IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 66 OF 2016

BETWEEN : AVINESH WARRAN NARAYAN

APPELLANT

AND : STATE

RESPONDENT

Counsel: Appellant in Person

Ms. L. Latu for the Respondent

Date of Hearing: 10th April 2017

Date of Judgment: 28th April 2017

JUDGMENT

INTRODUCTION

1. This is a timely appeal filed by the Appellant against the conviction and sentence of the learned Magistrate at Lautoka.

2. The Appellant was charged with one count of Indecent Assault contrary to Section 212(1) of the Crimes Decree 2009.

3. The trial Magistrate found the Appellant guilty of the charge and convicted him accordingly. On the 25th October, 2016, Appellant was sentenced to a term of 18 months' imprisonment with a non parole period of 12 months.

4. Being dissatisfied with the above conviction and sentence the Appellant filed a notice of Appeal on the 8th of November, 2016 with following grounds:

GROUNDS OF APPEAL

i. That the learned Magistrate erred in law when he failed to note down the summary of facts that he was guilty for in his sentencing remarks.

ii. That the learned Magistrate erred in that he took the starting point of 1 year without outlining the circumstances of the facts with which the appellant is charged and pleaded guilty with;

iii. That the learned Magistrate erred in law and in fact when he enhanced 1 year as aggravating factor which does not constitute the offence without outlining the summary of facts, this has caused a miscarriage of justice;

iv. The learned sentencing Magistrate erred in law and fact when he failed to give any reason why it took him 4 years to pass a custodial sentence rather than a suspended sentence since the sentence was below 2 years;

v. The learned sentencing Magistrate erred in that he misguided himself with the guideline authority as paragraph 4 of his sentencing when he failed to highlight the facts of the case;

vi. That the sentence of 18 months with non-parole period of 12 months is harsh in all circumstances of the case;

vii. The learned Magistrate erred in law and principle when he failed to exercise discretion to guide himself with the Sentencing and Penalties Decree;

viii. The learned sentencing Magistrate erred in law when he failed to exercise Section 4 (1) (2) and 15 of the Sentencing and Penalties Decree.

5. Appellant in his written submission advanced the following grounds of appeal against conviction.

(1) Offence not proved beyond reasonable doubt

(2) Conviction and sentence are null and void as the learned Magistrate failed to conform to requirements set out in Section 142 (1) of the Criminal Procedure Act.

LAW RELATING TO APPEALS AGAINST CONVICTION AND SENTENCE

6. The law relating to appeals against conviction and sentence is set out in Section 246 (1) and (4) of the Criminal Procedure Act

> *246. — (1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgment and sentence;..*

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

7. 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].*

8. 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)".*

9. 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.

10. 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 by an appellate court when 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"*

FACTUAL MATRIX

11. The facts accepted by the trial Magistrate are as follows:

Complainant was renting a flat on ground floor belonging to accused's mother. On 27th November, 2012, she was home and was near the washtub washing dishes facing washtub when the Accused came behind. Accused touched her private part, squeezed and held onto it. She struggled hard to free herself with her only hand. (her other hand had been amputated after an accident). The accused then threatened her and said *'if this matter leaks out, I will chop your husband'*. The accused then went upstairs. Complainant took her kids and went to town. She did not report to police out of fear and waited her husband to return. On the next day she went to the police station with her husband and reported the matter to police. Accused begged for reconciliation but she moved out of the flat after three days.

ANALYSIS

APPEAL AGAINST CONVICTION

12. Learned trial Magistrate accepted the version of the Prosecution and rejected that of the Defence. He had carefully analysed evidence of both sides and given reasons for his decision.

13. Prosecution had called the complainant and the investigating officer as witnesses. Complainant's evidence is consistent and reliable. She had made a prompt complaint to police and had relocated herself with her family due to fear of the accused. Complainant had made a prompt complaint to police on the following day. The investigating officer (PW2) who had recorded the statement of the Complainant confirmed that she (complainant) was in a distressed condition when the statement was being recorded.

14. Trial Magistrate rejected evidence of the Accused and his mother. Reasons given for rejection are well founded. He had highlighted number of material contradictions between evidence of the Accused and his mother. Accused admitted that he lied to police at the caution interview about his alibi. Trial Magistrate found Accused's caution statement inconsistent with evidence called for Defence.

15. Accused touched Complainant's private part, squeezed and held onto it. She struggled hard to free herself with her only hand. Complainant's evidence which was acted upon by the trial Magistrate proved the elements of Indecent Assault although he had failed to set out the elements of the offence specifically in the Judgment. Defence failed to create any doubt in the Prosecution case. The trail Magistrate's finding that Prosecution proved the case beyond reasonable doubt is available in evidence.

16. Trial Magistrate had identified points of determination and given his finding on each point. He had given reasons for his decision. Therefore, there is no error on the part of the Magistrate. Two grounds of appeal against conviction are dismissed.

