**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**APPELLATE JURISDICTION NO. HAA 44 OF 2016**

**BETWEEN:** **SALESH NARAYAN**

**APPELLANT**

**AND:** **STATE**

**RESPONDENT**

**Counsel:** **Ms. V. Diroiroi for Appellant**
**Mr. J. Niudamu for Respondent**

**Date of Hearing:** **06th December, 2016**

**Date of Judgment:** **14th December, 2016**

## JUDGMENT

1. The Appellant was charged in the Magistrates Court at Nadi with one count of Kidnapping with Intent to Confine Any Person and one Count of Criminal Intimidation contrary to Sections 281 and 375(1)(a) (iv) respectively of the Crimes Decree No. 44 of 2009.

2. The Appellant on his own accord pleaded guilty to the charge on the 6th of October, 2015.

3. The learned Magistrate convicted the Appellant for these two counts and sentenced him on the 5th August 2016 to 18 months' imprisonment for the 1st count and 12 months' imprisonment for the 2nd Count with concurrent effect with a non-parole period of 12 months.

4. The Appellant being not satisfied with the sentence has appealed against his sentence within time.

5. Appellant is advancing two grounds of appeal which are as follows:

   a. The sentence was harsh and excessive in totality.

   b. Imposition of a non-parole for 12 months was harsh and excessive

**Law**

6. This Court will approach an appeal against sentence using principles set out in ***House v The King*** *[1936] HCA 40; (1936) 55 CLR 499 and adopted in* ***Kim Nam Bae v The State Criminal Appeal*** *No.AAU0015 at [2].*

7. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Fiji Appeal Court observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".*

8. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** *(supra):*

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

9. The Fiji Court of Appeal in ***Sharma v State*** [unreported Cr. App. No. AAU0065 of 2012; 2 June 2014] discussed the approach to be taken when exercising appellate jurisdiction in reviewing a sentencing discretion of a lower court. The Court observed:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust"*

10. The summary of facts admitted by the Appellant is as follows:

> *On the 23rd day of July, 2011 at about 0715 hrs at Nalovo, Nadi one Salesh Narayan [Accused] 33 years, Custom Clerk of Talaiya, Ba with another kidnapped one Muni Sangeeta Naicker, 31 years Product Manager of Nalovo, Nadi with intent to secretly and wrongfully confine the said Muni Sangeeta Naicker.*
>
> *[Complainant] and [Accused] were legally married but they have divorced.*
>
> *On the above date, time and place Complainant [PW-1] was at the Queen's Road Highway waiting for a transport to go to work. Accused and another came with one seven-seater van registration number FO 014 came and stopped to [PW-1] and he asked PW-1 if she wants to go to town. [PW-1] got into the van and seated at the back seat of the driver while crossing Uciwai Junction accused who was hiding at the back seat hold PW-1 on her face using a cloth in which accused had put the chemical to make PW-1 unconscious. PW-1 struggled to free herself but could not as accused was very strong. PW-1 also tried to stop the van but the driver did not stop. Accused threatened PW-1 that he is going to kill her, PW-1 fell down in the van and she felt dizzy due to chemical used on her face. PW-1 then saw the face of the accused and she identified as her ex-husband Accused threatened PW-1 saying that 'tume hum jaan se maar dka, tum hamar nahi to koi ke nahi" meaning that I will kill you if you are not mine, you cannot be for another person. [PW-1 kept on asking accused to let her go but Accused with another driving towards Northern Press road into an apartment.*
>
> *Accused took PW-1 into one room and started questioning PW-1as whom is she is getting married to and Accused threatened PW-1 that he cannot stay without PW-1 and their daughter and he will make PW-1 drink that chemical and die. After some time, Accused brought the camera and took the photo of PW-1 with him sitting on the bed. Accused rang somebody to bring some food to him in the room.*

*PW-1 was really afraid that Accused is going to kill her. To save her life, PW-1 did what Accused told her. Accused then threatened PW-1 with the bottle of chemical to write a letter stating that she was not forced to come with him. Under threat PW-1 then wrote a letter and signed it.*

*Accused then rang a taxi to pick them from the apartment. While Accused was looking outside from the front door to call the taxi then PW-1 run from the back door and shouted for help and the Security Officer of the apartment assisted her. PW-1 then got in the taxi which the Accused called and she went to her workplace and after that she went to Nadi Police Station.*

*PW-1 was medically examined as she received injuries and the statement was recorded. Accused was arrested and caution interviewed and admitted the facts and stated that he planned to kidnap PW-1 as Accused wanted to talk to PW-1 to solve the problem in their family then Accused was charged with one count of Kidnapping With Intent To Confine Any Person and one count Criminal Intimidation.*

11. Both parties have filed written submissions and further to that Counsel made oral submissions. I have considered the same. Having examined the legal position and the approach to be taken in an appeal against a sentence, I now turn to analyse the grounds of appeals.

