

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION**

Criminal Case No: 72 - 2015

STATE

-v-

FAROOK ALI AKTHAR

For Prosecution : WPC Chand A. [Police Prosecution]
Accused : Mr Samy A. [Legal Aid Commission]
Date of Trial : 23rd April 2019
Date of Judgment : 28th May 2019
Date of Sentence : 2nd June 2020

SENTENCE

BACKGROUND

1. **FAROOK ALI AKTHAR**, you denied the allegation preferred by the prosecution and after I received evidence during your trial, I found you guilty and convicted you of the following:

Statement of Offence

COMMON ASSAULT: Contrary to section 274 of the *Crimes Act No. 44 of 2009*.

Particulars of Offence

FAROOK ALI AKTHAR on the 2nd day of January, 2015 at Tavua in the Western Division unlawfully assaulted **PRIYA PRITIKA**.

2. The female victim was a former de-facto partner of the defendant. The female victim would have been around 28 years old at the material time. They have a 5 or 6 year old child together. The female victim has been staying with the defendant since she was 18 years old. The victim and the defendant separated but the defendant asked her to return. After her return, the female victim revealed in her evidence that in January 2015 she was sitting on a chair outside the house when the defendant came to her and put a knife on her neck. The defendant asked the victim whether she was

going to talk to her parents. Her parents did not like the defendant. The defendant swore at the victim's parents saying 'Maichod' or 'Motherfucker'. The defendant told the victim that he will 'cut her' and he will go to prison. The defendant punched the victim 2 times on the victim's face. Their daughter was at a neighbour's place and ran back to the house asking the victim why she was crying. Later around midnight, the defendant told the victim to drink rum and the defendant put a glass to her mouth and told her to drink it. The defendant also tried to have sex with the victim and was taking off her clothes. The victim told the defendant to stop as their daughter was there. That is when the defendant kicked the victim's stomach and told her to sleep outside. The victim did not move out immediately after the defendant's actions as the defendant threatened that he will cut her neck if she did.

3. The prosecution did not charge the defendant with criminal intimidation for the threatened use of a knife. Criminal intimidation attracts a higher penalty when contrasted with the penalty for common assault.
4. I cannot consider the use of the knife as an aggravating feature as that would mean that I would be punishing the defendant for a more serious offence for which he was not charged with [State v. Peniseni [2020] FJHC 328; HAA 30.2019 (22 May 2020)].
5. The defendant is not a first offender. He had convictions for larceny and house breaking in 1999 which was 6 years before assaulting the victim in this case. I will not consider these as spent convictions and I will not deal with the defendant as a first offender or a person of good character.
6. The defendant has not spent any time in remand.
7. The defendant is 55 years old. He resides alone. He is a social welfare recipient. His family has neglected him. His house was destroyed during Cyclone Winston and he received injuries during the cyclone. He has a tibia fracture and has plates and screws attached to his leg. He developed swelling to that area after surgery and a 'referral form' from hospital was provided to reflect his condition. The defendant experiences unbearable pain during the cold season to his injured leg. He experiences blood clots and this has to be drained. He also takes antibiotics for his pain.
8. In his written mitigation, it is argued that the defendant is genuinely remorseful.
9. I cannot accept this argument. The defendant was found guilty after trial. He denied the allegations and being violent towards the victim. I have not found any indication so far even after the judgment was given, to persuade me that the defendant is remorseful.

LAW

10. The maximum sentence that is imposable by law for the offence of common assault is up to 1 year imprisonment.

TARIFF

11. Suspended sentences have been deemed appropriate [**State v Sokiveta** [2013] FJHC 407; HAC 12.2013 (8th August 2013) .
12. Even fines or terms of imprisonment may be appropriate [**Kumar v State** [2017] FJHC 360; HAA28.2017 (17 May 2017)].
13. Ultimately, each case will determine its own sentence within the maximum punishment imposable.

STARTING POINT

14. Considering the objective seriousness of the offence, a 15 day imprisonment term is selected as a starting point.

AGGRAVATING FEATURES

15. A domestic relationship was in existence. The victim was the de-facto partner of the defendant.
16. The defendant punched the victim 2 times on the face while the victim was seated outside the house and later around midnight, he kicked the victim's stomach and told her to sleep outside after she refused to have sex with him or drink liquor which the defendant was giving.
17. The defendant also swore at the victim's parents.
18. I increase the defendant's sentence to 3 months and 15 days imprisonment.

MITIGATION

19. The defendant has a debilitating injury and it is apparent he needs constant medical attention.

20. I do not see any other compelling mitigating factor.
21. I reduce the defendant's sentence to 2 months imprisonment.

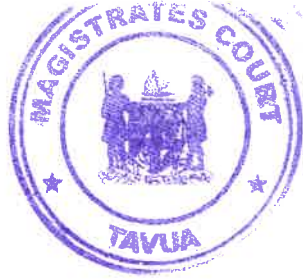
SUSPENSION and FINE and OBJECTIVE OF SENTENCING

22. I can suspend the defendant's imprisonment term either in whole or in part pursuant to section 26 (1) and (2) (b) of the **Sentencing and Penalties Act 2009** if his sentence is 2 years and below.
23. Section 31 of the **Sentencing and Penalties Act 2009** allows the court to fine an offender in addition to or instead of any other sentence.
24. I also take into account the factors outlined in section 4 of the **Sentencing and Penalties Act 2009** when determining the defendant's sentence.
25. The defendant's sentence will be aimed at deterrence and is to punish him adequately.

SENTENCE

26. The defendant has not spent any time in remand so his sentence will not be reduced any further.
27. **FAROOK ALI AKTHAR**, you are sentenced to 2 months imprisonment.
28. Primarily because of the injury to your leg I will suspend your imprisonment term in whole.
29. You are not to commit any other serious offence or offence punishable with imprisonment in the next 12 month, if you do, this 2 months imprisonment that is suspended or held in reserve may be activated [explained to the defendant].
30. You are also fined \$100 to be paid in 35 days.
31. You default and you risk up to 5 days imprisonment.
32. The Domestic Violence Restraining Order [DVRO] with section 27 standard non-molestation conditions which was imposed and explained to you on the 15th of June 2015 is made final.

33. You are to continue behaving towards the victim whether you two have separated or not. You misbehave towards the victim or breach any condition of that DVRO, you may be charged and prosecuted for another offence.
34. I will give a date hereafter to review whether you have paid your fine.
35. 28 days to appeal.



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Lisiate T.V. Fotofili
Resident Magistrate

Dated at Tavua this 2nd day of June, 2020.