IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

SAMUELA DURUKATIA

Appellant

CASE NO: HAA. 14 of 2017
[MC Nausori, Crim. Case No. 139 of 2012]

Vs.

STATE

Respondent

Counsel	:	Ms. C. Choy for Appellant Ms. S. Lodhia for Respondent
Hearing on	:	21st September, 2017
Judgment on	:	31st October, 2017

JUDGMENT

1. The appellant was convicted of the following offence after trial by the magistrate court on 14/11/16;

FIRST COUNT
Statement of Offence
SEXUAL ASSAULT: contrary to section 210 (1)(a) of the Crimes Decree 2009.

Particulars of Offence
SAMUELA DURUKATIA, on the 12th day of September 2012 at Kumi Village, Verata, Tailevu in the Eastern Division unlawfully and indecently assaulted A M (name suppressed) a 3 years old child by touching her vagina.

2. The appellant was sentenced on 23/01/17 for 5 years imprisonment with a non-parole period of 4 years.

3. The appellant assails the sentence imposed by the Learned Magistrate based on the following grounds of appeal;

   a) *That the sentence imposed was very harsh and excessive due to the given facts that the appellant was a first offender.*

   b) *The learned magistrate erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence which conflicts with the appellant's prospects for rehabilitation provided by section 4(1)(d) of the Sentencing and Penalties Act 2009.*

   c) *The learned magistrate erred in principle and erred in exercising his sentencing discretion when he deducted 12 months for mitigation which included the time he had spent in remand which should have been deducted separately.*

4. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

   "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 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) 55 CLR 499)."

5. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had;

   a) acted upon a wrong principle;

   b) allowed extraneous or irrelevant matters to guide or affect him;

   c) mistook the facts; or

   d) did not take into account some relevant consideration.

6. The evidence led before the Learned Magistrate had revealed that the appellant had taken the 3 year old victim inside the house, pulled up her clothes and rubbed her naked genitalia with his hand. The appellant is related to the victim.

7. When sentencing the appellant, the Learned Magistrate had identified the correct sentencing tariff applicable to the offence of sexual assault under section 210(1) of the Crimes Act which is 2 years to 8 years imprisonment. The Learned Magistrate then considered the fact that the appellant had rubbed the naked genitalia of the victim with his hand which is a factor that was not subsequently considered as an aggravating factor, in selecting the starting point of 4 years. In doing so, the Learned Magistrate had relied on the decision in the case of ***State v Laca*** [2012] FJHC 1414; HAC252.2011 (14 November 2012). Thereafter 2 years were added in view of the aggravating factors and 1 year was deducted for mitigating factors to arrive at the final sentence of 5 years imprisonment. The mitigating factors considered by the Learned Magistrate included the 07 days the appellant had spent in custody.

8. The issue raised on the first ground of appeal is that the sentence is harsh an excessive given the fact that the appellant was a first offender. However, the appellant's main submission on this ground is that in selecting 4 years as the starting point, the Learned Magistrate failed to apply the following dictum in the case of ***Koroivuki v State*** [AAU 018 of 2010];

> *"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."*

9. It is pertinent to note that the appellant does not complain about the discount the Learned Magistrate had given in view of the fact that the appellant was a first offender. As stated above, the appellant's main argument on the first ground is that in selecting 4 years as the starting point, the Learned Magistrate failed to apply the 'principle of good practice' stipulated in ***Koroivuki v State*** (supra).

10. It is clear that in this case, a certain aspect of the actual offending which can clearly be regarded as an aggravating factor had been taken into account by the

Learned Magistrate in selecting the starting point of 4 years where the applicable sentencing tariff is 2 years to 8 years imprisonment.

