the timber used by the Appellant is not described in the summary of facts. Based on the facts admitted by the Appellant, it can be assumed that the timber was not that dangerous compared to a weapon like a cane knife or iron rod. However, it had been used on the head, the most vulnerable part of the body. The medical reports do not form part of the summary of facts admitted. However, the facts admitted do not suggest that the injuries were serious. The Learned Magistrate in his sentencing remarks has only observed that the injuries were consistent with the allegation.

14. The most important element to constitute the offence of the Act with Intent to Cause Grievous Harm is the specific intent of the offender at the time of the offence. For the prosecution to prove the charge, it must be established beyond reasonable doubt that the Appellant intended to cause grievous harm. That intent should be gathered from the circumstances of the offence.

15. In finding the guilt of the Appellant on the 1st count, (Act with Intent Cause Grievous Harm), the Learned Magistrate would no doubt have considered the type of the weapon used, the type of the injuries, and the place of the body the injuries had been inflicted in finding the Appellant guilty on the 1st count. Therefore, the use of timber is consumed in the offence itself so far as it sheds light on the specific intent required to be established to constitute the offence.

16. The tariff set by the High Court in Mokubula (above) for the offence of the Act with Intent to Cause Grievous Harm is 6 months to 5 years' imprisonment. In setting this tariff, the High Court had advocated a minimum custodial sentence of 2 years where a weapon had been used and the starting point to be decided based on the type of weapon used. The type of the weapon used (piece of timber) is not that dangerous compared to other weapons.

17. The Appellant argues that the Learned Magistrate fell in error in identifying a starting point in the upper range of the tariff. As a matter of practice, the starting point should be picked from the lower or middle range of the tariff (**Koroivuki v. State** [2013] FJCA 15; AAU0018.2010 (5 March 2013 in paragraph 27); I must agree with that.

18. Having identified the tariff between 2-5 years imprisonment which is reserved for offences committed with a weapon, the Learned Magistrate picked the starting point at 3 years from the upper range of the tariff. The reason given was that the timber was used to strike the head of the complainant, which is a vulnerable part of the body.

19. The Learned Magistrate's consideration of the use of a piece of timber and that it had struck the head should be included in the assessment in deciding the guilt of the accused for this offence, and therefore these facts are consumed in the offence itself. Otherwise the Learned Magistrate would have found the Appellant guilty of a lesser count. Furthermore, the tariff itself dictates that the starting point within the range should be decided on the basis of the weapon used. Therefore, selection of a starting point in the upper range of tariff is erroneous.

20. Having considered the type of the weapon used and the injuries sustained, the Learned Magistrate should have picked a starting point from the bottom end of the tariff which is two years and then adjusted the final sentence after considering the aggravating and mitigating factors.

21. Furthermore, having picked a starting point from the upper range of the tariff on account of the use of timber, the Learned Magistrate considered it as an aggravating factor at

tier two of the sentencing process to further increase the sentence by one year which is again erroneous as it amounts to double counting.

22. The Appellant voluntarily admitted the offence at the first available opportunity and expressed his desire to reconcile with his wife as an indication of genuine remorse. Generally, the reconciliation efforts are viewed with a degree of scepticism when the offence is committed in a domestic setting. At the same time, having carefully examined the circumstances of the offence and what followed thereafter to gauge the genuineness of the proposed reconciliation, the courts must endeavour to give effect to the reconciliation efforts.

23. From the summary of facts, it is clear, that the Appellant had returned home drunk and gone straight upstairs. The complainant had followed the Appellant and hit him. There was no evidence that the Appellant was violent when he reached home although he was drunk. It was the complainant who had triggered the offence. She had clearly offered provocation by hitting her husband who was drunk. The courts must not jump to the conclusion that it is always the male counterpart who is the perpetrator of violence in a domestic setting. The sentencers should approach the facts with an open and balanced mind and should not be guided by stereotypes.

24. The Learned Magistrate remarked on the prevalence of domestic violence offences in the community and considered it as an aggravating factor to enhance the sentence. The widespread prevalence of the offence in the society may be relevant in a deliberation of whether a particular sentence will work as an effective deterrence, but not as a subjective factor at tier two of the sentencing process to aggravates the offence.

25. While drunkenness, breach of trust and the fact that the offence was committed in a domestic setting are legitimate aggravating factors, the act of provocation on the part of the complainant must necessarily mitigate the culpability of the offence. The Learned Magistrate failed to consider the act of provocation as a mitigating circumstance. Instead, he considered the same as an aggravating factor to enhance the sentence on the premise that the reaction of the Appellant was disproportionate to the provocation offered. I can't help but agree that the Learned Magistrate allowed extraneous or irrelevant matters to guide him and failed to consider some relevant considerations.

26. I accept that the Learned Magistrate has acted upon a wrong principle and allowed extraneous or irrelevant matters to guide him and failed to take into account some relevant considerations. As a result of which he ended up with a disproportionate and excessive sentence. Therefore, the sentence imposed by the Learned Magistrate should be quashed and substituted with another sentence.

27. Since the imprisonment term has exceeded two years, the Learned Magistrate must fix a non-parole period. However, no non-parole period has been fixed in this matter. It appears that, by doing so, the Learned Magistrate has appreciated that the Appellant is eligible for parole at any time.

28. Having considered the type of weapon and the injuries, the sentence should have been started at 24 months at the bottom end of the tariff. 12 months should have been added for aggravating factors, bringing the aggregate sentence to 36 months in the interim. For his guilty plea, albeit late, his sentence should be reduced by 6 months and for other mitigating factors such as first offender, remorse, family circumstances and time served in remand, a reduction of 6 months should have been appropriate. His final aggregate sentence should have been 24 months' imprisonment.

29. Section 26 (2)(b) of the Sentencing and Penalties Act 2009, states that a Magistrate's Court may suspend a sentence of imprisonment if the period of imprisonment or the aggregate period of sentence of imprisonment does not exceed 2 years. Since the final sentence does not exceed two years, I should consider if a suspended sentence is warranted for the Appellant in the circumstances of the offence.

30. There is no automatic entitlement to a suspended sentence merely because the final sentence has not exceeded the two years' imprisonment period. Whether the sentence should be suspended will depend on several factors, and these factors may sometimes overlap with some of the mitigating factors. The 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. In other words, special circumstances justifying a suspension should be present.

31. In **State v Roberts** [2004] FJHC 51; HAA0053J.2003S (30 January 2004), Shameem J laid down the following guidelines for imposing a suspended sentence:

> The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation.
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> However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender and the attitude of the victim" (emphasis added).

32. The case law in Fiji suggests that when a first offender pleads guilty at the first available opportunity, thus indicating genuine remorse, to a charge that is not serious and there is no breach of trust, the offender is a suitable candidate to receive a suspended sentence. The judicial discretion in this regard should be guided by Section 4(1) of the Sentencing and Penalties Act, which prescribes the purposes for which a sentence is imposed by a court.

33. In the present case, the Appellant is a first offender. He pleaded guilty but not at the first available opportunity for the 1st count. In his mitigation submission in the court below and the submission to this Court, the Appellant pleaded for a suspended sentence in view inter alia that he is the sole breadwinner of the family of three kids. It was not disputed that the complainant had first hit the Appellant and provoked the offence. The Appellant was a first offender and was of a good character. The Appellant had sought forgiveness of the complainant and made a genuine effort to reconcile.

34. The complainant has forgiven the Appellant. She, in a letter dated 8 May 2023 (Tab A) wrote to the Magistrates Court at Ba, while the sentence was pending, blaming herself for the offence and taking responsibility for provoking her husband by throwing a killer punch which had landed on his left ear. She, at the appeal hearing, came to Court to beg for a suspended sentence for her husband.

35. The Counsel for Appellant submits that his client is a heart patient and survives on penicillin injections. From his young days, the Appellant is diagnosis for a hole in his heart and during the cold weather, he needs more attention and care. However, there is no medical certificate to substantiate this claim.

36. For 6 years, when the case was pending, the Appellant has had the offence hanging over his head like a 'Sword of Damocles' and within this period it appears that he has rehabilitated. He has re-baptised as a Seventh Day Adventist church member and become a pastor at Ba Central Seventh Day Adventist Church (Tab C).

37. The Appellant is young and the sole breadwinner of a family of three children who are still schooling. Because of one wrongful act of the father, the children should not be deprived of their fatherly love, care and support for more almost three years. The Courts must take into children's welfare as primary consideration when deciding whether or not the sentence should be suspended.

38. Our Constitution provides that the best interests of a child are the primary consideration in every matter concerning the child [Section 41(2)]. Every child has the right to family care, protection and guidance, which includes the equal responsibility of the child's parents to provide for the child [41(1)(c)]. The Bill of Rights Chapter of the Constitution binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office [Section 6 (1)]. The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in the Bill of Rights Chapter [Section 6(2)] which include the rights of a child.

39. Although the Sentencing and Penalties Act does not require the courts in the sentencing process to have regard to the personal and family circumstances of the offender, in view of the said provisions of the Constitution, the court cannot turn a blind eye to the rights of the children of the offender that may be affected by its decision.

40. A full suspended sentence however is not warranted in view that a violent offence has been committed in a domestic setting. The Appellant has already served exactly six months in the correction facility. In the circumstances of this case, the term he has

served would sufficiently fulfil the purposes of deterrence, punishment and denunciation. To achieve the purpose of rehabilitation and in the best interests of the children, I am inclined to suspend the remaining portion of the sentence as provided for under Section 26(1) of the Sentencing and Penalties Act.

41. I accordingly order that the remainder of one and half (1 ½) years of the sentence be suspended for a period of three years. If the Appellant commits any crime punishable by imprisonment during the above mentioned operational period of three years and is found guilty by the court, he is liable to be charged and prosecuted for an offence pursuant to Section 28 of the Sentencing and Penalties Act. The Interim Domestic Violence Restraining Order which is now in operation is converted to a Permanent Domestic Violence Restring Order.

42. The Appeal succeeds to that extent. The Appellant is released forthwith.

Aruna Aluthge
Judge

At Lautoka
15 September 2023

Solicitors:

M.Y.Law for Appellant
Office of the Director of Public Prosecution for Respondent