

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 27 OF 2016

BETWEEN : THE STATE

APPELLANT

AND : MOROTIKEI VOCEVOCE

RESPONDENT

Counsel : Mis Luisa Latu for the Appellant
Mr W. Naimima for the Respondent

Date of Judgment : 23rd of January 2017

JUDGMENT

1. The Respondent had been charged in the Magistrate Court of Ba for one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Decree. The Respondent was first produced before the Magistrate Court on the 12th of October 2015. Subsequent to few adjournments, the Respondent had pleaded guilty for the offence on the 17th of May 2016. On the 20th of May 2016, the Learned Magistrate had adjourned the proceeding for a period of twelve months and released the Respondent without entering a conviction against him upon his undertaking to comply with the following conditions pursuant to Section 45 (2) of the Sentencing and Penalties Decree.

i) You must be of good behaviour during the above 12 months,

ii) You must resume your parental role as well as being the father figure to your children including if you are living separate from them by retiring to the family household forthwith s Section 27 of the Domestic Violence Decree 2009 invoked,

iii) You must not re-offend,

iv) Because this sentence is a non-conviction allowing you to resume employment you must strive in your career as a Police Officer and volunteer into any course or workshops in order to upgrade yourself on par with the modernisation of a Police Force,

v) You must attend counselling with either the Police Force Counselor or in the alternative the Family Court Counselor based in the Ba Magistrates Court on appointment,

2. Unsatisfied with the said sentence, the Appellant files this Petition of Appeal on the following grounds *inter alia*;

i) That the learned Resident Magistrate erred in not imposing a conviction on the grounds that the Respondent is a Police Officer and the circumstances in which the offending took place,

ii) That the learned Resident Magistrate erred in law and in principle in imposing a sentence that was below the tariff for this type of offending and was manifestly lenient,

3. The Appellant and the Respondent consented to conduct the hearing by way written submissions. I accordingly directed the parties to file their respective

perused the respective written submissions filed by the parties and the record of the proceedings of the Magistrates Court, I now proceed to pronounce the judgment as follows.

The Law

4. The Fiji Court of Appeal in Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015) has discussed the applicable approach of the appellate court in dealing with appeal filed against the sentence imposed by lower court, where the Fiji Court of Appeal held that;

“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”.

5. Gounder JA in Sagainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015) held that;

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

- i) Whether the sentencing judge acted upon a wrong principle;
- ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;
- iii) Whether the sentencing judge mistook the facts;
- iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)"

Grounds I & II

6. The learned Magistrate in paragraph 9 of the sentence has outlined the reasons that made him to deviate from the acceptable tariff limit for the offence of Assault Causing Actual Bodily Harm. It states that;

"This court accepts that you have submitted forceful mitigation choosing not to blame your wife throughout and this court will reward you for your true remorse and honesty. You also accept that you need to control your temper and anger. You have finally released the importance of family and view this opportunity as God willing. Hence, this is the basis for which I see myself departing from the tariff. I therefore in an attempt by this court to rehabilitate you I release you pursuant to Section 45(2) of the Sentencing and Penalties Decree 2009 without conviction and adjourn the proceedings for 12 months with an undertaking by you of the following: "

7. Accordingly, the learned Magistrate's decision to depart from the tariff is founded on the following main grounds;
 - i) Respondent did not blame the wife,
 - ii) True remorse and honesty,
 - iii) Acceptance of the need to control temper and anger,
 - iv) Realisation of the importance of family,
8. Section 45 (2) of the Sentencing and Penalties Decree provides the procedure to release the accused without recording a conviction and adjourn the proceedings for a period of up to five years. It states that;

"A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to five years and release the offender upon the offender giving an undertaking to comply with the

conditions applying under sub-section (2) and may further conditions imposed by the court”,

9. The factors that need to be considered by the court in exercising its discretion whether to record a conviction or not, have been stipulated under Section 16 (1) of the Sentencing and Penalties Decree, where it states that;

“In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including-

i) The nature of the offence,

ii) The character and past history of the offender; and

iii) The impact of a conviction on the offender’s economic or social well-being, and on his or her employment prospects,

10. Hon Chief Justice Gates in **State v Batiratu [2012] FJHC 864; HAR001.2012 (13 February 2012)** expounded the following guidelines if the court contemplates of discharging the accused without a conviction. Hon Chief Justice Gates held 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 questions, 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 or 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 inappropriate 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.*

20. In this particular case, the summary of facts reveals that the Respondent got angry when he found the victim had lied to him stating that she was at her parent's place, when she actually had gone to a night club. He had then pressed her neck and eyes and then inserted his fingers into her mouth and pulled it both sides. The Respondent had then stomped her thighs and knees. He had punched her several times on her shoulder and head. He had then continuously tortured her and made her crawl to the kitchen floor when she wanted a drink. The ordeal had been continued for about two hours. On the following morning, the Respondent had continued the assault by hitting her on her back, knees and thighs. The Respondent suspected the victim was having an affair with someone and questioned her about it.
21. According to the summery of fact, there had not been any form of provocation by the victim. Marriage is not a union of a master and subordinate. It is a union of two individuals with mutual respect, trust and affection. Hence, none of the

parties of a marriage has authority to assault or to punish the other partner on the ground of disobedience or breaching of respect and trust. Accordingly, I do not find any justification to conclude that the Respondent could not morally blame for this assault on the victim.

