

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA07 OF 2018

(Magistrates' Court Case No. 555 of 2017)

BETWEEN: **PAULO ISOA TUIWAINUNU**

APPELLANT

AND: **THE STATE**

RESPONDENT

Counsel: **Appellant in person**
 Mr R Kumar for the Respondent

Date of Hearing: **08 June 2018**

Date of Judgment: **08 June 2018**

JUDGMENT

- [1] This is a timely appeal against sentence only.
- [2] On 8 December 2017, the appellant was charged with one count of criminal intimidation contrary to section 375 of the Crimes Act. He was produced in the Magistrates' Court on the same day. He waived his right to counsel and freely and voluntarily pleaded guilty to the charge. He was released on bail pending sentence. On 14 March 2018, the appellant was sentenced to 19 months imprisonment, 10 months to be served in prison and the balance suspended for 2 years.

[3] The grounds of appeal in summary are:

- (i) The starting point was too high.
- (ii) Double counting of aggravating factors in the starting point.
- (iii) The sentence is wrong in principle.

[4] The victim is the appellant's spouse. At the time of the offence the victim had gone to her parents village for a visit while the appellant had remained at his village in Kanakana. He was 46 years old while she was 40 years old when the alleged incident occurred.

[5] On 5 December 2017, the appellant after hearing rumours that his wife was outgoing during her visit to her village went to confront her. When he arrived at her village, he got himself drunk with kava and homebrew. At around 2am in the morning, he went to the victim's house to talk to her. The victim refused to have a conversation with him because he was drunk. He got angry and threatened to chop her. The victim got scared and ran away from her home and hid herself.

[6] In his caution interview, the appellant said that he was so drunk that he had no recollection of the words uttered to the victim.

[7] In his sentencing remarks, the learned magistrate referred to the maximum penalty of 5 years imprisonment prescribed for criminal intimidation and the tariff of 1- 4 years imprisonment in accordance with the case of *State v Anasa Baleinabodua & Tevita Seru* [2012] HAC 145/10S. She used 27 months as a starting point and added 6 months for the breach of trust arising from the domestic relationship as an aggravating factor. The starting point was within the range and there was no double counting.

[8] She gave a separate one-third discount for the early guilty plea. However, she did not consider that the guilty plea was a true expression of remorse. Instead, the learned magistrate measured the genuineness of the appellant's guilty plea as a measure of remorse by depriving the appellant any credit for his previous good character. The learned magistrate said at para 8.2:

“...Although you are a first offender, this (sic) nothing to show you are remorse. You continue to rant in your mitigation why she had left you without acknowledging that you were wrong.”

- [9] The approach was wrong. Previous good character was a separate mitigating factor. It should not have been used to measure whether the appellant was remorseful and taking responsibility for his conduct. Genuineness of the guilty plea as a measure of remorse should have been determined with the timing and consistency of the guilty plea. The appellant took responsibility for his conduct and pleaded guilty to the charge on the first appearance before the Magistrates' Court.
- [10] There was no evidence of any previous history of violence towards his spouse. When he uttered the threatening words, he did not have any weapon with him. He did not inflict any physical violence on her.
- [11] In these circumstances, it was not open for the learned magistrate to find that the appellant was not genuinely remorseful.
- [12] The appellant was entitled for discounts in sentence for his previous good character and expression of remorse. The appellant has already served about three months in prison for uttering threatening words to his wife.
- [13] For these reasons, the sentence imposed in the Magistrates' Court is set aside and substituted with a sentence of 6 months' imprisonment suspended for 2 years.



.....
Hon. Mr Justice Daniel Goundar

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions for the Respondent