IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 32 OF 2017

BETWEEN: THE STATE

APPELLANT

AND: AISAKE LAGILAGI SALATO

RESPONDENT

Counsel : Ms. S. Naibe for Appellant

: Mr. Mohammed Yunus for Respondent

Date of Hearing : 24th October, 2017

Date of Ruling : 15th November, 2017

JUDGMENT

INTRODUCTION

1. This is an appeal filed by the State against the sentence passed by the learned Magistrate at Lautoka in case No. 470 of 2016.

2. The Respondent was charged in the Magistrates Court at Lautoka with one count of Causing Grievous Harm contrary to Section 258 of the Crimes Act 2009.

3. On 17th October, 2016, the Respondent pleaded guilty to the charge on his own free will and was found guilty when he agreed the summary of facts filed by the State.

4. As per the Court Record, a conviction was entered on the same day whereupon mitigating factors were recorded.

5. The matter was adjourned twice for farther mitigation in view of possible reconciliation.

6. On, 24th January, 2017, the victim was present in Court and confirmed reconciliation. The police prosecutor indicated that *'this is a reconcilable offence and court had the power to terminate proceedings –leave it to the court'*.

7. The learned Magistrate proceeded to sentence and, by his written Ruling dated 6th March, 2017; the Respondent was sentenced to 9 months' imprisonment suspended for 2 years. The Respondent was also ordered to pay a compensation of FJD 500 to the victim.

8. In his Ruling, the learned Magistrate, at paragraph 2, reconfirmed the conviction. However, at paragraph 9, the learned Magistrate, having considered the negative impact the conviction would have on Respondent's economic wellbeing and prospects of his employment as a police officer, did not to record a conviction.

9. Being dissatisfied with the said Ruling, the State filed this timely appeal against the said sentence on following grounds:

   I. That the learned Magistrate erred in law in not imposing a conviction on the ground that the respondent is a police officer; and

   II. That the learned Magistrate erred in law and in fact when he imposed a sentence that was below the tariff for this type of offending and was manifestly lenient.

The Law

10. 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 by the Court of Appeal in ***Kim Nam Bae v The State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999).

11. In ***Bae v State*** (supra), the Fiji Court of Appeal 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)".

12. 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.*

The Facts

13. The summary of facts admitted by the Respondent reads as follows;

> *The victim in this matter is TIMOCI BAVADRA (PW 1), 17 years old, Unemployed of Tomuka, Lautoka.*
>
> *On the 23rd of April, 2016 at about 11.00 pm at Shirley Park, Lautoka, PW 1 was sitting down with two of his friends namely; JONE RATUMAIBAU (PW 2) and MELI SEREVI (PW 3), both Students of Tomuka, Lautoka. The Accused was on Mobile Patrol around the city and he was driving vehicle registration number GP 119. The Accused parked the vehicle along Shirley Park and approached PW 1 and confronted him about going to his home, swearing and threatening his family. PW 1 denied the allegation and then the Accused swore at him, punched him on the mouth and then hit his head with a black torch light several times.*
>
> *PW 2 and PW 3 were both with PW 1 at the material time and place, they saw the Accused punching PW 1 several times on the face and also hitting PW 1's jaw and head with a black torch light.*
>
> *The matter was reported at the Lautoka Police Station. PW 1 was then taken for medical examination at the Lautoka Hospital. PW 1 was admitted at the Surgical Ward for 2 weeks with a broken jaw. Accused was arrested; caution*

interviewed and was later charged with Grievous Harm contrary to Section 258 of the Crimes Decree No. 44 of 2009.

Ground 1 **That the learned Magistrate erred in law in not imposing a conviction on the ground that the respondent is a police officer**

14. It appears that the learned Magistrate has exercised his direction ostensibly under Section 16 of the Sentencing and Penalties Act (SPA) when he did not record a conviction.