11. The Learned Magistrate had in fact relied on the categorisation of the sexual assault offences which is based on the nature and the place of contact as outlined in the case of ***State v Laca*** (supra) in selecting the starting point of the appellant's sentence. The aforementioned categories are;

> ***Category 1*** *(the most serious)*
> *Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.*
>
> ***Category 2***
> *(i) Contact between the naked genitalia of the offender and another part of the victim's body;*
> *(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*
> *(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.*
>
> ***Category 3***
> *Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).*

12. Though the aforementioned decision in ***State v Laca*** (supra) does not clearly explain how the above categories should be used in the sentencing process, according to paragraph 10 of the said decision it can be inferred that the categories are to be used when selecting the starting point. Therefore, in fact the appellant is challenging the decision in ***State v Laca*** (supra) based on what was held in the judgment in ***Koroivuki v State*** (supra) with regard to the selecting of the starting point of a sentence.

13. On the face of it, what is proposed in ***State v Laca*** (supra) with regard to sentencing in cases of sexual assault is not consistent with the practice outlined by

the Court of Appeal in ***Koroivuki v State*** (supra) where it was held that no reference should be made to the aggravating and mitigating factors in selecting the starting point and that the starting point should be based on the objective seriousness of the offence.

14. Therefore, the issue raised on the first ground of appeal in fact is, whether the approach outlined in ***State v Laca*** (supra) in selecting the starting point when it comes to cases of sexual assault which the Learned Magistrate had applied in the case at hand, is a wrong principle in sentencing.

15. It is necessary to carefully look at the sentencing process in order to find the answer to the above question. It is well established that the punishment should be proportionate to the gravity of the offending. Therefore, where the punishment is a term of imprisonment, a judge or a magistrate is required arrive at an imprisonment term that corresponds to the nature and the seriousness of the offending. The two-tier method of sentencing which is widely applied in Fiji is a method of reasoning that assists the sentencer to arrive at a sentence that is proportionate to the seriousness of the offending. The sentencer is required to select a starting point; then add a period of imprisonment that would correspond to the aggravating factors; and thereafter deduct a period that would correspond to the mitigating factors. It is therefore necessary that the same factor is not taken into account more than once during the sentencing process when using the two-tier method.

16. In my view, the paragraph from the judgment in the case of ***Koroivuki v State*** (supra) alluded to above at paragraph 11 of this judgment stipulates the best method of selecting the starting point of a sentence in order to arrive at a just and a proportionate sentence for a particular offending when applying the two-tier approach. Not taking into account the aggravating and mitigating factors but only the objective seriousness of the relevant offence when selecting the starting point, prevents the possibility of double counting. As the appellant himself had submitted, what was laid down in ***Koroivuki v State*** (supra) is a 'principle of good practice' that would prevent double counting when using the two-tier

approach of sentencing.

17. However, it is my considered view that the approach in ***State v Laca*** (supra) which the Learned Magistrate followed to select the starting point of the sentence in the instant case does not violate any principle of law though the said approach is not in line with the aforementioned principle of good practice pronounced in ***Koroivuki v State*** (supra). It would not amount to an error in law to take into account a particular aggravating factor or a mitigating factor when selecting the starting point in using the two-tier approach as long as the sentencer does not consider that same factor at a later stage in the sentencing process again to adjust the sentence.

18. The tariff for the rape of a child is another example where an aggravating factor of the actual offending is required to be taken into account when the starting point is selected.

19. The sentencing tariff for the offence of rape where the victim is an adult is 7 to 15 years imprisonment (***State v Marawa*** [2004] FJHC 338) and where the victim is a child the tariff is 10 to 16 years imprisonment (***Raj v State*** [2014] FJSC 12; CAV0003.2014 (20 August 2014)). However, the penalty for the offence of rape as provided in the Crimes Act is life imprisonment and the said Act does not provide that different penalties should be imposed based on the age of the victim. Given the above sentencing tariff for the rape of a child, the minimum sentence that should be selected as the starting point is 10 years imprisonment compared to the 7 years that is applicable when the victim is an adult. It is manifestly clear that the fact that the victim is a child which is in fact an aggravating factor reflected in the actual offending is taken into account when a court selects 10 years as the starting point for the sentence for the rape of a child victim based on the tariff established in ***Raj v State*** (supra).

