

**Linus Kiriau**

**-V-**

**REGINA**

**HIGH COURT OF SOLOMON ISLANDS  
(PALMER CJ.)**

**Criminal Case Number 262 of 2020**

**HEARING: 17 November 2020**

**JUDGEMENT: 20 November 2020**

*Mr. Daniel Kwalai for the Appellant  
Ms. Patricia Tabepuda for the Crown*

**Palmer CJ.**

1. This is an appeal against the orders of the Magistrates' Court dated 4 May 2020, in which the Appellant was convicted on his guilty pleas to two counts of domestic violence, to wit, physical abuse contrary to section 4(1)(a) of the Family Protection Act 2014 ("FPA") as read with section 58 of the said Act.
2. He was sentenced for those offences as follows:
  - (i) Count 1: 2 years and 8 months imprisonment;
  - (ii) Count 2: 1 year and 6 months imprisonment, to be served concurrently.
3. The summary of agreed facts showed that the offences were committed on two separate occasions. The first incidence of domestic violence was committed on or about the 8<sup>th</sup> June 2014, in which the victim (his wife) was dragged along the road and punched in the face with a closed fist, resulting in the loss of one tooth.
4. The second incident, which occurred on the 23<sup>rd</sup> February 2019 (about 5 years later), the victim was slapped, her chest was grabbed and squeezed tightly causing bruises and scratches to the chest and shoulder.
5. The maximum penalty for the offence of domestic violence is a fine of 30,000 penalty units or imprisonment for 3 years or both.

**The brief facts.**

6. The first incident related to an argument about the cause of the sickness of their daughter, which escalated into each accusing each other of infidelity. The victim managed to escape from the Appellant but was later seen by the Appellant and assaulted resulting in the loss of a tooth.
7. In the second incident, which occurred much later in February 2019 at their garden in their home village, again it started off with an argument and escalating into the Appellant assaulting the victim by slapping and scratching on the chest and shoulder. No major injuries were caused and incurred by the victim.
8. In the first incident, the summary of facts indicate that she did not report that crime to the Police due to threats from the Appellant. When the second incident occurred in May 2019, she decided to report that assault and included the earlier incident. The Appellant was thereby served with a "police safety notice". Shortly thereafter, he left for Honiara and according to the summary of facts, has not been in contact with the victim since.

**Grounds of appeal.**

9. Four grounds of appeal are relied on by the Appellant as follows:
  1. His Worship erred in law when he convicted the appellant for Count 1 of Domestic Violence in 2014 when the Family Protection Act has not yet come into effect.
  2. His Worship erred in law by taking the Maximum penalty as the starting point for Domestic Violence cases.
  3. His Worship erred in law when he equate loss of tooth with Grievous Harm.
  4. That the 2 years 8 months sentence was manifestly excessive in light of the aggravating and mitigating factors of this particular case.
10. All of the four grounds, relate to Count 1 of the charge, in which the Appellant was convicted and sentenced to 2 years and 8 months. There is however an overlap into Count 2 in terms of the sentence of 1 year and 6 months imposed which relate directly to the totality principle in sentencing. The two sentences were made concurrent and thus ultimately the Appellant was required to serve 2 years and 8 months.

**Ground 1.**

11. The first ground can shortly be disposed of as no issue is taken with the submission that the FPA was not in force when the act of domestic violence in Count 1 was committed on 8 June 2014. It is not disputed that the FPA did not come into operation until much later on 1<sup>st</sup> April 2016, per Legal Notice No. 9 of 2016. Accordingly, the Appellant cannot be charged with it and the conviction and sentence are *void ab initio*.

12. Accordingly, the charge, conviction and sentence imposed by the Magistrates' Court should be dismissed forthwith.
13. This raises the question whether in the alternative, the Appellant should be re-charged under the Penal Code for the offence of assault causing actual bodily harm (ACABH) contrary to section 245 of the Penal Code.
14. In her submissions on this point, Ms. Tabepuda concedes on grounds of fairness and prejudice that it would not be proper in the circumstances to have the Appellant re-charged when he had been mistakenly charged, prosecuted, convicted and sentenced. She submits it would be tantamount to being punished twice for the same offence.
15. I agree and even if he was to be re-charged, the offence would be stale having been left for too long, a period of 5 years before it was prosecuted. A permanent stay therefore should be imposed against any prosecution of this offence.

#### **Grounds 2, 3 and 4.**

16. Those grounds are dependent on Ground 1 and stand or fall accordingly. They had been raised on the assumption that the charge, conviction and sentence imposed were valid. However with the invalidation of the charge, the conviction and sentence must follow suit.
17. Consequential orders accordingly should be made and those grounds upheld.

#### **Count 2, re-sentence.**

18. With the dismissal of count 1, the only remaining and valid charge is that set out in Count 2, with the sentence imposed by the presiding Magistrate, Mr. Chite, being 1 year and 6 months.
19. In his submissions on this issue, he (Mr. Kwalai) argues that the starting point of 2 years was too high and resulting in a manifestly excessive sentence of 18 months being imposed.
20. The starting point on this issue is the concession correctly made by the Prosecutor, Ms. Tabepuda, that the sentence is manifestly excessive taking into account all aggravating features and mitigating factors, and comparative sentences imposed for similar type of offences.
21. While the offence of domestic violence is a new statutory offence created under the FPA, it does not necessarily make it more serious than what otherwise would be the case if the offender had been charged under the Penal Code for either a common assault under section 244, or an assault causing actual bodily harm under section 245.
22. A common assault is regarded as a misdemeanour and carries a maximum penalty of 12 months imprisonment, while an offence under section 245 carries a maximum penalty of 5 years.
23. So while the maximum penalty that can be imposed for a person charged with domestic violence under the FPA is a fine of 30,000 penalty units or imprisonment for 3 years or both,

effectively placing it midway between a common assault and an assault causing actual bodily harm, that does not necessarily mean that for any similar fact situation the penalty to be imposed should necessarily be higher or harsher. Each case will have to be considered on its merits, the circumstances of the offender and the circumstances of offending, taken into account. These will include such factors as the age of the offender, any previous criminal history of domestic violence, assault, provocation, whether a weapon was used, persistence of the attack, vulnerability of the victim and their relationship.

24. When those factors are taken into account in relation to the second count, the circumstances of which relate to an argument between a husband and wife, a slap on the face, a scuffle and which resulted in scratches being caused to the chest and shoulder of the victim, those circumstances by any standard cannot be described as being serious and warranting a custodial sentence in the first instance. A fine would have been sufficient, and if there was any serious concern of repetition in offending or a pattern of behaviour in the commission of the offence and a need to send out a strong message of specific and general deterrence to the offender and the public, then a bound over order under section 32 of the Penal Code could also be considered. A custodial sentence should only be considered if the circumstances of offending and the offender warranted it.
25. In the circumstances, I am satisfied the sentence of 18 months was manifestly excessive and should be set aside, in lieu thereof in the re-sentencing exercise, I would impose a fine of 500 penalty units and a bound over order under section 32 of the Penal Code, to keep the peace and be of good behaviour for 12 months.
26. Noting that the prisoner having served time in prison since conviction and sentence on or about 20 April 2020, those orders should be discharged in full.
27. Finally, I note that the prisoner has been separately charged on a much more serious offence, being two counts of rape, for which a committal had been done to the High Court by the Magistrates' Court on 27<sup>th</sup> July 2020<sup>1</sup>, for which he had been remanded in custody as well, pending hearing of those matters. Accordingly I am satisfied he should not be released pending any further orders or directions regarding that new matter and direct that his remand in custody to continue herewith.

#### **ORDERS OF THE COURT:**

- 1. Allow appeal.**
- 2. Quash orders of the Magistrates' Court issued on 4<sup>th</sup> May 2020 in respect of the prisoner's conviction and sentence imposed in respect of Count 1 of his charge.**
- 3. Impose a permanent stay on any alternative charge that may be brought in respect of that same offence.**

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<sup>1</sup> Note a High Court file has been opened, Regina v. Linus Kiriau CRC 466 of 2020.

4. Uphold conviction in respect of Count 2 of his charge, but quash sentence of 18 months imprisonment imposed in respect of Count 2 of the charge as being manifestly excessive in the circumstances.
5. Re-sentence the prisoner in respect of Count 2 as follows:
  - (i) Impose a fine of 500 penalty units, and
  - (ii) Impose a bound over order under section 32 of the Penal Code to keep the peace and be of good behaviour for 12 months.
6. Noting the prisoner had already served time in prison for the offence under Count 2, the penalty imposed herewith (in paragraph 5 above) is to be discharged in full.
7. Direct his remand in custody is to continue in respect of the separate charges of rape that he had been charged with.
8. Adjourn this matter for further mention/directions on 4<sup>th</sup> December 2020 at 9:30 am.

SIR ALBERT R. PALMER CBE

The Court.