IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 19 OF 2013

BETWEEN: **PRANAY PRATAP KISSUN**

Appellant

AND: **STATE**

Respondent

Counsels : **Mr. M.N. Sahu Khan for the Appellant**
Mr. Semi Babitu for the Respondent

Date of Hearing : **2 December 2013**
Date of Judgment : **13 February 2014**

JUDGMENT

1. The appellant was charged before the Tavua Magistrate under the following count:

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM:- Contrary to Section 275 of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

PRANAY PRATAP KISSUN, on the 14th day of April 2013 at Tavua in the Western Division, assaulted **ROSELYN PRASAD** thereby causing her actual bodily harm.

2. The appellant pleaded guilty, convicted and sentenced for 6 months imprisonment suspended for 3 years on 1st July 2013.

3. The facts of the case are on 14th April 2013 at home, the victim was asking her child to do some house work which was not liked by the victim's mother in law. Victim had told mother in law not to interfere as she wants her daughter to learn. There was heated argument between victim and the mother in law. The appellant who is the husband of

the victim asked the victim why she was rude to his mother. Then appellant held the victim by neck and pushed her out side.

4. This appeal was filed on 9th July 2013 within time.

5. The grounds of appeal are :

Appeal against the conviction:

(a) That the learned Trial Magistrate erred in law and in fact in convicting the Appellant when he failed to consider all aspects and/or all relevant matters of mitigation into account.

(i) Failing to consider the fact that the complainant had written a letter withdrawing the complaint;

(ii) Failing to consider the emails attached to the typed mitigation submitted to the Court;

(iii) Failing to consider the effect of conviction on the well being of the family and the likely effect on the marriage between the parties;

(iv) Failing to consider the continued support by the accused of his family despite the affair of his wife with another man and the reasons why he had lost his job with Big Rooster.

(b) That the learned Trial Magistrate erred in law and in fact in concluding that there was no provocation in the matter particularly in view of the emails attached to the mitigation.

(c) That learned Trial Magistrate's decision in entering a conviction was manifestly harsh and excessive and wrong in principal and in the exercise of his discretion in all the circumstances of the case.

(d) That the learned Trial Magistrate's application and/or interpretation of the case of ***State v David Batiratu*** Revision Case No. HAR 001/2012 is with respect incorrect particularly also in view of considering Section 9 of the Sentencing and Penalties Decree 2009.

(e) That the learned Trial Magistrate failed to exercise his discretion under Section 15,16, and 45 of the Sentencing and Penalties Decree 2009, which discretion he has under the said provisions.

(f) That the appellant reserves his right to add to the above grounds of appeal upon receipt of the Court records in this matter.

Appeal against the sentence

(a) That the appellant appeal against the sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

(b) That the learned Trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and also not taking into relevant considerations.

(i) Failing to consider the fact the complainant had written a letter withdrawing the complaint;

(ii) Failing to consider the emails attached to the typed mitigation;

(iii) Failing to consider the effect of conviction on the well being of the family and the likely effect on the marriage between the parties;

(iv) Failing to consider the continued support by the accused of his family despite the affair of his wife with another man and the reasons why he had lost his job with Big Rooster.

(c) That the learned Trial Magistrate erred in law and in fact in considering the prevalence of offence as aggravating factor.

(d) That the learned Trial Magistrate erred in law and in fact when considering the lack of provocation and aggravating factor when clearly pursuant to the emails attached to the mitigation there was provocation.

(e) That the learned Trial Magistrate's application and/or interpretation of the case of ***State v David Batiratu*** Revision Case No. HAR 001/2012 is with respect incorrect particularly also in view of considering Section 9 of the Sentencing and Penalties Decree 2009.

(f) That the learned Trial Magistrate erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree 2009 and in particular Sections 4,5,9,15,16 and 45 when sentencing the appellant.

Appeal against the conviction:

6. The appellant had pleaded guilty to the count against him and admitted the summary of facts on 24.6.2013.

7. In the written submissions of mitigation filed by the appellant before the learned Magistrate he had prayed for dismissal of the charge without recording a conviction acting under Sections 15(1) (j), 16 (1) and 45 (1) of the Sentencing and Penalties Decree on the basis that such conviction will jeopardize his prospects of employment.

8. The learned Magistrate had considered the question whether it would be appropriate in the circumstances of the case to enter a no conviction against the appellant and to discharge him.

