

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 227 of 2020

STATE

V

MANASA BERA KAUKIOVALAU

Counsel : Ms. Shirley Tivao for the State  
Mr. Isireli Romanu for the Accused

Sentence Hearing : 25 February 2021

Sentence : 12 March 2021

## SENTENCE

- [1] Manasa Bera Kaukiovalau, as per the Information filed by the Director of Public Prosecutions (DPP) you were charged with the following offence:

### FIRST COUNT

#### *Statement of Offence*

**ACT WITH INTENT TO CAUSE GRIEVOUS HARM:** Contrary to Section 255 (a) of the Crimes Act 2009.

#### *Particulars of Offence*

**MANASA BERA KAUKIOVALAU**, on the 2<sup>nd</sup> day of August 2020, at Nasinu, in the Central Division, intended to cause grievous harm to **SITERI DIVUNIWAQA**, by punching and kicking her head against the kitchen wall.

- [2] This matter was first called before the High Court on 19 August 2020, and the State sought time to file Information and Disclosures.
- [3] Accordingly, the State filed the Information and Disclosures on 14 September 2020 and the matter was adjourned for plea.
- [4] When the matter came up before me on 6 October 2020, you were ready to take your plea. You pleaded guilty to the one count in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charge against you and the consequences of your plea.
- [5] Thereafter, on 14 October 2020, the State filed the Summary of Facts. Since you were contesting some of the contents of the Summary of Facts filed, Court permitted you to vacate your guilty plea. Accordingly, a plea of not guilty was recorded.
- [6] At the time your plea was first taken and later vacated, you remained unrepresented.
- [7] On 25 November 2020, Court was informed that Mr. Isireli Romanu has been retained to appear on your behalf.
- [8] On 29 January 2021, Court fixed this matter for trial from 14 June - 18 June 2021.
- [9] On 10 February 2021, you wished to take your plea once again and you pleaded guilty to the one count in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charge against you and the consequences of your plea.
- [10] The Summary of Facts originally filed were read out and explained to you on 19 February 2021 and you understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the charge in the Information, and found the charge proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the charge of Act with Intent to Cause Grievous Harm.
- [11] I now proceed to pass sentence on you.
- [12] The Summary of Facts filed by the State was as follows:

**Background**

1. *Victim: Siteri Divuniwaqa, (PW1) 39 year old, waitress at The Curry House residing at Wailea Settlement Vatuwaqa.*
2. *Accused: Manase Bera Kaukiovalau, 34 year old unemployed of Wailea Settlement Vatuwaqa.*

### Incident

3. *The complainant and the accused are married.*
  4. *On the 2<sup>nd</sup> of August 2020, PW1 was drinking grog and alcohol with the accused and others, they had been binge drinking from the previous night. All PW1 remembers is that she had been drinking with the accused and then she remembers waking up in hospital.*
  5. *Alipate Soka Baravilala (PW2) 14 year old student and Manasa Ledua (PW3) is a 10 year old student, they are the accused and PW1's children.*
  6. *On 2 August 2020, PW2 witnessed PW1 sitting on the floor of the sitting room in their house, drunk holding a bottle of Josky. He then witnessed the accused started kicking PW1's thigh, stomach and face multiple times. Neighbor's came to help and PW1 was rushed to hospital.*
  7. *PW3 was also present and he witnessed the accused repeatedly kicked and hit PW1's head. He heard his mother say 'bera sa rauta' i.e. stop however the accused kept kicking her until she could not move. PW3 went to his neighbor's house for help.*
  8. *When the accused was kicking PW1 on the head, stomach, and thighs multiple times he intended to cause grievous harm.*
  9. *Maikali Raloi (PW4) is PW1 and the accused's neighbor. He states that on the 2<sup>nd</sup> August 2020, he was watching TV when his wife started calling for him to go check on the accused and PW1. He then got up and went to the accused's house, before he entered he heard the accused saying 'Baba wake up' multiple times. When he entered the house he noticed PW1 lying motionless on the floor with her head leaned onto the wall. He also noticed that blood was on PW1's face, her clothes and on the floor.*
  10. *PW4 recalls that the accused and PW1 smelt like liquor, he told the accused not to touch her and informed PW2 to go fetch a taxi, however PW4 was able to get one of his neighbors to take them to the hospital in his rental.*
  11. *PW1 was medically examined by Doctor Bandana Priya Prasad, she has noted that the PW1 was intoxicated with a decreased level of consciousness. There was an 8-10 cm parietal- temporal laceration at the back of her head.*
- *A copy of the complainant's medical report is attached as Annexure 1."*

