

**IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
APPELLATE JURISDICTION.**

**Criminal Appeal No.108 of 2017Ltk.**

**VILIAME MATAI**

**Appellant**

**vs**

**THE STATE**

**Respondent**

**Date of hearing: 16 January 2018**

**Date of Judgment: 26 January 2018**

**Ms. J. Singh (L.A.C.) for the Appellant**

**Mr. A. Singh for the State.**

**JUDGMENT**

**(New Domestic Violence Tariff)**

1. On the 1<sup>st</sup> day of August 2017 at the Magistrates Court in Lautoka, the Appellant entered an unequivocal plea to one count of Assault causing actual bodily harm and one count of breach of suspended sentence. He was sentenced to a term of 10 months for the assault count and the suspended sentence of 6 months was ordered to be restored and after receiving credit of 2 weeks for time spent in custody, he was sentenced to a total term of 15 months and 2 weeks' imprisonment.
2. It is against this sentence that the appellant appeals on the following two grounds.
  - a) That the learned Magistrate acted upon wrong principles and considered irrelevant factors in reaching his final sentence.
  - b) That the learned Magistrate failed to consider that there was no weapon, the level of culpability and harm was not high and as such the sentence was harsh and excessive in all the circumstances of the case.

### **Facts**

3. The facts agreed to by the Appellant below are these:

*On the 30<sup>th</sup> July, 2017 at about 7.30am at Rifle Range, Lautoka, (the accused) 48yrs, market vendor assaulted Sainimili Senikuba, complainant, 37 years, market vendor of the same address.*

*On the above mentioned date, time and place the complainant was sleeping when her husband (the accused) who was drunk woke her up. After that both complainant and accused had an argument about their electric BBQ pan. The argument heated up accused then punched complainant on her mouth.*

*The accused was serving a sentence of 6 months imprisonment suspended for 3 years (case file no noted) on 2<sup>nd</sup> October 2016 when he committed the offence (sic).*

### **The Sentence Below**

4. The learned Magistrate made note of the fact that the offence for which he was serving a suspended sentence was for the same as this instant offence, namely an assault causing bodily harm to his wife. In addition to the suspended sentence he had been made subject to a domestic violence restraining order in favour of the wife as protected person. That order had clearly been breached but no charge was laid in respect of that.
5. The Magistrate then went on to say that he found it to be an aggravating factor that this present offence was a domestic violence offence.
6. The court below acknowledged the mitigation advanced for the appellant: that he is 48 years old with 3 children and that the offence was committed as a result of "uncontrolled anger, influenced by wrong decision" and his plea for forgiveness given his remorse. He had 24 previous convictions, and most importantly he relied on his early plea of guilty to the charges. He was said to be seeking counseling and guidance from his church elders.
7. In casting his sentence, the Magistrate declared the tariff of domestic assault to be from 9 to 12 months before taking a starting point at the lower end, 9 months. He then added a further 7 months for the "aggravating factor" which he had

earlier declared to be that the crime was one of crime being domestic violence. From that interim figure of 16 months he deducted 3 months for the mitigating factors and another 3 months for the early guilty plea. The final sentence for the assault was a term of 10 months. He went on to activate the suspended sentence (6 months) which had been breached, allowing 2 weeks for time spent in custody. It is the final composite sentence of 15 months and 2 weeks that is being appealed.

### **The Law**

8. The maximum penalty for the crime of assault occasioning actual bodily harm is a term of 5 years imprisonment and it now accepted that the tariff is from 6 to 9 months.

9. This Court said in **Sikitoro** [2010] FJHC 466(22 October 2010):

*“The cases of Elizabeth Joseph [2004] HAA03 and Tevita Alati [2004] HAA73 establish a tariff of 9 to 12 months imprisonment, the severity of the wound being the determining factor in the starting point. However sentences of 18 months have been upheld in domestic violence cases. “*

In the case of **Amasi Korovata** Cr.App HAA 115 of 2006, Shameem J. dealt with a domestic assault all too similar to the present appeal. In that case, the husband kicked his wife in the mouth while she lay on the floor, knocking out 4 of her teeth. He had 22 previous convictions and 9 months previously had been convicted of the same offence on his wife and had been made the subject of a restraining order, restraining him from approaching his wife.

10. Shameem J. upheld a sentence of 18 months imposed by the Magistrate and in doing so said:

*“This Court has a duty to protect the vulnerable from violence. The tariff of a suspended sentence to 3 years imprisonment is designed to cover a wide variety of assault cases. This is one of the most serious. This was a second attack on her. She was kicked on the mouth. The Appellant was in breach of two Court orders, imposed by different Courts. In these circumstances the 18 month term was justified. .... The terms imposed do not exceed the maximum end of the tariff for assault occasioning actual bodily harm “.*

11. Shameem J. could well have been writing that paragraph in respect of this case, apart from the fact that here we have a punch to the mouth and not a kick.

12. This Court would agree. Absent evidence of any provocation (the victim was asleep), and it being a second attack while the assailant was on a suspended sentence, no leniency can be shown to the accused.
13. In light of Shameem J.'s finding (*supra*) it must now be said that the tariff for a domestic violence assault causing actual bodily harm is a wide range of 6 to 18 months, wide enough to cater for all kinds of injuries. It would be only in exceptional circumstances that a suspended sentence would be passed for the offence, given that sending the convict back into the family home could well have perilous consequences. For a second offence on the same victim, a suspended sentence is inconceivable.
14. The appellant is correct: the Magistrate in this case has fallen into error by punishing him twice by taking the domestic violence tariff and then adding time for the fact that it is a domestic violence offence. But given this Courts views as to the seriousness of the offence, the final sentence of 10 months is lenient in the circumstances and it will not be disturbed.
15. For the avoidance of doubt, the sentence for breach of suspended sentence will also remain undisturbed.
16. The appeal is dismissed.
17. A fresh Domestic Violence Restraining Order is now made against the Appellant as perpetrator and Sainimili Senikuba the protected person, such order to remain in place until further order made in the High Court.
18. **Orders of the Court:**
  1. Appeal is dismissed.
  2. Sentence of 10 months for assault (s.275) is undisturbed.
  3. Total sentence of 15 months and 2 weeks is also undisturbed.
  4. DVRO re-issued.



**Paul K. Madigan**  
**Judge**