IN THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

Appeal Case No. HAA 27 of 2024

(Criminal Case No. CF 429 of 2024)

Simione Vakalagilagia

For the Appellant: **Mr. T. Varinava**

For the Respondent: **Mr. T. Naimila**

Date of Hearing: **15th August 2024**

Date of Ruling: **1st October 2024**

RULING ON APPEAL

1. The Appellant was tried in the Nasinu Magistrate's Court on the charge of Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes Act 2009.

2. The particulars of the offence are that "Simione Vakalagilagia on the 30th day of March 2024 at Nasinu in the Central Division, assaulted Semi Ratu by punching his face, ribs, all over his body and his right knuckles thereby causing him actual bodily harm."

3. He was produced in Court on the 4th of April 2024, and he was bailed at the first appearance.

4. On the 10th of May 2024 he entered a plea of guilty. He admitted the Summary of facts outlined to him and the Court convicted him of the Charge against him.

5. On the 27th of May 2024 the Nasinu Magistrate's Court sentenced him to 7 months and 11 days imprisonment. The Court also issued a final Domestic Violence Restraining Order against him for the protection of the complainant in this matter.

6. The Appellant was aggrieved at the sentence and filed a timely appeal against sentence based on the following grounds: -

   (a) The Learned Magistrate erred in law and in fact by double counting the aggravating factor of sustained attack on the body which may have already been reflected in the starting point.

   (b) The Learned Magistrate erred in law and in fact by allowing extraneous or irrelevant matters to guide her in passing the sentence.

   (c) The Learned trial judge erred in law and in fact in not considering relevant considerations before passing sentence.

7. The Appellant therefore seeks that the appeal be allowed.

8. The appeal was first called on the 11th of July 2024 and directions were made for the filing of appeal submissions.

9. The matter was then fixed for hearing on the 15th of August 2024.

<u>The Appeal Hearing</u>

<u>Appellant's Submission</u>

10. Section 246 of the Criminal Procedure Act 2009 sets out the right to appeal any decision of the Magistrate's Court to the High Court.

11. Section 247 limits the rights of appeal for a guilty plea only to appeals against sentence.

12. With respect to double counting, counsel submits the authority of <u>Gucake</u> vs <u>State</u> [2023] FJHC 203; HAA 001 of 2023 (6th April 2023).

13. Counsel submits that the Magistrate, at paragraph 6 (iv) stated "tenderness noted on the forehead, chest and hands as per the medical report dated 2 April 2024, as an aggravating factor. Counsel submits that this is an element of the offence and this would have been subsumed in the tariff. The Appellant therefore submits that the Learned Magistrate fell into error by double counting.

14. With respect to the second ground of appeal, the Appellant submits that the Magistrate erroneously considered previous convictions where he had been discharged by the Court pursuant to section 154 of the Criminal Procedure Act 2009.

15. Counsel submits that the Appellant is still a first offender as the previous proceedings do not count by virtue of the section 154 discharge.

16. The Appellant therefore submits that the appeal grounds have been made out and the appeal should be allowed.

<u>State's submissions</u>

17. The State submits that the Appellant was properly convicted on his own guilty plea of the offence of <u>Assault Causing Actual Bodily Harm</u>.

18. He admitted the summary of facts outlined to him and the Court dully convicted him and on the 27th of May 2024, he was sentenced to 7 months 11 days imprisonment, a custodial sentence.

19. The Appellant has filed a timely appeal, and he relies on three grounds of appeal as follows: -

    (a) The Learned Magistrate erred in law and in fact by double counting the aggravating factor of sustained attack on the body which may have already been reflected in the starting point.

(b) The Learned Magistrate erred in law and in fact by allowing extraneous or irrelevant matters to guide her in passing the sentence.

(c) The Learned resident Magistrate erred in law and in fact in not considering relevant consideration before passing sentence.

20. The appellant also submits that section 246 of the Criminal Procedure Act provides a right to parties to a criminal proceeding with the right to appeal any judgment, sentence or order of a Magistrate's Court to the High Court.

21. Section 256 of the Act then sets out the powers of the High Court on appeal, specifically at section 256 (2).

22. The State refers to the authority of Kim Nam Bae vs The State [1999] FJCA 21 (26th February 1999) where the Court of Appeal provides that the appellant must prove that the Court below fell into error in exercising sentencing discretion by allowing irrelevant or extraneous matters to guide or to affect him. If he mistakes the facts, if he does not take into account some relevant considerations then the Appellate Court may impose a different sentence.

23. With respect to Ground 1 of the Appeal, the State submits the Supreme Court cases of Senilolokula vs State [2018] FJSC 5; CAV0017 of 2017 (26 April 2018) and Kumar vs State [2018] FJSC 30; CAV 0017 of 2018 (2nd November 2018).

24. The State submits that the Senilolokula case, the Supreme Court explained that the problem of double counting arises when there is no established authority for the starting point, but instead only a range of sentence and, as a matter of good practice, the starting point is picked from the lower or middle range of the tariff.