- [13] Manasa you have admitted to the above Summary of Facts and taken full responsibility for you actions.
- [14] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the purposes for which sentencing may be imposed by a Court; and sets out the relevant factors that a Court should take into account during the sentencing process.
- [15] In particular, Section 4 (3) of the Sentencing and Penalties Act provides as follows:

*"(3) In sentencing offenders for an offence involving domestic violence, a court must also have regard to —*

*(a) any special considerations relating to the physical, psychological or other characteristics of a victim of the offence, including —*

*(i) the age of the victim;*

*(ii) whether the victim was pregnant; and*

*(iii) whether the victim suffered any disability;*

*(b) whether a child or children were present when the offence was committed, or were otherwise affected by it;*

*(c) the effect of the violence on the emotional, psychological and physical well-being of a victim;*

*(d) the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a victim;*

*(e) the conduct of the offender towards the victim since the offence, and any matter which indicates whether the offender —*

*(i) accepts responsibility for the offence and its consequences;*

*(ii) has taken steps to make amends to a victim, including action to minimise or address the negative impacts of the offence on a victim;*

*(iii) may pose any further threat to a victim;*

*(f) evidence revealing the offender's —*

*(i) attitude to the offence;*

*(ii) intention to address the offending behaviour; and*

*(iii) likelihood of continuing to pose a threat to a victim; and*

*(g) whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance."*

[16] In terms of Section 255 (a) of the Crimes Act No. 44 of 2009 (Crimes Act) "A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—

(a) *Unlawfully wounds or does any grievous harm to any person by any means....."*

The prescribed penalty for this offence is imprisonment for life.

[17] The offence of Act with Intent to Cause Grievous Harm also existed under the Penal Code (Section 224 of the Penal Code), with the same prescribed penalty of life imprisonment.

[18] In *State v. Maba Mokubula* [2003] FJHC 164; HAA 52J.2003S (23 December 2003); Her Ladyship Madam Justice N. Shameem said:

*"On the basis of these authorities, the tariff for sentences under section 224 of the Penal Code, is between 6 months imprisonment to 5 years imprisonment. In a case of an attack by a weapon, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon.*

*Aggravating factors would be:*

- 1. Seriousness of the injuries;*
- 2. Evidence of premeditation or planning;*
- 3. Length and nature of the attack;*
- 4. Special vulnerability of the victim;*

*Mitigating factors would be:*

- 1. Previous good character;*
- 2. Guilty plea;*
- 3. Provocation by the victim;*
- 4. Apology, reparation or compensation.*

*In general terms, the more serious and permanent the injuries, the higher the sentence should be. As a matter of principle, a suspended sentence is not appropriate for a case of act with intent to cause grievous harm....."*

[19] His Lordship Justice Madigan in *State v. Emosi Taku Tuigulagula* [2011] FJHC 163; HAC 31.2010 (15 March 2011); stated thus:

*"The maximum penalty for this offence is life imprisonment and the Court of Appeal has said in **Shaukat Ali** (1976) 22 FLR 87 that for this offence a custodial sentence is inevitable. The offence is akin to section 224 of the old Penal Code and so the authorities pertaining to that section are relevant. In the case of **Mokubula** (2003) FJHC 164, Shameem J set out several cases of assault intending to cause grievous bodily harm and came to the conclusion that the then prevailing "tariff" was between 6 months imprisonment to 5 years imprisonment, but stressing that where a weapon was used the starting point should be 2 years."*