15. In exercising its discretion whether or not to record a conviction, a court under Section 16(1) of the SPA, must have regard to all the circumstances of the case, including

    (a) the nature of the offence

    (b) the character and past history of the offender;

    (c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

16. The learned Magistrate appears to have considered only ground (c) above when he stated (at para 9):

    "The conviction against you will have an impact on your economic and social wellbeing and also you have a prospect in your employment as a police officer".

17. It has to be accepted that grounds specified in Section 16(1) are not exhaustive. However, the learned Magistrate under this section was required at the minimum to have regard to the nature of the offence and the character and past history of the offender. The learned Magistrate failed to consider other two circumstances in Section 16 (1) or any other ground that would support his decision as to why a conviction should not be recorded.

18. A conviction is likely to affect Respondent's occupation as a police officer and have an impact on his economic or social well-being. That is a factor that the Respondent should have considered before launching a physical attack on an unarmed civilian. He is not a plumber from Raiwanqa but a responsible police officer of the Fiji Police Force with 7 years' experience. The country expects a high degree of professionalism and self-discipline from law enforcement officers.

19. It is apparent from the summary of facts that the Respondent had approached the victim whilst engaged in his official duty on mobile patrol around the city. The victim was a 17-year-old youth sitting down near the Shirley Park with

two of his friends when the incident occurred. The assault took place in a public place in the presence of two of victim's friends (PW 2. and PW3).

20. Causing grievous harm to an unarmed civilian by a police officer in a public place is a serious matter. There is no evidence that the victim offered any resistance or provocation at the time of the incident. If the victim had in fact threatened his family, the most prudent step that the Respondent should and could have taken as a police officer was to deal with the victim under the law instead of taking the law into his own hands.

21. As a matter of public policy, failure to denounce and condemn such actions in strongest terms by courts will send a distorted message to the society and will have drastic consequences on the rule of law of the country.

22. The learned Magistrate took personal circumstances of the Respondent without having due regard to the harm caused to the victim who had suffered serious injuries resulting him being hospitalized for two weeks.

23. The offence of Causing Grievous Harm is a serious offence carrying a maximum sentence of 15 years' imprisonment. The tariff is between 2 and 6 years' imprisonment when a weapon is used to cause injuries ***Patel v State*** [2011] FJHC 669; HAA030 2011, ***State v Mokubula*** [2003] FJHC 164; HAA0052J.2003S (23 December 2003)

24. This offence is not a reconcilable offence under Section 154 of the Criminal Procedure Act although the police prosecutor had wrongly submitted to the learned Magistrate otherwise. Not only is Causing Grievous Harm not included in the list of offences where reconciliation may be considered for a non-conviction, the offence is one too serious by its nature for the matter to be dealt in such a way.

25. There can be no doubt that this case is not a technical breach or one where no moral blame detaches. In these days police brutality is very much in the forefront of the public consciousness, police officers who are tasked to uphold the law must be also seen to stay within the law. Since *State v Batiratu HAR 001/2012 (13 February, 2012),* it is 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 human dignity, equality and freedom as enshrined in Section 3(1) of the Constitution 2013 [per Madigan J in ***State v Prasad*** [2015] FJHC 493; HAA010.2015 (3 July 2015)]. There is no reason why there should be no conviction recorded in the present case.

26. I observe another defect in learned Magistrate's Ruling where he ordered a sentence of imprisonment without a conviction being first recorded.

27. The learned Magistrate found the Respondent guilty in the first place. Section 15 of the Sentencing and Penalties Act (SPA) allows a court to make following orders upon being satisfied that a person is guilty of an offence.

> *15. (1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this Decree —*
>
> *(a) record a conviction and order that the offender serve a term of imprisonment;*
>
> *(b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;*
>
> *(c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;*
>
> *(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;*
>
> *(e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act [Cap. 22];*
>
> *(f) with or without recording a conviction, order the offender to pay a fine;*
>
> *(g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;*
>
> *(h) record a conviction and order the discharge of the offender;*
>
> *(i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;*
>
> *(j) without recording a conviction, order the dismissal of the charge; or*
>
> *(k) impose any other sentence or make any other order that is authorised under this Decree or any other Act.*

28. Pursuant to this section, a non-conviction can be recorded under (e), (f), (i) and (j) above. The learned Magistrate, having recorded a non-conviction, did not make any of the orders prescribed in the section. He did not order community work under (e) or impose a fine under (f); he did not release the Respondent on a binding over order under (i) or did not dismiss the

discharge under (j) above. Instead, the learned Magistrate imposed a suspended term of imprisonment and ordered compensation. It is clear that a term of imprisonment whether suspended or not can be imposed only upon a conviction being first recorded. The learned Magistrate fell into error when he imposed a sentence of imprisonment without a conviction being first recorded. Therefore, this ground should succeed.

