IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 26 OF 2016

BETWEEN: STATE

APPELLANT

AND: TIMOTEO VALAIBULU

RESPONDENT

Counsel : Ms S. Naibe for Appellant

: Mr W. Nainima for Respondent

Date of Hearing : 21st November, 2016

Date of Judgment : 31st January, 2017

JUDGMENT

Introduction

1. The Respondent was charged in the Magistrates Court at Ba with one count of Assault Occasioning Actual Bodily Harm contrary to Section 275 of the Crimes Decree 44 of 2009.

2. On the 8th of June 2016, the Respondent, a Police Officer pleaded guilty to the charge and also admitted the summary of facts prepared by the State.

3. The Respondent was then 'sentenced' on the 10th of June 2016. By his sentencing Ruling, the learned Resident Magistrate, pursuant to Section 45 (2) of the Sentencing and Penalties Decree, released the Respondent without conviction being recorded and, upon Respondent giving undertaking to comply with following conditions, adjourned proceedings for 12 months:

   a. *To be of good behavior within the duration of 12 months;*

   b. *Must not re-offend;*

   c. *Because this sentence is a non-conviction allowing you to resume employment you must strive in your career as a Police Officer and volunteer or otherwise into any courses or workshops in order to upgrade yourself on par with the modernization of a Police Force;*

   d. *Attend counseling within the Force or in the alternative the Family Court Counselor based in Suva Magistrates' Court on appointment.*

4. Being dissatisfied with the above 'sentencing Ruling' the Appellant filed a Petition of Appeal on the 17th of June, 2016 on following grounds:

   - *That the learned 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; and*

- *That the learned 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.*

Facts

5. *On the 13th March, 2016, wife of the accused (PW1) was inside the bedroom when the accused came inside to tell her to have lunch. PW1 told the accused that she will have lunch later. The accused started getting angry after a heated argument. PW1 then told the accused that she would rather giver their children to someone else because he is now with another lady and they are about to have a child together. The accused upon hearing this, punched PW1 on the face. PW1 then tried to save her face by blocking the punches with her hands.*

The accused then drank wine and rum, and started breaking the bottles on their house porch and also damaged some louver blades. The matter was reported to the Ba Police Station whereupon and the accused was arrested. The accused at the caution interview admitted punching PW1 only once.

Analysis

Propriety of No- Conviction Order

6. The offence of Assault Occasioning Actual Bodily Harm carries a maximum penalty of 5 years' imprisonment. The tariff for the said offence ranges from an absolute or conditional discharge to 12 months imprisonment.

7. Shameem J in the case of ***Tugalala*** [2008] FJHC 78 stated:

> *"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months' imprisonment.... That it is the extent of the injury which determines sentence".*

This guideline was also followed in a number of cases. ***State –v- Sat Narayan Pal Criminal Appeal No. HAC 059/2012, State –v- Shalendra Kumar Criminal Case No. HAC 143/2011*** *and also in* ***State –v- Tevita Bose Criminal Case No. HAC 248/2010.***

8. It appears that, according to the said guideline, even an absolute discharge could possibly have been ordered if the circumstances so warranted. The learned Magistrate apparently followed the said guideline and also preferred the approach taken by Gates J (as his Lordship then was) in ***Kumar*** [2001] FJLR 225 where His Lordship was determining the fate of a police officer who had assaulted his wife. Gates J ruled that the accused be discharged without conviction, saying:

> *"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 ....."*

9. The question arises as to whether the no conviction order recorded by the learned Magistrate was appropriate in this case, given the circumstances of the case before him and, particularly after coming into force the Sentencing and Penalties Decree and the Domestic Violence Decree in 2009.

10. The Respondent and the complainant in the substantive matter are married and therefore fall under the preview of Domestic Violence Decree 2009. In ***State v Prasad*** [2015] FJHC 493; HAA010.2015 (3 July 2015) Madigan J observed:

> *"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. A judicial officer can of course sentence outside that tariff if and only if he or she gives reasons for departing from the tariff".*

11. In ***Prasad*** (supra) Madigan J further emphasized:

> *"In a domestic violence context, a sentencing tribunal must take into account the factors set out in Section 4(3) of the Sentencing and Penalties Decree. Unfortunately, despite the word must contain in the Section, so many judicial officers don't.*

12. It is clear from the case record that the learned Magistrate had been informed of the said judgment in ***Prasad*** (supra) when he was contemplating the sentence. Nevertheless he preferred to follow ***Kumar*** (supra) which predates both Decrees mentioned above and the case authority cited. It should be noted that Gates J, in **State v *Batiratu*** [2012] FJHC 864; HAR 001/2012 (13 February 2012) sitting as the Chief Justice has recently added qualifications to his own decision in ***Kumar*** (supra) and elaborated the correct approach to be taken in following terms:

"absolute discharges are appropriate only in a limited number of circumstances such as where no moral blame detaches, where a mere technical breach of the law has occurred perhaps by imprudence without dishonesty."

13. The case before the learned Magistrate cannot be described as one having a technical breach or detaches moral blame. Even though the learned Magistrate had not ordered an absolute discharge, given the circumstances of this case, and considering the latest developments after coming into force the two Decrees mentioned above and also the judgment in ***Prasad*** (supra) which was brought to his notice, the learned Magistrate should have recorded a conviction and proceeded to sentence the Respondent.