9. He had considered the judgment of ***State v Kumar*** [2001] FJHC 101; HAA 0014.2001l(2 February 2001), where it was held that :

   "*The Court in its sentencing remarks said rightly, it was faced with a very awkward situation for this accused was facing dismissal from his employment if a conviction were to be entered. Nevertheless a discharge without conviction being entered was not an appropriate sentence here. Absolute discharges are appropriate only in limited number of circumstances, such as where no moral blame attaches(R v O'Toole (1971) 55 Cr App p 206) or where a mere technical breach of the law has occurred, perhaps by imprudence without dishonesty (R v Kavanagh (unreported) May 16th 1972 CA)"*

10. Further the case of ***State v David Batiratu*** Revisional Case No. HAR001/2012 was also considered by the learned Magistrate. It was held in that case by the Hon. Chief Justice that:

    "*The effect of the cases and the purport of the more detailed provisions of the Sentencing and Penalties Decree with regard to discharges can be summarized. If a discharge without conviction is urged upon the Court the sentencer must consider the following question, whether:*

    (a) The offender is morally blameless.
    (b) Whether only a technical breach in the law has occurred.
    (c) Whether the offence is of a trivial and minor nature.
    (d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.
    (e) Whether circumstances exist in which it is appropriate to record a conviction, or merely to impose nominal punishment.
    (f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender."

11. The learned Magistrate then stated that:

"*When considering the above questions, the offender in this case cannot be said to be morally blameless. The offending was deliberate and there's no technical breach of the law. In addition as noted earlier the nature of the offending in this case is serious and not trivial. It is domestic violence offence and due to its seriousness it is no longer a reconcilable offence. In the public interest and to ensure that enforcement of the law is effective, a punishment is warranted due to seriousness of the charge. There are no exceptional circumstances in this case that justify no conviction to be entered and offender to be discharged. Therefore in exercising my discretion a conviction will have to be entered and as it would be wrong in principle to discharge you without conviction."*

12. I totally agree with the observations of the learned Magistrate in the back ground of the cited authorities.

13. Further in ***State v Kumar*** [2001] FJHC 340;[2001] 2FLR 225 (25 July 2001) it was held by His Lordship Anthony Gates that:

"*The respondent, prior to the sentence, has suffered in various ways. The case went through many adjournments in the Magistrates' Court. For nearly 3 years he suffered interdiction without pay. This had the equivalent effect of a substantial time. His wife had earlier left him. He was trying to look after the two children, to whom he had to act as mother and father. I had been informed that he was to pay $100 to the complainant as compensation, which compensation the victim has now confirmed has been paid. Upon the basis that a punishment, if it were to result in the loss of the respondent's livelihood with the police, would be disproportionate to the crime committed, I ordered that the Respondent be discharged absolute without conviction entered.* ***This cannot be a precedent however for the imposition of absolute discharges in cases of this sort."***

14. It was cited in approval the reasoning of Richard J in ***Fisheries Inspector v Turner***[1978] 2 NZLR 233 at p241 who described the extend of the sentencing discretion for a section not very different from section 44 of the Fiji's Penal Code:

"*In considering the exercise of the discretion under s42 the Court is required to balance all the relevant public interest considerations that apply in the particular case; or; as s42 (1) puts it, 'after inquiry into the circumstances of the case', which must refer to all circumstances that are relevant in the particular case before the Court. It must have due regard to the nature of the offence and the gravity with which it is viewed by Parliament; to the seriousness of the particular offending; to the circumstances of the particular offender in terms of the effect on his career, his pocket, his reputation and any civil disabilities consequential on conviction; and to any other relevant circumstances. And if the direct and indirect consequences of a conviction are in Court's judgment, out of all proportion to the gravity of the offence, it is proper for the a discharge to be given under s42."*

15. The appellant by his counsel had submitted that the learned Magistrate should have taken Section 16(1) (c) of the Sentencing and Penalties Decree into consideration and not order a conviction to be entered. He submits that as he is a first offender and there is reconciliation it is a suitable case for not recording a conviction.

16. Section 16 (1) of the Sentencing and Penalties Decree reads as follows:

    "Section 16 (1) In exercising his discretion whether or not record a conviction, a Court shall have regard to all the circumstances of the case, including-……..

    (a) The nature of the offence;
    (b) The character and past history of the offender; and
    (c) The impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects."

17. The operative word in this section is "discretion". Where the Magistrate had exercised his discretion within the bounds of his power that it would be in very exceptional circumstances that an appellate Court would interfere with that exercise.

18. This is particularly so in cases of Domestic Violence which this case is. The Domestic Violence Decree is clearly a Decree to provide greater protection from Domestic Violence and it would not be in the spirit of this legislation to not to record a conviction against a perpetrator.

19. Further according to Section 154 (6) of the Criminal Procedure Decree promotion of reconciliation is not applicable to offences of Domestic Violence, as defined by the Domestic Violence Decree, 2009.

20. The appellant had pleaded guilty to the offence and had admitted the summary of facts which go to the elements of the offence. The learned Magistrate had exercised his discretion correctly.
    Thus there is merit in the grounds against the conviction and those fails.

