

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 28 OF 2023

BETWEEN: KAMINIELI LOMANI APPELLANT

A N D: THE STATE RESPONDENT

Counsel: Mr. E. Wainiqolo for Appellant
 Mr. E. Samisoni for Respondent

Date of Hearing: 01st December 2023

Date of Judgment: 23rd February 2024

J U D G M E N T

1. The Appellant was charged in the Magistrate's Court at Suva with one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act. The Appellant pleaded guilty to this offence on the 22nd of May 2023 and admitted the summary of facts tendered by the Prosecution. In her sentence dated the 7th of August 2023, the learned Magistrate sentenced the Appellant to two years and two months imprisonment with a non-parole period of one year and six months. Aggrieved with the said sentence, the Appellant appealed to this Court against the said conviction and sentence on the following grounds:

Grounds of Appeal

- a) ***THAT** the Learned Resident Magistrate erred in law and in fact in not taking into consideration that apart from the evidence of the reconciliation by the parties to discount the sentence;*

- b) ***THAT*** the Learned Resident Magistrate erred in law and in fact in relying on and/or considering and/or taking into consideration that the Appellant had pleaded guilty to the charge at the very first available opportunity.
- c) ***THAT*** the Learned Resident Magistrate erred in law and in fact in not fully analyzing/and/or inadequately analyzing the evidence before the Court and hence, there was a substantial miscarriage of justice.
- d) ***THAT*** the Learned Resident Magistrate erred in law and in fact in not adequately directing/misdirecting the issue of matrimony, in that the parties has reconciled and move forward with life through the covenant of marriage and has children together respectively.

Appeal against Sentence

- a) ***THAT*** the Learned Resident Magistrate erred in law and in fact in not aking into consideration that the Learned Resident Magistrate did not take irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.
- b) ***THAT*** the Learned Resident Magistrate erred in law and in fact in not taking into relevant consideration **SENTENCING AND PENALTIES DECREE 2009 NAMELY:-**
 - i) Section 3 of the Sentencing and Penalties Decree
 - ii) Section 4 of the Sentencing and Penalties Decree; and
 - iii) Section 5 of the Sentencing and Penalties Decree.

c) ***THAT*** the Appellant reserves his rights to argue and/or file further grounds of appeal upon receipt of the Court records in this matter.

2. During the hearing of this Appeal, the learned Counsel for the Appellant informed the Court that the Appellant wished not to proceed with the Appeal against the conviction; hence, abandoned the same. The Appeal then proceeded to the hearing regarding the Appeal against the sentence. The learned Counsel for the Appellant and the Respondent then filed their respective written submissions.
3. The learned Magistrate had summarized the factual background of this offence in the sentence I reproduced.

“2. You indicated that you understood and admitted the State’s Summary of Facts. The Facts show that you and your victim were in a de-facto relationship since 2015. You have two children but have been separated since February 2023. On 13 April 2023 at 2.00 pm, Fiowa Christina Lomalomanibau had been at work when she received a call from you saying you wanted to see her. She told you that she was at work and told you not to come there. At 5.50pm while she was still at work, she saw you approaching. To avoid a commotion in front of her boss, she came out of the shop and met you before you entered her work place. She immediately realized that you were drunk because you smelt heavily of liquor. She then walked away from her workplace and you followed. She asked you why you had come to see her. She was a little ahead of you and you were by her side when you suddenly gave her a hard slap to the back of her head. She was terrified and she ran towards the sea wall. You ran after her. She saw some people sitting on the sea wall and she went and sat with them thinking it would deter you but to her surprise you dived on top of her causing her and others to roll over onto the sea shore. You tried to grab her hair but she got free. You

then grabbed onto her face and gouged her eyes. She cried and struggled until a man who had been there managed to pull you off her. The matter was reported to the Lami Police Station and she was taken for medical examination.

3. According to the medical report prepared after her examination, she suffered injuries to the eyes, bruises to her forearms and bruises to her left knee. When interviewed by the Police you admitted to the assault against her."

4. Having carefully considered the grounds of Appeal and the written submissions filed by the learned Counsel for the Appellant, I could summarize that this Appeal is founded on three main grounds:
 - i) The learned Magistrate failed to consider the reconciliation between the Appellant and Complainant, and he then married the Complainant subsequent to this incident,
 - ii) The learned Magistrate failed to consider the injuries and the medical report properly,
 - iii) The sentence is harsh and excessive.
5. In paragraph 9 of the sentence, the learned Magistrate considered the subsequent reconciliation and their marriage as a mitigation factor. Hence, the first ground submitted by the learned Counsel for the Appellant has no merits.
6. There are a few approaches in setting the tariff for the Assault Causing Actual Bodily Harm. In State v. Tugalala (2008) FJHC 78; HAC 025/2008S, the High Court found the tariff for Assault Causing Actual Bodily Harm ranges from an absolute or conditional discharge to 12 months imprisonment. In State v Qalobula - Sentence [2020] FJHC 255;

HAC100.2018 (the 3rd of April 2020), Hamza J found the tariff is three months to twelve months imprisonment. Aluthge J in **State v Kumar - Sentence [2019] FJHC 544; HAC46.2019** (the 22nd of May 2019) found that the tariff for the offence of Assault Causing Actual Bodily Harm when committed in a domestic setting, ranging from 6 months to 18 months.

7. According to the summary of facts tendered in the Magistrate's Court, it is clear that no weapons or any objects were involved in assaulting the Complainant. The nature of the injuries was not serious. There were no details about the conversation between the parties that happened before the assault besides the fact that she walked away from the shop and asked the Appellant why he came to see her at her workplace.
8. The learned Magistrate had considered the Appellant's previous conviction as a reason for setting a final sentence beyond the higher end of the applicable tariff range. Section 4 (2) (i) and 5 of the Sentencing and Penalties Act allows the sentencing court to consider the previous convictions to determine the offender's previous character. The Appellant was recorded with one prior conviction for an offence similar to the one in this matter. However, the ground itself does not justify imposing a sentence above the applicable tariff range.
9. Considering the early plea of guilty entered by the Appellant, his reconciliation with the Complainant and the subsequent marriage with her, and the sentencing practice of this jurisdiction, I find the final sentence imposed by the learned Magistrate is harsh and excessive. Hence, I replace it with a sentence of 14 months imprisonment.
10. In conclusion, I make the following orders:
 - i) The Appeal is allowed,
 - ii) The sentence dated the 7th of August 2023 is set aside and replaced with a sentence of 14 months imprisonment, commencing from the 7th of August 2023.

11. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to be "R. D. R. T. Rajasinghe", written over a horizontal dotted line.

Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

23rd February 2024

Solicitors.

Messrs. Alpha Legal for Appellant.

Office of the Director of Public Prosecutions for the Respondent.