Ground (ii) That the learned Magistrate erred when he imposed a sentence that was below the tariff as it was manifestly lenient.

29. The maximum sentence for the offence of Causing Grievous Harm is 15 years' imprisonment. The learned Magistrate did not correctly identify the tariff for the Crimes Act offence when he said that the tariff is between six months and 5 years. The Respondent had used a weapon capable of inflicting serious injuries. Even the learned Magistrate observed that an excessive use of a torch could be fatal.

30. In *Patel v State* [2011] FJHC 669; HAA030.2011 (27 October 2011) Madigan J stated that the tariff for Section 258 offence should be 2 to 6 years' imprisonment. The Counsel for Respondent does not dispute this tariff. In *Patel* (supra) the Court confirmed a term of thirty months' imprisonment for appellant who had pleaded guilty to causing grievous harm by throwing a beer bottle onto his brother's head causing serious injuries.

31. The learned Magistrate further fell into error when he selected a starting point of 18 months, below the tariff, without giving justifiable reasons. As a good sentencing practice, the starting point should be picked from lower of middle range of the tariff and the final sentence should fall within tariff.

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

33. The learned Magistrate also failed to observe the use of considerable degree of violence and lack of provocation as aggravating factors. Therefore, this ground too should succeed.

34. Having said that I would attach a degree of leniency to this Respondent's sentence for following reasons.

35. Firstly I direct my mind to the reasonable expectation theory expounded by Madigan J in ***State v Prasad*** [2015] FJHC 493; HAA010.2015 (3 July 2015) where it was observed:

> *"On any review where a lenient sentence is to be replaced by a harsher penalty, that harsher sentence should be alleviated to compensate for the accused's reasonable expectation that his case had been dealt with and determined presumably to his satisfaction".*

36. Secondly, the Respondent has already complied with the order of the Magistrate that he must pay FJD 500.00 to the victim as compensation.

37. Finally, the Respondent had strong mitigation features available to him in that he had entered a plea of guilty to the offence, he was a first offender, he had reconciled with the victim and he was relatively young.

Conclusion

38. Pursuant to section 256(2) of the Criminal Procedure Act 2009, I quash the Magistrate's non-conviction order and it is ordered that a conviction be recorded.

39. Pursuant to Section 256(3), I impose a sentence as follows. I select a starting point of 2 years from the bottom end of the tariff. I add one year for above stated aggravating circumstances and deduct one year for mitigating circumstances to arrive at a sentence of 2 years' imprisonment.

40. The Respondent is a young and first offender. He is remorseful and pleaded guilty to the count at the first available opportunity. When considered the strong mitigating circumstances and Respondent's prospects of rehabilitation, a partly suspended sentence is not obnoxious in this case. Since the sentence has not exceeded 2 years, I order a suspension half of his sentence pursuant to Section 26 (1) of the Sentencing and Penalties Act. Accordingly the Respondent is to serve only 12 months in prison and 12 months of his sentence is suspended for a period of 2 years.

41. Purpose and effect of the suspended sentence and consequences of breach are explained to the Respondent.

Summary

42. The Respondent is convicted. He is sentenced to two years imprisonment. Half of the sentence is suspended for a period of 2 years. Accordingly the Respondent is to serve only 12 months in prison.

43. 30 days to appeal to the Court of Appeal.

Aruna Aluthge

Judge

AT LAUTOKA

15th November, 2017

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

Mr. Mohammed Yunus for Respondent