**Ground 1- The Sentence was Harsh and Excessive in Totality**

12. The sentencing Court should be guided by the proportionality principle enshrined in the Constitution of the Republic of Fiji, Sentencing and Penalties Decree, 2009 and guideline judgments, if any, in arriving at an appropriate sentence.

13. An examination of Fiji case law reveals that proportionality is the most fundamental principle of sentencing so far developed by the courts. This principle seems not only to be

a rule of law but also a constitutional imperative. The selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality. A constitutional protection to exist in determining that the punishment must first be proportionate to the offence but also proportionate to the personal circumstances of the offender. In essence, this principle demands that a sentencing court should first locate the specific offence on the overall scale of gravity and then proceed to make any necessary allowance for relevant personal circumstances. It is within this cardinal principle that criminal record must be assessed in affecting the quantum of punishment to be imposed on the offender.

14. Section 11 (1) of the Constitution provides:

> *"Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment"*

15. Section 15 (3) of the Sentencing and Penalties Decree states:

> *"As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in section 4, and sentences of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in this Part".*

16. Having considered the aforementioned sentencing principles I proceed to review the sentence imposed by the learned Magistrate to see if it was harsh and excessive.

17. It appears that the learned Magistrate has correctly identified the tariff for each offence and applied established legal principles in selecting the starting point.

18. The maximum sentence for the 1st count is imprisonment of seven years and for the 2nd count, five years' imprisonment.

19. The tariff for the 1st count is well settled. In ***State v Sasau*** [2012] FJHC 1301; HAC 111.2009 (28 August 2012) Madigan J set the tariff between 18 months and 4 years' imprisonment.

20. The learned Magistrate correctly stated that there was no established tariff for the 2nd Count. In the absence of an established tariff, he examined the relevant case law and was guided by ***Lagi v The State*** [2004] FJHC 69; HAA0004j.2004S (12 March 2004) and ***Wise v State*** [2008] FJHC 316; HAA 078J.2008S (10 November 2008) when he determined that the range of sentence should be between 1 and 2 years' imprisonment.

21. Having identified the appropriate tariff for each offence, the learned Magistrate proceeded to select the starting point. He picked a starting point of 24 months from the lower range of tariff for the 1st count and 12 months for the second count considering the principles enunciated in ***Laisiasa Koroivuki v State*** (Criminal Appeal AAU 0018 of 2010). In ***Koroivuki***, it was observed:

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range".*

22. The learned Magistrate then proceeded to identify the relevant aggravating and mitigating factors for appropriate adjustments. He increased the sentence by 12 months for each count for following aggravating factors:

- Pre planning
- Using of a chemical to make the victim unconscious
- Taking photos of the victim
- Forcing the victim to write a letter saying she came voluntarily
- Using force on the victim

23. In paragraph 5 of the sentencing Ruling the learned Magistrate identified mitigating factors and gave a discount of 18 months for the 1st count and 12 months for the 2nd count to arrive at a final sentence of 18 months' imprisonment for the 1st count and 12 months' imprisonment for the 2nd count. Even though he had not given a separate discount for the guilty plea, he had considered the guilty plea in mitigation (although it was a belated one).

24. Since his final sentence fell below two years, the learned Magistrate, in exercising his discretion under Section 26 (2) of the Sentencing and Penalties Decree, considered whether the Appellant's case was one warranted a suspended sentence. In the balancing exercise, he has considered the need to rehabilitate a first and young offender on one hand and the need for retribution and deterrence on the other. Having directed his mind to relevant case law and spirit of Sections 4(1) and 15(3) of the Sentencing and Penalties Decree, the learned Magistrate eventually concluded that an immediate custodial sentence was warranted.