14. To justify the order of no conviction and the adjournment with conditions, the learned Magistrate at paragraph 9 stated:

"In light of the ***Kumar*** *(supra) and* ***Batiratu*** *(supra) cases above I find myself leaning more towards the* ***Kumar*** *(supra) approach as reflected in the provisions of the Sentencing & Penalties Decree 2009 however I do not intend to granting an absolute discharge. This court accepts that apart from being provoked which led to this offence 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. 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 & Penalties Decree 2009 without conviction and adjourn the proceedings for 12 months with an undertaking by you of the following":*

15. It is clear from the above passage that the learned Magistrate's decision not to record a conviction had not been based apparently on the fact that the Respondent was a police officer, as has been alleged by the Appellant. Instead he considered the Respondent's office as an aggravating factor when the learned Magistrate at paragraph 7 said:

> *"The offence you committed is serious. You are a police officer and therefore supposedly a custodian of law and order"*

16. Quite surprisingly, having acknowledged that the offence committed was serious and the fact that the perpetrator was a custodian of the law, the learned Magistrate decided not to record a conviction, a decision to my mind is rather awkward.

17. Equality before the law is strongly entrenched right in our Constitution. Madigan J in ***Prasad*** (supra) observed:

> *"Since Batiratu (supra), it is now a well-entrenched truth in our criminal law that nobody is above the law. The Chief Justice there and this Court here give a loud voice of application of human dignity, equality and freedom as enshrined in section 3(1) of the Constitution 2013".*

18. Furthermore, it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done ***R v Sussex Justices, Ex parte McCarthy*** ([1924] 1 KB 256, [1923] All ER Rep 233). When a police officer, a custodian of the law and order is punished leniently by a court, it

is inevitable that such a decision being viewed by the general public with a degree of skepticism. Judiciary should be mindful of that aspect also.

19. There can be no doubt that the learned Magistrate took into account Respondent's personal circumstances outlined in paragraph 3 of the Ruling which included Respondent's remorsefulness and the effort at reconciliation.

20. As a matter of principle, a sentence imposed for an offence of domestic violence should be determined by the seriousness of the offence, not by the expressed wishes of the victim. Nonetheless, there may be circumstances in which the court can properly mitigate a sentence to give effect to the expressed wish of the victim so that the relationship be permitted to continue or in the interest of children. The court must, however, be satisfied that such a wish is genuine, and that giving effect to it will not expose the victim or children to a real risk of further violence.

21. The learned Magistrate has sated in Paragraph 3:

> *"You are sorry and remorseful for your stupid actions. You promise not to re-offend and seek the leniency of this court. Further, your wife confirms that both of you have reconciled and you both wish to make a fresh start from hear. She has also been visibly present throughout your appearances in court thus far".*

22. It appears that the learned Magistrate merely relied on victim's expressed wish and her visible presence in court. He should have further inquired into the genuineness of victim's expressed wish specially in a context that her husband

was a police officer and ought to have been certain that her wish would not have been induced by threat made by, or by a fear of, her husband.

23. In these days where domestic violence is very much in the forefront of the public consciousness, police officers who are tasked to uphold the law and specially the Domestic Violence Decree must not be seen to stay above the law.

24. Madigan J. in ***Prasad*** (supra) observed:

> *"An appellate Court would upset the exercise of judicial discretion in a Court below very rarely, however in balancing here the competing interests of the State and the accused it has to be determined that the strict provisions of the Domestic Violence Decree must flow on to a policeman charged with assaulting his wife. There is no evidence before the Court either below or here that would say that his future in the Force would be affected but in any event that is a factor that he should have considered before launching a physical attack on his wife who had extended to him very little if any provocation".*

25. The learned Magistrate considered the Respondent's offence as one provoked by the victim. When it is asserted that the offence has been provoked by the conduct of the victim, such assertions for mitigation should be treated with great care, both in determining whether they have a factual basis and in considering whether in the circumstances the alleged conduct amounts to provocation sufficient to mitigate the seriousness of the offence.

26. It appears from the summary of facts admitted; the victim had given a little provocation. The Respondent had admitted that he started getting angry after a heated argument and punched the victim on the face.

27. Punches around the head are potentially dangerous and in this case a disproportionate reaction to an argument over him staying with another woman. After punching the victim, the Respondent drank wine and rum and started breaking the bottles on their house porch and also damaged louver blades.

28. There is no reason why there should be no conviction recorded in the case before the learned Magistrate. Therefore, pursuant to section 256(2) of the Criminal Procedure Decree 2009, I quash the adjournment order made in the Court below and order that a conviction be recorded.

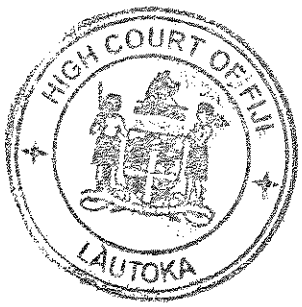
29. Having considered the personal circumstances of the Respondent and other strong mitigating factors placed before the learned Magistrate, I would proceed to sentence the Respondent afresh.

30. The Respondent had entered a plea of guilty to the offence at the first available opportunity, he was a first offender, he had reconciled with the victim and he was relatively young. I would attach a high degree of leniency to Respondent's sentence.

31. I sentence the Respondent to six months' imprisonment. Having considered the provisions of the Sentencing and Penalties Decree, his strong mitigating factors and his wish to rehabilitate and reconcile with his wife, I suspend the sentence for a period of two years.

32. I impose a Domestic Violence Restraining Order on the Respondent as perpetrator and the wife as the protected person, which will remain in force until further orders.

33. Before I conclude, I would like to emphasize that this sentence passed in special circumstances is not to be regarded as a precedent sentence for police officers assaulting their wives.



Aruna Aluthge

Judge

At Lautoka

31st January 2017

Solicitors: **Office of the Director of Public Prosecution for Appellant**

Office of the Legal Aid Commission for Respondent