25. In the same case, the Supreme Court identified another sentencing methodology where the Court identifies its starting point, states the aggravating and mitigating factors and then announces the final sentence without saying how much was added for the aggravating factors and how much was taken for the mitigating factors.

26. The State submits that the most important consideration is the final sentence and whether it falls within the tariff and it is commensurate with the offending in this case. The State submits that ground 1 of the appeal is not made out.

27. For the second and third grounds of appeal, the State submits paragraphs 13 to 16 of the sentencing remarks and offers this as evidence that the Magistrate had considered all of the relevant factors associated with the offending as well as the circumstances of the offender and arrived at a final sentence that

28. The State also contends that the Third ground of appeal is not made out as the Magistrate applied proper sentencing principles and arrived at a sentence that was within the tariff.

29. The State therefore submits that the appeal grounds are not made out and the appeal should be dismissed.

<u>Analysis</u>

30. The right to appeal is established by section 246 of the Criminal Procedure Act and this is a timely appeal against sentence.

31. The Appellant relies on the following three grounds: -

   (a) The Learned Magistrate erred in law and in fact by double counting the aggravating factor of sustained attack on the body which may have already been reflected in the starting point.

   (b) The Learned Magistrate erred in law and in fact by allowing extraneous or irrelevant matters to guide her in passing the sentence.

   (c) The Learned resident Magistrate erred in law and in fact in not considering relevant consideration before passing sentence.

32. Section 256 (2) of the Criminal Procedure Act sets out the powers of the High Court on appeal.

33. In the case of <u>Kim Nam Bae</u> –v- <u>State</u> [1999] FJCA 21; AAU 15 of 1998 (26th February 1999) the Court of Appeal stated as follows: -

> "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* (1936) 55 CLR 499)."

34. The Supreme Court confirmed this in the case of <u>Naisua</u> –v- <u>The State</u> [2013] FJSC 14; CAV 10 of 2013 (20th November 2013) as follows: -

> "[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in ***House v The King*** (1936) 55 CLR 499 and adopted in ***Kim Nam Bae v The State*** Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:
>
> (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 consideration.
>
> [20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in ***Chirk King Yam v The State*** Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case."

35. In passing this sentence, the Magistrate applied the appropriate tariff for the Assault Causing Actual Bodily Harm, and as the offence was committed in a domestic setting, she correctly identified the tariff for domestic violence offences – 6 to 18 months' imprisonment.

36. After arriving at the final sentence of 7 months 11 days, she then considered whether to suspend the sentence, pursuant to section 26 of the Sentencing and Penalties Act. In deciding not to suspend the sentence, she considered the fact that he was not a first offender citing a previous conviction from Nausori Magistrate's Court in CF 260 of 2023 – two counts Assault Causing Actual Bodily Harm and Damaging Property

37. It now transpires that the proceedings were dismissed in CF 260 by virtue of section 154 of the Criminal Procedure Act 2009. That being the case, as this is the only record against the Appellant, there was no conviction against his name as the Court has dismissed the proceedings with no finding of guilt.

38. The Magistrate therefore fell into error as she wrongly considered this as a previous conviction against the Appellant when in fact there was no such conviction, as he was discharged by the Court with no conviction or finding of guilt. This was then the basis for the decision not to suspend the sentence, resulting in the custodial sentence that the Appellant is currently serving.

Court's Finding

39. I have considered all the circumstances of the appeal, the three grounds submitted by the Appellant. I have also considered the respective appeal submissions filed by both parties.

40. I find that the Magistrate did consider all the personal circumstances of the Appellant and prepared a sentence that was permissible and within the tariff for domestic violence offences.

41. In deciding not to suspend the sentence, the Learned Magistrate then fell into error as she considered previous convictions, which were not convictions at all, rather the charges were dismissed pursuant to section 154 of the Criminal Procedure Act.

42. The Appellant was sentenced on the 27th of May 2024, and he has now served 4 months 14 days of his sentence of 7 months and 11 days imprisonment. As the Magistrate fell into error in mistaking the fact of the Appellant's previous conviction, I find that his sentence should have been suspended.

43. Pursuant to section 256 (3) of the Criminal Procedure Act, I direct that the Appellant be released forthwith, and the balance of his sentence is suspended for 2 years.

<u>This is the Ruling of the Court</u>: -

1. **The appeal against the sentence handed down by the Nasinu Magistrate's Court on the 27th of May 2024 is allowed and pursuant to section 154 of the Criminal Procedure Act 2009, the Court finds that the sentence of 7 months and 11 days will be suspended.**

2. **The Appellant is to be released forthwith as he has served 4 months and 14 days imprisonment, and the balance of his sentence (2 months 28 days) is suspended for 2 years**

30 days to appeal

Mr. Justice U. Ratuvili

<u>Puisne Judge</u>

cc: ***Office of the Director of Public Prosecutions***
Legal Aid Commission