IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 78 OF 2019

BETWEEN	:	**DHARMENDRA KUMAR SAMI**
		APPELLANT
AND	:	**THE STATE**
		RESPONDENT
Counsel	:	Mr. M. Yunus for the Appellant.
		Ms. L. Latu for the Respondent.
Dates of Hearing	:	26 February, 2020
Date of Judgment	:	28 February, 2020

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Ba with one count of assault causing actual bodily harm contrary to section 275 of the Crimes Act.

2. On 26th November, 2019 the appellant had pleaded guilty and thereafter he admitted the summary of facts read. The brief facts are as follows:

   On 10th August 2019 at about 1 am the appellant who was drunk went to the roadside at Varoko, Ba where the victim was

selling barbeque. The appellant wanted to eat since he was hungry, the victim informed the appellant that he was packing up to leave.

Upon hearing this, the appellant swore at the victim and punched him twice on the left side of his face. The appellant is the brother in law of the victim. The matter was reported to the police and the victim was medically examined. The appellant was arrested, caution interviewed and charged.

3. The learned Magistrate upon being satisfied that the appellant had entered an unequivocal plea of guilty convicted the appellant as charged. After hearing mitigation, on 19th December, 2019 the appellant was sentenced to 7 months imprisonment with a permanent non-molestation Domestic Violence Restraining order issued.

4. The appellant being aggrieved by the sentence filed a timely appeal against his sentence as follows:

APPEAL AGAINST SENTENCE

a. *That the learned Magistrate erred in principle when he selected a starting point of 7 months imprisonment which was on the higher scale of the tariff.*

b. *That the learned Magistrate erred in law and in fact when he took breach of trust as one of the aggravating factors to enhance the sentence, when there was no evidence in the summary of facts to support this factor.*

c. *That the learned Magistrate erred in law and in principle when he failed to give any leniency to the Appellant because of him being previously convicted for similar offences.*

d. *That the learned Magistrate erred in law when he failed to consider section 15(3) of the Sentencing and Penalties Act whilst sentencing the Appellant.*

e. *That the sentence is harsh and excessive in all the circumstances of the matter.*

5. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

LAW

6. The Sentencing and Penalties Act sets out the broad sentencing guidelines that need to be adhered to by the Sentencing Court in sentencing an offender. Section 4(1) of the Sentencing and Penalties Act inter alia identifies the following purposes which may be imposed by the Sentencing Court:

"(a) to punish offenders to an extent and in a manner which is just in all the circumstances;
(b) to protect the community from offenders;
(c) to deter offenders or other persons from committing offences of the same or similar nature;
(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;
(e) to signify that the court and the community denounce the commission of such offences; or
(f) any combination of these purposes."

HIGH STARTING POINT

7. The appellant argues that the learned Magistrate erred in selecting 7 months imprisonment as a starting point which was on the higher side of the tariff. The accepted tariff for assault causing actual bodily harm is from a suspended sentence to 9 months imprisonment *(Jonetani Sereka v State, HAA 027 of 2008).*

AGGRAVATING FACTORS

8. The appellant also argues that to this already high starting point the learned Magistrate added aggravating factors of 3 months which resulted in an excessive sentence. Counsel for the appellant in his written submissions also pointed out that the breach of trust component was wrongly added as an aggravating factor when there was no such relationship of trust in existence in respect of the offending.

DETERMINATION

9. This court agrees that the learned Magistrate erred when he selected 7 months imprisonment which was on the higher scale of the tariff as the starting point to which he had added aggravating factors which resulted in double counting and an excessive sentence.

10. The Court of Appeal in *Laisiasa Koroivuki v The State, criminal appeal no. AAU0018 of 2010* at paragraphs 26 and 27 states the following:

[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] 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.

11. For the above reasons, this court is satisfied that the sentence is a consequence of an error the ground of appeal against sentence is allowed.

12. At paragraph 6 of the sentence the learned Magistrate had taken breach of trust as an aggravating factor which was not reflected in the summary of facts at all. The fact that the victim is the brother in law of the appellant does not suggest there was any breach of trust in respect of the offending which should not have been used to enhance the sentence. The sentence was increased by 3 months but in my judgment no substantial miscarriage of justice has been caused to the appellant by this omission the increase is justified in the circumstance of the offending despite the omission. This ground of appeal does not succeed.

13. Having allowed the appeal against sentence and in accordance with section 256(3) of the Criminal Procedure Act I quash the sentence of the Magistrate's Court and sentence the appellant afresh.

14. After assessing the objective seriousness of the offence committed I take 3 months imprisonment as the starting point of the sentence (lower range of the tariff). For the aggravating factors I increase the sentence by 3 months (as per current sentence) bringing the interim sentence to 6 months imprisonment. I reduce the sentence by 3 months (as per current sentence) for guilty plea and mitigation, since the appellant has previous convictions he does not receive any discount for good character. The final sentence is 3 months imprisonment.

15. This sentence falls within the ambit of section 26 of the Sentencing and Penalties Act since it does not exceed 3 years imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has discretion to suspend the term of imprisonment either wholly or partly if the court considers it to be appropriate to do so in the circumstances of the case.

16. The discretion to suspend the term of imprisonment must be exercised judicially after identifying special reasons for doing so.

17. In order to suspend the sentence of the appellant this court has to consider whether the punishment is justified taking into account the offence committed by the appellant. In this regard the guidance offered by Goundar J. in *Balaggan vs State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:

"Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?"

18. This court accepts that there are some factors in favour of the appellant such as he was 40 years of age at the time of the offending, was maintaining a 12 year old child and had pleaded guilty at the earliest opportunity. On the other hand, the appellant has committed an unprovoked serious offence and his culpability is obvious.

19. After carefully weighing the factors in favour of the appellant and the serious nature of the offence committed, I am compelled to state that there is a need for special and general deterrence. I am satisfied that the term of 3 months imprisonment is an appropriate sentence to be served and I therefore refuse to suspend the term of imprisonment.

ORDERS

1. The appeal against sentence is allowed.

2. The sentence of the Magistrate's Court is quashed and set aside.

3. The appellant is sentenced to 3 months imprisonment with effect from 19th December, 2019 with a section 27 non-molestation DVRO made permanent.

4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
28th February, 2020

Solicitors
Messrs M. Y. Law for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.