21. The appeal against the conviction is dismissed.

Appeal against the sentence

22. The learned Magistrate had taken a starting point of 9 months. For aggravating factors namely the prevalence of the offence in community and lack of provocation he had added 2 months. This being the first offence and other mitigating factors 2 months was reduced. Further 3 months were reduced for the guilty plea arriving at a sentence of 6 months.

23. Then the learned Magistrate had considered the suspension of the sentence. He had stated that '*Although the nature of the offending was unprovoked, this is your first offence and you need to be given opportunity to reform yourself. Therefore I am going to suspend your sentence.'*

24. The sentence of 6 months imprisonment was suspended for 2 years. Further he had made permanent the interim restraining orders made under Section 27 (2) of the Domestic Violence Decree on 18th April 2013.

25. The learned Magistrate had followed the following tariff judgments.

State v Salote Tugalala HAC 25 of 2008
Elizabeth Joseph v The state [2004] HAA 030.2004S
State v Tevita Alafi [2004] HAA 073 .2004S
Amasi Korovata v The State [2006] HAA 115.2006S

According to these judgments the tariff for the offence of Common Assault and Assault Occasioning Actual Bodily Harm appears to range from an absolute or conditional discharge to 12 months imprisonment. In ***State v Tevita Alafi*** [2004] HAA 073 .2004S it is stated that it is the extent of the injury which determines sentence…….. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate. In domestic violence cases sentence of 18 months imprisonment have been upheld. (***Amasi Korovata v The State*** [2006] HAA 115.2006S)

26. In ***Raisoqoni v State*** [2011] FJHC 32; HAA 004.2011 (7 February 2011) Hon. Mr. Justice Daniel Gounder held that:

'*The Domestic Violence Decree has changed the old law. Under the new law, domestic violence offences are not reconcilable and therefore there is no discretion given to the courts to encourage reconciliation. However, if the victim freely reconciles with the partner and gives evidence of that effect, reconciliation is a factor that ought to be taken into account in sentencing the offender……..The term of six months imprisonment was within the tariff and was arrived at after all relevant factors were taken into account.'*

27. In ***State v Kumar*** [2011] FJHC 341; HAA 020.2010(9 June 2011) Hon. Mr. Justice Paul Madigan held that:

'*A domestic violence offence which this obviously is cannot be reconciled and in any event the Court record notes that the victim did not want to reconcile. It is incumbent upon the tribunal or officer of the Court to have regard to the Domestic Violence Decree which came into force on the 1st of December 2009. The Decree was enacted to protect persons, men women and children, from abuse in domestic environment and if the Courts do not make findings and rulings within the spirit of the Decree, then that altruistic arm is thwarted.'*

Setting aside a penalty of $100 compensation, a term of 6 months imprisonment suspended for 2 years was ordered in this case.

28. In ***Chand v State*** [2011] FJHC 593; HAA 024.2011 (23 September 2011) Hon. Mr. Justice Paul Madigan held that:

'*Assaults in a domestic context are particularly odious in that wives, and husband for that matter, should feel safe in their homes without having their trust I their loved ones betrayed. The learned Magistrate was quite correct in finding that the domestic element to this offending was an aggravating feature.'*

29. In ***Botaki v State*** [2012] FJHC 1250; HAA 015.2012 (1 August 2012) Hon. Mr. Justice Paul Madigan held that:

'*The question of reconciliation in a Domestic Violence is a difficult one. It is quite clear that it is not a reconcilable offence, it being a domestic violence case and that being so, reconciliation as a mitigating factor is of very dubious value. A female victim will nearly always say that the parties are reconciled because she will fear the loss of the family breadwinner and supporter or she is forced to say it by her accused husband. A sentencing tribunal should always therefore look at a submission of reconciliation with great caution and suspicion. In this case, although the Magistrate has listed reconciliation as a mitigating factor, he later expresses doubts whether it was voluntary or not because the victim did not confirm it in Court. It was a submission of the accused.'*

30. The learned Magistrate had not mentioned that he considered reconciliation as a ground of mitigation. However, he had deducted 2 months for mitigation. In the circumstances the learned Magistrate is justified in making that deduction for all the mitigation.

31. The sentence is well within the accepted tariff for the offence. The Magistrate has not made any error of law in passing the sentence, and in the circumstances it is entirely appropriate sentence. The appeal against the sentence has no merit and is dismissed.

32. For the reasons given above the appeal against conviction and sentence is dismissed.

Sudharshana De Silva
JUDGE

At Lautoka
13th February 2014

Solicitors : Nazim Lawyers for the Appellant
Office of the Director of Public Prosecution for Respondent