APPEAL AGAINST SENTENCE

17. Appellant argues that the learned Magistrate erred when he failed to note summary of facts on which the conviction was recorded in his sentencing remarks.

18. There is no essential need for the sentencing court to summarise the facts in the sentencing remarks. As a matter of good practice, it is desirable for a sentencing magistrate / judge to summarise facts in the sentencing ruing so

that the reader, including the appellate court would know, without reading the judgment, on what facts a particular sentence was arrived at. Having gone through the judgment, I am satisfied that the sentence is lawful and not disproportionate to the factual circumstances of the offending. This ground has not merit and is dismissed.

19. Other grounds of appeal against sentence are based on premises that the learned Magistrate failed to apply sentencing principles and that the sentence is harsh and excessive. Therefore, all these grounds can be dealt with together.

20. Appellant contends that the sentencing Magistrate erred in law when he picked a starting point of one year without outlining the circumstances of the case.

21. The sentencing Magistrate correctly cited the guideline judgment and mentioned the tariff for Indecent Assault as between twelve months and four years. He has not specifically mentioned why he picked one year as the staring point.

22. In picking the starting point a court should be mindful only of objective seriousness of the offence. In gauging the objective seriousness, a sentencing court is supposed to look at culpability factors and harm caused to the victim. As a matter of good practice the starting point should be picked from the lower or middle range of the tariff.

23. In ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) Gounder J observed at paragraph [27]

"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".

24. Learned sentencing Magistrate picked one year as the starting point from the bottom edge of the tariff. He made no reference to aggravating or mitigating circumstances. He considered only the circumstances of offending (paragraph 5). When the starting point is picked from the bottom end of the tariff, sentencing court is not required to give reasons for doing so as the guideline judgment recommends that the starting point should be picked from within the tariff band preferably from the lower or middle range of the tariff. There is no merit for this ground and should be dismissed.

25. The learned Magistrate cited the correct tariff for the offence of Indecent Assault that is reflected in paragraph [4] that is 12 months to 4 years' imprisonment as per ***Ratu Penioni Rokota v State*** Criminal Appeal No. HAA00068 of 2002 and further noted the observation made by Justice Shameem:

"Sentences for indecent assault range from 12 months' imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used

and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence. These are the general principles which affect sentencing under Section 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a five year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these."

26. Learned Magistrate picked the starting point of twelve months from the bottom end of the tariff before adjusting the sentence for aggravating and mitigating features. He reached the final sentence of eighteen months within the tariff.

27. He considered aggravating features and added 12 months. He deducted 6 months for mitigating features and finally arrived at a sentence of 18 months' imprisonment, with a non parole period of 12 months.

28. The learned Magistrate further noted the Appellant's clean record for the past 10 years as a mitigating factor (paragraph [9])

29. In his final sentencing remarks learned Magistrate considered the nature of the offending in this case and opined that a custodial sentence is inevitable. In other words, the learned Magistrate had directed his mind whether to suspending the sentence or not. Having considered the circumstances of the

offending he decided to impose an immediate custodial sentence.

30. The observation of Justice Shameem in ***Ratu Penioni Rokota v State*** *(A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these.")*, in my opinion, has not taken away the discretion of a sentencing court to consider any other ground /s that may prevent a suspended sentence being imposed.

31. In this case, the offence was committed on a vulnerable mother. She is a single handed woman. She was residing in a rented house belonging to Appellant's mother. After this incident she had to relocate herself with her family out of fear of the Appellant. The Appellant had threatened the Complainant and said *'if this matter leaks out, I will chop your husband'*. Under these circumstances, learned Magistrate's decision to impose a custodial sentence is not wrong in principle. There is no merit to this ground.

32. The Appellant argues that the learned Magistrate erred in law and in principle when he failed to apply the Sentencing and Penalties Decree [SPD] to guide his sentencing options. Even though the learned Magistrate did not directly quote the applicable section under the SPD, he has considered Section 4 (2) (b), (c) and (d) and further considered Section 18 (3). Therefore, there is no merit to this appeal and should be dismissed.

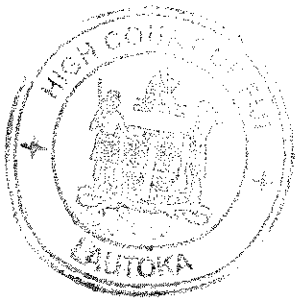
33. Further, the Appellant argues that the learned Magistrate failed to accord adequate reduction on mitigation factors. This has been considered by the learned Magistrate in paragraphs [8] to [10] of the sentencing Ruling.

Order

34. Conviction recorded by the learned magistrate is lawful and is available in evidence. Sentence is neither excessive nor unreasonable.

35. I affirm the conviction recorded and sentence imposed by the learned Magistrate. The appeal against conviction and sentence is dismissed.

36. 30 days to appeal to the Court of Appeal.



Aruna Aluthge

Judge

At Lautoka

28th April, 2017

Solicitors: Appellant in Person

Office of the Director of Public Prosecution for the Respondent