

**REGINA-v-TONY KAKE**

HIGH COURT OF SOLOMON ISLANDS  
(Mwanosalua, J.)

*Criminal Case No.383 of 2005*

**Hearing:** 21<sup>st</sup> June 2006

**Judgment:** 4<sup>th</sup> September 2006

*N. Mirou for the Appellant*

*M. Swift for the Respondent*

**JUDGMENT**

**Mwanosalua, J:** The Respondent pleaded guilty to the offence of assault causing actual bodily harm under Section 245 of the Penal Code (Cap.26) (the Code) in the Central Magistrate Court in Honiara on 14 June 2005. The Learned Magistrate convicted him of that offence upon his own plea and sentenced him to two months imprisonment suspended for twelve months. On 8 August 2005 the Appellant filed this appeal on the following grounds:

1. The Learned Magistrate erred when he failed to take into consideration the facts of the case and the nature of the injuries sustained by the victim.
2. The Learned Magistrate erred when he imposed a suspended sentence in breach of Section 44(2) of the Penal Code.

**Facts on the Record**

The Respondent lives at Rifle Range in Honiara with his wife (the victim). On 16 May 2005, he assaulted the victim on the left elbow with a steam pot, punched her on the head and kicked her on the back during an argument. The victim was taken to the Hospital Out Patient ward for medical attention after that assault. She was found with pain at her back and a painful swelling on her left elbow. She was later discharged after taking medicine. The Respondent was later charged with assault causing actual bodily harm to the victim. He pleaded guilty to the charge and the medical report on the victim was exhibited to the court as evidence. He was convicted on his own plea and sentenced to serve a term of two months in prison. The sentencing Magistrate however made an order that this two months custodial sentence be suspended for twelve months.

## The Appellant's Case

The two points raised on behalf of the Appellant in this appeal are: First, that the Magistrate made a mistake in failing to consider the facts of the case and the nature of the injuries sustained by the victim; and Second, that the Magistrate made a mistake in law when he suspended the two months custodial sentence imposed on the Respondent in view of Section 44(2) of the Code.

## The Respondent's Case

The case for the Respondent is that: (1) that the sentencing Magistrate did consider the facts of the case and the seriousness of the attack on the victim; (2) that Section 44(2) is merely designed to ensure that offences that are aggravated by the use of a weapon are not disposed of by way of suspended sentence; and (3) that it would be manifestly unjust and oppressive to require the Respondent to serve the custodial sentence in the event this court should find that the Magistrate made a mistake in suspending the custodial sentence, as the operational period of the suspended sentence had already lapsed without the Respondent committing any further offence.

## Issues to be determined

There are three issues to be decided in this appeal case. First, whether the sentencing Magistrate failed to consider the facts of this case before he imposed sentence on the Respondent; Second, whether a steam pot is a weapon in terms of Section 44(2) of the Code; and third, whether the Magistrate made a mistake in law in suspending the custodial sentence imposed on the Respondent.

## Decision of the Court

In a guilty plea, the sentencer will expect the prosecution to discharge its duty to present clear factual basis of the offence on which to access the appropriate sentence to be imposed. The discharge of that duty to the court ensures that the accused knows the nature and the extent of the case against him so that he has a fair opportunity of meeting it. A failure to discharge that duty *"may tend to deprive the defendant of a fair opportunity of meeting a case which might ultimately be made on appeal. It would be unjust to a defendant, whose freedom is in jeopardy for the second time, to consider on appeal a case made against him on a new basis – a basis which he might have successfully challenged had the case against him been fully presented before the sentencing court."*<sup>1</sup>

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<sup>1</sup> *Tait and Bartley [1979] 24 ALR 473, 477*

The factual basis of the offence against the respondent in this appeal, were those presented to the sentencing Magistrate in the court record. These are relevantly set out above. It is clear from the facts that the Magistrate did consider the facts of the case as presented to him by the Prosecution before he imposed sentence on the Respondent. He pointed out the risk posed to the victim when the Respondent kicked her on the back. The risk is that the victim's kidneys could sustain internal injury. He further pointed out that the assault was serious even though it emanated from a domestic dispute. He stressed that assault arising from domestic dispute must be discouraged. He then imposed a sentence of two months imprisonment suspended for twelve months on the Respondent. It is necessary to bear in mind here that the suspended sentence was aimed at achieving two objectives. The first is that it kept the Respondent out of prison; and the second, is that it acted as a deterrent measure for the Respondent not to re-offend within the operational period of the suspended sentence. It is the view of this court that the Magistrate did consider the essential facts of the offence and the injuries sustained by the victim before imposing sentence on the Respondent.

The Appellant contended that the Magistrate made a mistake in law by suspending the custodial sentence which he imposed on the Respondent in view of section 44(2) of the Code.

**Section 44(1) and (2) of the Code provide:**

*"Suspended Sentences*

*44(1). Subject to the provisions of subsections (2) and (3) of this section, a court which passes a sentence of imprisonment on any offender for a term not more than two years for any offence, may order –*

- (a) that the sentence shall not take effect during a period specified in the order; or*
- (b) that after the offender has served part of the sentence in prison, the remainder of the sentence shall not take effect during a period specified in the order,*

*unless during the period specified in the order, the offender commits another offence punishable with imprisonment and a court thereafter orders under section 45 that the original sentence shall take effect:*

*Provided, that the period specified in the order shall not be less than one year and more than two years.*

(2) *The provisions of subsection (1) of this section shall not apply where the offence involved the use or the illegal possession of a weapon.*"

One of the issues raised in this appeal is whether a steam pot is a weapon within the terms of Section 44(2) of the Code. There is a definition Section in the Code. It is Section 4. But the word "weapon" is not being defined in that section. However, I note that subsection 6 of Section 84 of the Code defines the word "weapon" as used in that section. Under subsection 6 "weapon" means any article or instrument capable of causing injury to any person and without restricting the generality of this subsection shall include any knife, bush knife, club, firearm or explosive.

The prosecution did not provide the descriptions of the Steam pot with which the Respondent assaulted the victim to the Magistrate. But that steam pot caused actual bodily harm to the victim. I think it is an article which is capable of causing injury to a person. It is a weapon within the terms of Subsection 2 of Section 44 of the Code. The Sentencing magistrate made a mistake in suspending the two months custodial sentence imposed on the Respondent. The appeal is allowed. I order accordingly.

**ORDERS OF THE COURT:**

1. Appeal allowed.
2. Quash sentence of 2 months imprisonment suspended for 12 months.
3. Substitute sentence of two months imprisonment with effect from 14 June 2005.

**Francis Mwanalua  
Puisne Judge**