22. Indeed this offence is not a mere technical breach of the law. It is a deliberate and planned act of violence. The Respondent had continuously assaulted and tortured the victim without any mercy. Hence, this act of violence is not a trivial or minor nature. This offence falls with the meaning of Domestic Violence as stipulated under Section 3 of the Domestic Violence Decree. Section 4(3) of the Sentencing and Penalties Decree and Section 6 of the Domestic Violence Decree clearly indicates the profound significance of public interest in preventing and eliminating of domestic violence.
23. In view of the reasons discussed, it is my opinion that the circumstances of this offending do not fall within the test enunciated by Hon Gates CJ in **Batiratu (supra)** in discharging the person without a conviction.
24. Gounder JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has discussed the purpose of the tariff and its applicability in sentencing, where his lordship found that;

“The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public’s confidence in the criminal justice system is maintained.”

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 stage. 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"

25. In view of the observation made by Gounder JA in **Koroivuki (supra)** if the sentence falls below the acceptable tariff limit, the sentencing court is required to provide reasons.
26. The learned Magistrate has taken into consideration the grounds mentioned in paragraph 16 above in order to depart from the acceptable tariff limit for the offence of Assault Causing Actual Bodily Harm. Indeed, the Respondent could not blame the victim for this incident as no evidence of provocation or wrong doing by the victim. Hence, the fact that the Respondent did not blame the victim for this incident has no mitigatory value.
27. Moreover, there is no evidence to confirm that the Respondent has already started any form of anger management in order to receive substantive discount. A mere indication of his understanding to control his anger undoubtedly cannot attract much mitigatory value in the sentencing of an offence of this nature. Accordingly, I find the reasons that had been taken into consideration by the learned Magistrate in departing from the acceptable tariff is founded on a wrong sentencing approach.

28. Having considered the reasons discussed above, I quash the adjournment order without a conviction made by the learned Magistrate on the 20th of May 2016 pursuant to Section 256 (2) of the Criminal Procedure Decree. Furthermore, I order that a conviction be recorded against the Respondent.
29. I now draw my attention to consider an appropriate sentence in order to reflect the seriousness and the appropriate culpability of the Appellant in this offence.
30. The tariff for the offence of Assault Occasioning Actual Bodily Harm ranges from a suspended sentence where there is a degree of provocation and no weapon used to 9 months imprisonment for the more serious cases of assault. (**Gounder J in Jonetani Sereka v The State 2008, FJHC 88, HAA027,2008**), (**State v Anjula Devi, Crim Case No 04 of 1998**) (**Basa v State [2014] FJHC 518; HAA12.2014 (15 July 2014)**).
31. Justice Madigan in **State v Sikitora [2010] FJHC 466; HAC067.2010L (22 October 2010)** found that;
- “The cases of Elizabeth Joseph v State [2004] HAA 03 of 2004 and State v Tevita Alati [2004] HAA 73 of 2004 establish a tariff of 9 months to 12 months imprisonment, the severity of the wound being the determining factor in the starting point. However sentences of 18 months imprisonment have been upheld in domestic violence cases (Amasi Korovata v State [2006] HA 115 of 2006)”*
32. Justice Madigan in **State v Prasad [2015] FJHC 493; HAA010.2015 (3 July 2015)** held that;

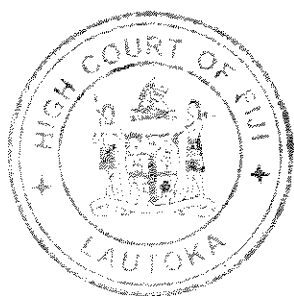
“A “normal” punishment for a domestic violence assault is a term of imprisonment for a period of between 9 and 12 months with an enhancement up to 18 months if the assault be considered serious”

33. Having considered the seriousness and the duration of the assault, and the absence of any provocation, I select ten (10) months as the starting point. In committing this crime, the Respondent had breached the trust and the confidence reposed in him by the victim as her husband, which I consider as aggravating circumstances of this offending. I increase three (3) months, reaching to an interim imprisonment of thirteen (13) months.
34. You pleaded guilty at the early stage of the proceedings, which demonstrates your remorse and acceptance of your criminal responsibility. You are a young first offender. For the early plea of guilty, I reduce four (4) months and for other mitigating factors, I reduce three (3) months, making the final sentence of six (6) months imprisonment period.
35. Justice Gounder in Raisoqoni v State (2011) FJHC 32; HAA.004.2011 (17 February 2011) held that a sentence of 6 months was within the tariff for a case of assault causing actual bodily harm where the injured person was the spouse of the accused. The victim had suffered injuries of bruises, laceration, lumps and swellings over her head and face.
36. Justice Madigan in Chand v State (2011) FJHC 593; HAA 024.2011 (23 September 2011) held that a sentence of 4 months is within the tariff for an incident, where the accused had pushed and punched his wife causing her to fall and hit her head.

37. In **State v Prasad (supra)** Justice Madigan has sentenced the accused for a period of 4 months imprisonment for assaulting his wife. The Accused was a Police Officer at that time.
38. Having considered the above judicial precedents and the seriousness of this offence, I do not find any compelling reasons to suspend this sentence.

Conclusion

39. In conclusion, I convict and sentence the Respondent for a period of six (6) months imprisonment for the offence of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Decree.
40. Appeal is allowed.
41. Thirty (30) days to appeal to the Fiji Court of Appeal.



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

23rd of January 2017

Solicitors : Office of the Director of Public Prosecutions

Office of Legal Aid Commission

*Judgment
delivered
by
Madhoo C.*