- [20] However, in the above case, Justice Madigan sentenced the accused, who pleaded guilty for striking his wife with a cane knife, severing her fingers in both hands, excluding the thumbs, and also injuring the head, to 6 years imprisonment.
- [21] In **State v. Aseela Rabia** [2012] FJHC 877; HAC074.2011 (22 February 2012); the Fiji High Court followed the tariff that had been adopted in **Mokubula and Tuigulagula** (*supra*).
- [22] In **State v. Seremaia Nalulu & 4 others** [2013] FJHC 358; HAC 155.2010 (23 July 2013); His Lordship Justice Paul Madigan, while adopting the above tariff held as follows:

*"The maximum penalty for act with intent to cause grievous harm contrary to Section 255(a) of the Crimes Decree 2009 is life imprisonment. Despite the accepted tariff being between 6 months and 5 years (as set by Shameem J in **Mokubula** (2003) FJHC 164) much higher sentences have been passed when the circumstances dictate. In **Tuigulagula** HAC 81 of 2010 this Court passed a sentence of six years on a husband who did very serious harm to his wife. The penalty being life imprisonment, it is to be regarded as a very serious offence indeed and sentences of up to 8 years would not be out of order."*

- [23] In **State v. Taniela Vakalaca** [2018] FJHC 455; HAC027.2018 (31 May 2018); His Lordship Justice Goundar held:

*"The offence of Act with Intent to Cause Grievous Harm is punishable by discretionary life imprisonment. The tariff for this offence is between 6 months imprisonment to 5 years imprisonment, and in cases where a weapon is used, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon (**State v Mokubula** [2003] FJHC 164; HAA0052J.20035 (23 December 2003)). Further, the offence may be aggravated by the seriousness of the injuries, premeditation or planning, length and nature of the attack and vulnerability of the victim....."*

- [24] In **Vosa v. State** [2019] FJCA 89; AAU0084.2015 (6 June 2019); the Fiji Court of Appeal while making reference to the tariff range and the sentences imposed in the above mentioned cases said that they provide some form of guidance in sentencing offenders

for the offence of Act with Intent to Cause Grievous Harm, subject of course to the different aggravating and mitigating circumstances prevalent in those cases.

[25] This Court adopted the said tariff in the following cases:

1. *State v. Jese Mateavula Toma* [2019] FJHC 648; HAC79.2018 (28 June 2019);
2. *State v. Emosi Banuve* [2019] FJHC 1022; HAC88.2019 (24 October 2019);
3. *State v. Isoa Boseyaco* [2019] FJHC 1037; HAC48.2018 (30 October 2019);
4. *State v. Jonacani Salabula* [2020] FJHC 47; HAC406.2018 (6 February 2020);
5. *State v. Etasa Digo* [2020] FJHC 514; HAC107.2020 (7 July 2020); and
6. *State v. Kiso Salawaqa* [2020] FJHC 921; HAC180.2020 (5 November 2020).

[26] Having regard to the above authorities, and since no weapon had been used to attack the complainant, I consider the tariff for the offence of Act with Intent to Cause Grievous Harm in the instant case to be between 6 months to 5 years imprisonment.

[27] In determining the starting point within the said tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

*“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 time. 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.”*

[28] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 12 months imprisonment for the charge of Act with Intent to Cause Grievous Harm.

[29] The aggravating factors in this case are as follows:

- (i) The frequent prevalence of offences of this nature in our society today.

- (ii) The complainant is your wife. Thus there is a domestic relationship. Since the complainant is your wife you should have protected her. Instead you have breached the trust expected from you.
- (iii) You punched and kicked the complainant in the presence of your two sons aged 14 years and 10 years.
- (iv) Injury was caused to the complainant as a result of your actions. The Medical Examination Report of the complainant confirms that she sustained an 8-10 cm parietal- temporal laceration at the back of her head.