25. In coming to this conclusion the learned Magistrate justified his decision in following fashion:

> *"Given the increasing number of family cases, the court has to take very tough stance on these offences and send a very clear and strong message that the courts will not tolerate these offences more. Otherwise all the people who have family cases and disputes will follow the same path. The people who have family disputes must go to the court to resolve them and should not take law into own hands"*

26. Having justified his decision, the learned Magistrate rightly concluded that the purpose of sentencing in these types of cases was to punish the offenders and to deter the would-be offenders as a means of expressing public outrage and Court's denunciation. The learned Magistrate has exercised his discretion lawfully and judiciously. Therefore, this ground fails.

**Ground (b) Fixing of non-parole period by sentencing court**

27. Section 2 of the Sentencing and Penalties Decree 2009 defines non-parole period as *"any period fixed under Part V during which an offender who is sentenced to a term of imprisonment is not eligible to be released on parole".*

28. Section 18 of the Sentencing and Penalties Decree 2009 states:

*"18. (1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.*

*(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).*

*(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.*

*(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.*

*(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in*

*respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.*

*(6) In order to give better effect to any system of parole implemented under a law making provision for such a system, a court may fix a non-parole period in relation to sentences already being served by offenders, and to this extent this Decree may retrospective application.*

*(7) Regulations made under this Decree may make provision in relation to any procedural matter related to the exercise by the courts of the power under sub-section (6)."*

29. A discretion has been granted to the sentencing judge in terms of Section 18 (3) of the Sentencing and Penalties Decree when fixing a non-parole period but is silent as to how that period should be arrived at. Calanchini P in ***Paula Tora v. The State Criminal Appeal*** No. AAU 0063 of 2011 (27 February 2015) stated:

*" The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27(2) of the Corrections Service Act, 2006 on the balance of the head sentence after the non-parole term has been served."*

30. It would be seen therefore that there is no basis for the imposition of the non-parole period in terms of the statutory provisions as it stands now in Fiji except to say that when fixing a non-parole period, it should be six months less than the head sentence. This would indicate that a period which is less than six months than the head sentence would be the maximum limit of the non-parole period. If the remission of one third is to be considered at the end of such a six months' period, it may go against the spirit of section 4(1) of the Sentencing and Penalties Decree, 2009 in striking a balance between rehabilitation and deterrence. *Vide:* ***Naitini v State*** [2015] FJCA 154; AAU102.2010 (3 December 2015)

31. It will also be necessary to consider the personal circumstances of the offender when deciding on the minimum non-parole period, as to whether he/she was a first offender or a person with a history of having committed crimes of a similar or serious nature which may have already been considered when imposing the head sentence.

32. While leaving the discretion to decide on the non-parole period when sentencing to the sentencing judge or magistrate it would be necessary to state that the sentencing judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case. In doing so, it is desirable that the sentencing judge or magistrate take into consideration the three objectives stated by Redlich JA and Osborn JA in ***Kumova v. Queen*** [2012]n VSCA 212 which I reproduce below:

> Redlich JA and Osborn JA stated:
>
> *"Like the head sentence, determination of the non-parole period involves the application of well settled principles and practices to the circumstances of the case. All factors are taken into account, first in determining the head sentence and then in fixing the non-parole period. The factors may be differently weighted at each stage of the exercise because there are different purposes behind each function. In fixing the proportion of the head sentence to be given to the minimum*

*sentence there are sentencing principles in operation which, together with the individual circumstances of the case will determine the proportion which the non-parole period must bear to the head sentence.* ***First, like the head sentence, the non-parole period must also reflect the objective gravity of the offence so that the non-parole period should constitute the minimum period of imprisonment that justice requires the prisoner to serve. Secondly, punishment is mitigated in favour of the prisoner's rehabilitation. The benefit of the minimum term is for the purpose of the offender's rehabilitation. Thirdly, in fixing the minimum term, the interests of the community, which imprisonment is designed to serve, must be taken into account."*** *(Emphasis added).*

33. Section 18(3) of the Sentencing and Penalties Decree gives a discretion to the sentencing magistrate to impose a non-parole period. In the present matter, the learned Magistrate had exercised his discretion judiciously pursuant to Section 18(3) and (4) of the Sentencing and Penalties Decree. Therefore, this ground fails.

34. For the reasons given, the appeal is dismissed. The sentence imposed by the learned Magistrate is affirmed.

**Aruna Aluthge**
**Judge**

HIGH COURT OF FIJI
LAUTOKA

**At Lautoka**
**14th December, 2016**

**Solicitors:** **Legal Aid Commission for the Appellant**
**Office of the Director of Public Prosecution for the Respondent**