IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 027 OF 2013

BETWEEN	:	**SALESH PRAKASH**	**APPELLANT**
AND	:	**THE STATE**	**RESPONDENT**
Counsel	:	Mr. Vananalagi for the Appellant Mr. Niudamu for the Respondent	
Judgment	:	4th December 2014	

JUDGMENT

1. The appellant, Salesh Prakash was sentenced to 9 months imprisonment and the same was suspended for 2 years by a learned Magistrate in the Magistrate's Court at Nasinu for one count of "Indecently Insulting or Annoying Any Person" contrary to section 213 (b) of the Crimes Decree 2009. This appeal is against the said sentence.

2. The appellant had pleaded guilty to the charge on his own free will after agreeing with the Summary of Facts. The learned Magistrate had convicted the appellant to the said offence and proceeded to sentence. The Statement of offence and Particulars of offence are as follows:

Statement of Offence

INDECENTLY INSULTING OR ANNOYING ANY PERSON: Contrary to Section 213 (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SALESH PRAKASH between November 2011 to 13th day of April 2012, at Lot 3 Vishnu Deo Road, Nakasi, Nasinu in the Central Division, intrudes upon the privacy of **SHIVANJANI NAIDU** by texting messages an act of a nature likely to offend her modesty.

3. The Sentence of the learned Magistrate reads as follows:

> *"I imposed 3 months imprisonment and suspend the same for 2 years time."*
>
> *"28 days to appeal."*

4. The Petition of Appeal is based on two grounds.

(i) The learned Magistrate erred in law when he sentenced the appellant as it is harsh and excessive when considering the facts of the offending.

(ii) The learned Magistrate erred in law as he failed to take into consideration the provisions and the guidelines of the Sentencing and Penalties Decree 2009.

5. Before analyzing the legal background of Sentencing in this instance, this court prefers to pursue the factual background of offending. The appellant had approached the complainant in November 2011 on Facebook and wanted to have a relationship with her. The complainant was not interested in this and told the appellant to stay away from her. One day the appellant had gone to her house uninvited. She had ignored the calls and text messages from the appellant thereafter. The appellant had continued to go to the complainant's house and wait outside the compound as she had not entertained him.

6. The appellant, then e-mailed the complainant from Vanuatu in January 2012 that he needs her in his life. She had not responded to that e-mail. After returning from Vanuatu, the appellant had kept on following the complainant wherever she goes and continued sending text messages. This had been reported to police and the appellant was severely warned not to repeat his conduct, to which the appellant had agreed. Since the behavior of the appellant had not changed a second report was lodged at Nasinu Police Station and the Magistrate's Court case was the result of that.

7. The State concedes that the imposed sentence to the appellant by the learned Magistrate is excessive as the charged offence is a misdemeanour which carries a maximum sentence of one year. The learned State Counsel, while citing **Kumar v. State** *[1995] FJHC 2; HAA003j. 1995b (7th February 1995),* states that the circumstances of this case is not very serious. The State submits that the appellant is a first offender and the learned Magistrate had failed to take into account the maximum sentence of the offence, the current Sentencing practices and Section 4 (2) of the Sentencing and Penalties Decree 2009, while sentencing the appellant.

8. There is no fixed tariff identified to the offence of "Indecently Insulting or Annoying any Person." Justice Pathik, in the case of **Kumar (supra)** reduced a sentence of 9 months of imprisonment imposed by the lower court to 3 months imprisonment for an offender who was charged for "Indecently Annoying a Female" by "forcefully kissing her on the mouth". It was said that;

> *"I have read the record of proceedings in this case and consider this to be a single out of character offence committed by the appellant for which the maximum sentence is 12 months imprisonment. The circumstances were not serious…*
>
> *With learned State counsel not opposing the appeal, in all the circumstances of this case I also consider that the sentence is on the high side for this type offence and therefore a reduction in sentence is justified. Whilst doing so I appreciate that each case depends on its own particular facts and circumstances for no two cases are alike in all respects."*

9. Coming back to the matter in hand, this court observes that the appellant was a first offender and had pleaded guilty to the charge on his very first appearance in court. The case record reflects that the appellant was not even equipped with the disclosures at the time his 'plea' was recorded. The appellant had stated in his mitigation that he was trapped by the complainant and wanted to get married to her.