[30] The mitigating factors in this case are as follows:

- (i) You are a first offender. The State has confirmed that there are no previous convictions or pending cases against you.
- (ii) That you cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have submitted that you are truly remorseful of your actions and have sought forgiveness from this Court.
- (iv) That you have sought forgiveness from the complainant after the incident. The complainant has accepted your apology and confirms that she has now reconciled with you.
- (v) That you entered a guilty plea during the course of these proceedings.

[31] Considering the aforementioned aggravating factors, I increase your sentence by a further 4 years. Now your sentence is 5 years imprisonment.

[32] I accept that you are a person of previous good character and that you have fully cooperated with the Police in this matter. I also accept your remorse as genuine and also the fact that you have sought forgiveness from the complainant and reconciled with her. Accordingly, considering these mitigating factors, I deduct 2 years from your sentence. Now your sentence is 3 years imprisonment.

[33] I accept that you entered a guilty plea at a very early stage in these proceedings. However, that guilty plea was vacated. Thereafter, you entered a guilty plea after the matter was fixed for trial. In any event, by doing so, you saved precious time and resources of this Court. For your guilty plea I grant you a further discount of one year. Now your sentence is 2 years imprisonment.

[34] Accordingly, I sentence you to a term of 2 years imprisonment for the charge of Act with Intent to Cause Grievous Harm.



[35] The next issue for consideration is whether your sentence should be suspended.

[36] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

*(a) does not exceed 3 years in the case of the High Court; or*

*(b) does not exceed 2 years in the case of the Magistrate's Court.*

[37] Manasa you are now 34 years of age (Your date of birth is 21 April 1986). You are married to the complainant and you have 3 children – 2 sons aged 14 and 10 years, and a daughter aged 9 years. All your children are schooling.

[38] Manasa you are said to be an Artist by profession. You have completed a Certificate Course and an Advanced Certificate Course in Computer Training in the year 2004. You have also attended the National Youth Service Scheme Skills for Life Training Course in the year 2009. The Certificate of Participation has been attached in proof of same.

[39] You have also submitted that you were employed at Pioneer Concrete Industries Limited in the year 2019.

[40] Manasa I am conscious of the fact that first offenders and young offenders (although at 34 years you cannot be considered as entirely young) and offenders who have pleaded guilty and expressed remorse, would usually be granted a non-custodial sentence.

[41] However, considering the nature and gravity of the offending and your culpability and degree of responsibility, and also the fact that the complainant is your own wife and the fact that the incident took place in the presence of your two sons, I am not inclined to suspend the entirety of your sentence. I am of the opinion that a custodial sentence is appropriate in the given circumstances so as to deter you and other like persons from committing such criminal acts.

[42] Accordingly I order that you must serve in custody 1 year of the 2 years term of imprisonment this Court is imposing on you. The balance term of 1 year is suspended for a period of 5 years. You are advised of the effect of breaching a suspended sentence.

[43] Section 24 of the Sentencing and Penalties Act reads thus:

*"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

[44] Manasa, you were in remand custody for this case on the 2 August 2020, the day on which you were arrested for this matter. Although this Court granted you bail on the 10 February 2021, you have not satisfied the bail terms and conditions imposed by Court. Thus you had continued to remain in custody. Accordingly, you have been in custody for a total period of 7 ½ months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 7 ½ months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.


[45] In the result, from the 1 year you have to serve in custody, the time remaining to be served by you would be 4 ½ months imprisonment.

[46] As I have stated earlier, the balance term of 1 year is suspended for a period of 5 years. You are advised of the effect of breaching a suspended sentence.

[47] In terms of the provisions of Section 27 of the Domestic Violence Act No. 33 of 2009, I order a permanent Domestic Violence Restraining Order for the protection of the complainant in this case, with standard non-molestation conditions as stipulated in the said section.

[48] You have 30 days to appeal to the Court of Appeal if you so wish.



  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

AT SUVA

Dated this 12<sup>th</sup> Day of March 2021

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitors for the Accused : MIQ Lawyers, Barristers and Solicitors, Suva.