20. All in all, I find that it is not wrong in law to select an appropriate starting point based on the severity of the offending assessed using the categorisation outlined in ***State v Laca*** (supra) when sentencing an offender for the offence of sexual

assault, provided that the relevant factor considered to place the offending in the relevant category is not considered again as an aggravating factor to further enhance the sentence.

21. Moreover, considering the facts of this case including the fact that the victim was 3 years old at the time of the offence, the imprisonment term of 5 years imposed by the Learned Magistrate in my view is not excessive. The said sentence is well within the applicable tariff. Therefore, the first ground of appeal fails.

22. Before moving on to the second ground of appeal, I wish to make one observation with regard to the 1st category outlined in ***State v Laca*** (supra). Section 210(2) of the Crimes Act provides a different penalty when the sexual assault involves bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.

23. Therefore, offences where the sexual assault involves contact between the genitalia of the offender and the mouth of the victim which would fall under the 1st category outlined in ***State v Laca*** (supra) do not in fact come under the purview of section 210(1) of the Crimes Act but under section 210(2) and the sentencing tariff established in the case of ***State v Ratawake*** [2016] FJHC 1078; HAC223.2015 (28 November 2016) should be applied in such cases.

24. On the second ground of appeal, the appellant submits that the non-parole period fixed by the Learned Magistrate is too close to the head sentence. The non-parole period fixed by the Learned Magistrate in this case was 4 years.

25. In terms of section 18(1) of the Sentencing and Penalties Act, 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. Section 18(4) of the Sentencing and Penalties Act provides that any non-parole period fixed under section 18 of the said Act must be at least 6 months less than the term of the sentence.

26. This ground of appeal is a ground that had been canvassed frequently before the

appellate courts. However, no criteria have been established thus far on fixing of the non-parole period.

27. It is pertinent to note that a sentencer would go through a careful reasoning process in order to arrive at the appropriate term when imposing a term of imprisonment. In my view, a further procedure to arrive at the non-parole period is not required for the reason that the sentencer would have a clear assessment on the seriousness of the offending at the time the non-parole period is fixed. For instance, in the case at hand the appellant was sentenced to only 5 years imprisonment in view of the applicable tariff and other sentencing principles where the maximum penalty for the offence is 10 years imprisonment.

28. What is required by law is for the non-parole period to be at least 6 months less than the head sentence as provided under section 18(4) of the Sentencing and Penalties Act. Therefore, where the term of imprisonment imposed is 2 years or more, any non-parole period which is 6 months less than that term of imprisonment is within the discretion of the sentencer and is lawful. There is no merit in the second ground of appeal.

29. On the third ground of appeal, the appellant submits that the Learned Magistrate erred in principle by not deducting the period of 7 days the appellant was held in custody, separately.

30. Section 24 of the Sentencing and Penalties Act provides thus;

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

31. Mitigating factors warrant a deduction of the sentence. However, the time an offender had spent in remand cannot be regarded as a mitigating circumstance simply because that period should be deducted (unless otherwise decided) from the sentence in terms of section 24 of the Sentencing and Penalties Act.

32. In my view, it would be wrong in principle to consider the period an offender had spent in custody prior to the trial as a mitigating factor.

33. However, in the case at hand, considering the fact that the appellant had spent only 7 days in remand and the fact that the Learned Magistrate had given a discount of 12 months in arriving at the final sentence where the only proper mitigating factor was the fact that the appellant was a first offender, I am satisfied that the Learned Magistrate had duly deducted the aforementioned 7 days from the appellant's sentence as required by section 24 of the Sentencing and Penalties Act.

34. In the light of the above, I would dismiss this appeal. The sentence imposed by the Learned Magistrate in Magistrate Court Nausori, Crim. Case No. 139 of 2012 is affirmed.

Vinsent S. Perera
JUDGE

Solicitors for the Appellant : Legal Aid Commission, Suva.
Solicitors for the State : Office of the Director of Public Prosecutions, Suva.