10. The single line 'sentence' of the learned Magistrate does not provide any indication as to whether or not he considered these factors when he decided the final sentence. There is no indication at all whether or not the learned Magistrate identified any aggravating factors in this instance. The final sentence, without any reasons, had come into light with a 3 months imprisonment suspended for 2 years. This court appreciates the fact that there is a heavy cause list in the Magistracy with large number of cases being handled on daily basis. That automatically curtails the time allocation of the judicial officers to a single case. Nevertheless, an accused person is also entitled to know as to on what footing he received his final sentence. Even a brief reasoning outlining the circumstances which led the sentencing court to reach the final sentence would not only clarify the doubts of the accused, but of the appellate court as well. It is unfortunate that the learned Magistrate in this instance had refrained from giving any clue as to how he assessed the final sentence.

11. No doubt, the learned Magistrate was aware of the basic general rule, that before passing a suspended prison term, the sentencing court has to be certain that the "offence" warrants a term of imprisonment. The elementary principle in sentencing is that the 'sentence' has to be proportionate to the 'offence'.

12. It is stated in 'Principles of Sentencing' (2nd Edition) by D.A. Thomas, that;

> *"The court has stated many times that a sentencer contemplating a suspended sentence should first consider whether the offence would justify a sentence of imprisonment in the absence of power to suspend". (page 240)*

13. Blackstone's Criminal Practice 2011 (E6.2, page 2150) says that;

> *"…provides that while there are many similarities between the suspended sentence and the community order, the crucial difference is that the suspended sentence is a prison sentence (or a sentence of detention in a young offender institution) and is only appropriate for an offence that crosses the custody threshold, and for which custody is the only option. As far as the length of the sentence is concerned, before making the decision to suspend, the court must first have decided that a prison sentence (or sentence of detention in a young offender institution) is justified and should also have decided the length of that sentence, which should be the shortest commensurate with the seriousness of the offence if it were to be imposed immediately."*

14. Having considered the underlining principles of a 'suspended term' and the guidance in section 15 (3) of the Sentencing and Penalties Decree 2009 that the sentences of imprisonment should be regarded as the sanction of last resort, this court also agrees with the appellant and the State that the sentence imposed by the learned Magistrate in this particular instance is harsh and excessive.

15. After having considered section 16 (1) (a) (b) and (c) of the Sentencing and Penalties Decree 2009, this court is of the view that the learned Magistrate had not exercised his judicial discretion properly when decided to record a conviction against the appellant. This is a fit and proper instance to grant the appellant a second chance to rectify his wrong doings whilst assuring the safety of the complainant.

16. Thus, this court acts in terms of section 256 (3) of the Criminal Procedure Decree and quash the conviction and the sentence of 3 months imprisonment suspended for 2 years imposed by the lower court. That sentence is substituted by a 'Binding Over'. The appellant is bound over for a sum of $1000 for the next 12 months to maintain good behaviour and peace with no interference to the complainant's life.

17. The Magistrate's Court of Nasinu is ordered to execute the Bond of the appellant's 'Binding Over'. If the appellant does not adhere to the conditions of the 'Binding Over' to the satisfaction of the learned Magistrate of the Nasinu Magistrate's Court, the appellant is liable to pay the $1000 bond to court. During the period of 12 months, the appellant should appear in the Magistrate's Court on notice.

18. The appellant is ordered to present himself at the Registry of the Nasinu Magistrate's Court on 11th of December 2013 to sign the Bond. Nasinu Magistrate's Court is directed to submit a copy of the Bond to the High Court Criminal Registry within 1 week.

19. Appeal is dismissed subject to above variations.

Janaka Bandara
Judge

At Suva
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent