IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL CASE NO. HAA 53 OF 2018

BETWEEN:	**PARVIN KUMAR**	**APPELLANT**
A N D:	**THE STATE**	**RESPONDENT**

Counsel: Appellant In Person
Ms. S. Tivao for State

Date of Hearing: 21st January 2019

Date of Judgment: 28th January 2019

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrate's Court of Nausori with one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. He was first produced in the Magistrate's Court on the 16th of July 2018. The Appellant was granted bail on the 16th of July 2018, and matter was then adjourned till 30th of July 2018 for the plea. On the 30th of July 2018, the Appellant was represented by a counsel from the Legal Aid Commission and pleaded guilty to the offence. The Appellant had then admitted the summary of fact and presented his mitigation submissions. The learned Magistrate in his sentence dated 30th of July 2018, sentenced the Appellant to a period of 4 years with a non-parole period of 3 years. Aggrieved with the said conviction and the sentence, the Appellant filed this appeal in person, therefore the drafting of his grounds of appeal are not

perfect as the draft of a trained lawyer. I reproduce his grounds of appeal in verbatim as follows:

i) He failed to take into account that I was a friend of the victim and my action was not in any way intended to offend, insult or harm my friend in any way,

ii) The learned Magistrate allowed irrelevant matters to affect him while passing the sentence, which is quite harsh and excessive as the incident stated by the victim is of a non-penetrative and fleeting type, compared to the case reference 1169/16, where the offender had actually licked the vagina of a 8 years student, breached the had received a sentence of 3 years,

iii) The learned Magistrate failed to take into account that I am remorseful for my actions, while I am incarcerated there is no one to look after my elderly sick mother and my property and my pending jobs,

2. The matter was first called in the High Court on the 28th of September 2018, and had to adjourn till 16th of October 2018 as the copy record of the proceedings in the Magistrate's Court was not available. On the 16th of October 2018, a lawyer from the Legal Aid Commission, representing the Appellant, sought time to obtain the instructions of the Appellant. The matter was again adjourned till 30th of October 2018. The matter had to adjourn two more occasions as the learned counsel for the Legal Aid Commission sought time to obtain instructions. Subsequent to those adjournments, the learned counsel for the Legal Aid Commission informed the court on the 27th of November 2018, that she withdraws as the counsel as the Appellant wants to engage a private counsel. The matter was then adjourned till 13th of December 2018. On the 13th of December 2018, the Appellant informed that he has no money to retain a private lawyer and ready to proceed in person. Accordingly, the Appellant was directed to file his written submissions on or before the 27th of December 2018. However, the Appellant was ready with his written submissions and filed it on the same day. The Respondent was then ordered to file their written submissions on or before the 27th of December 2018 and the Appellant was given

time till 10th of January to file his reply submissions. The matter was set down for the hearing on the 21st of January 2019.

3. Unfortunately, the Respondent has failed to file the written submissions on or before the 27th of December 2018 as ordered by the court. Instead, the learned counsel for the Respondent has tendered a written submissions on the 11th January 2018, without obtaining any leave of the court. It is important that all the parties in the proceeding must properly follow the orders given by the court in order to take the proceedings to an expedient and conclusive end. If there is any delay caused by any excusable and reasonable reasons, it is the duty of the counsel to advise the court and the opposing party about the delay and obtain leave of the court to file the submissions.

4. On the 21st of January 2019, the Appellant and the learned counsel for the Respondent made their respective oral submissions.

5. Having carefully considered the respective submissions and the record of the proceedings in the Magistrate's Court, I now proceed to pronounce my judgment as follows.

Unequivocal Plea

6. The Appellant in his written submissions and also during his oral submissions stated that, he did not fully understand the charges when he pleaded guilty to the offences in the Magistrate's Court. The grounds of appeal which he filed, does not contain such a contention. The Appellant in his submissions tried to advance a new ground of appeal on the basis that his plea was not unequivocal. Having taken into consideration that the Appellant is unrepresented, I now first take my attention to determine whether the plea of the Appellant in the Magistrate's Court was an unequivocal plea.

7. The Fiji Court of Appeal in **Tuisavusavu v State [2009] FJCA 50; AAU0064.2004S (3 April 2009)** has outlined the appropriate approach in determining the equivocality of the plea, where the Fiji Court of Appeal held that:

"The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see Bogiwalu v State [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (Liberti (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.

Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered."

8. According to the record of the proceedings in the Magistrate's Court, the Appellant was represented by a lawyer at the time he took his plea. The charges were explained to him in his preferred language that was in Hindi, which he had understood. Having understood the charges, the Appellant had pleaded guilty to the two counts on his own free will. He was then explained the summary of fact, which he had admitted. Furthermore, the Appellant had admitted the correctness of the record of his previous convictions.

9. In view of the record of the proceedings in the Magistrate's Court, it is clear that the Appellant was given all his rights and explained him the nature of the charges which he had understood. Accordingly, I am satisfied that Appellant had pleaded guilty to these two offences after understanding the charges properly. Therefore, I do not find any merit in the contention that the plea was equivocal.

10. I now draw my attention to the three grounds of appeal.

The Law

11. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** found that:

"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 of the relevant considerations, then the appellate court may impose a different sentence."

12. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that:

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

13. Goundar JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that:

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v. The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

i) Whether the sentencing judge acted upon a wrong principle;

ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;

iii) Whether the sentencing judge mistook the facts;

iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)".

Ground I

14. The first ground of the Appeal is based upon the contention that the learned Magistrate has failed to take into consideration that the victim was a friend of the Appellant and the Appellant had no intention to offend, insult or harm the victim.

15. Neither the Appellant nor his counsel had submitted in the Magistrate's Court that the victim was a friend of the Appellant. Moreover, the summary of fact does not state such as well. In fact, if the Appellant provided this information that the victim was a friend of him, the learned Magistrate should have taken it as an aggravating factor, to increase the sentence, as to commit such a crime to a friend would undoubtedly amount to a breach of trust of the friendship. Accordingly, I do not find any merit in this ground.

Ground II

16. I now draw my attention to the second ground of appeal of the Appellant, which is founded on the contention that the sentence is harsh and excessive.

17. The maximum punishment for indecent assault pursuant to Section 212 (1) of the Crimes Act is five years. The applicable tariff to the offence of indecent assault is 12 months to 4 years. **(Rokota v the State [2002] FJHC 168; HAA0068J.2002S (23 August 2002), State v Sagole - Sentence [2018] FJHC 843; HAC76.2018 (11 September 2018).** The learned Magistrate in paragraph 8 and 9 of the sentence has correctly considered the applicable tariff to the offence of indecent assault.

18. The maximum punishment for sexual assault is ten years. It was held in **State v Laca - Sentence [2012] FJHC 1414; HAC 252.2011 (14 November 2012)** that the tariff is 2 to 8 years imprisonment. Madigan J held in State v Laca - (supra) that:

> *"The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in Abdul Kaiyum HAC 160 of 2010 that the range of sentences should be between two to eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.*
>
> *A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:*
>
> ***Category 1** (the most serious)*
> *Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.*
>
> ***Category 2***
> *Contact between the naked genitalia of the offender and another part of the victim's body;*
>
> *Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*

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 parts of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)."

19. The learned Magistrate has correctly taken into consideration the tariff in paragraphs 5 and 6 of the Sentence. Having considered the nature of these two offences, the learned Magistrate has then correctly decided to impose an aggregate sentence pursuant to Section 17 of the Sentencing and Penalties Act. Section 17 of the Sentencing and Penalties Act states that:

"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them".

20. Taken into consideration the aggravating and mitigating circumstances of the offences, the learned Magistrate has finally reached to an imprisonment period of 4 years, which is well within the stipulated limitation of the aggregate sentence pursuant to Section 17 of the Sentencing and Penalties Act. Moreover, the final sentence is within the tariff limits of the offences of indecent assault and sexual assault. Therefore, I find that the sentence is neither harsh nor excessive.

Ground III

21. The third ground of appeal is based upon the contention that the learned Magistrate has failed to take into consideration the remorse of the Appellant and also his family and personal circumstances in the sentence.

22. In paragraph 16 of the Sentence, the learned Magistrate has taken into consideration the family and personal circumstances of the Appellant and concluded that they are not relevant in sentencing an offender for an offence of sexual nature. Accordingly, I am satisfied that the learned Magistrate has considered the personal and family circumstances of the Appellant in his sentence.

23. The learned Magistrate has given full discount of one-third for the early plea of guilty of the Appellant, acknowledging his remorse in committing this offence. Accordingly, I do not find any merit in the third ground of appeal as well.

Conclusion

24. In conclusion, I dismiss this appeal.

25. Thirty (30) days to appeal to the Fiji Court of Appeal.

R.D.R.T. Rajasinghe
Judge

At Suva
28th January 2019

Solicitors
Appellant In Person
Office of the Director of Public Prosecutions for the State.