

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 12 OF 2023

BETWEEN: **ALVIN JASHVIND SHANKAR** **APPELLANT**

A N D: **THE STATE** **RESPONDENT**

Counsel: Mr. A. Chand for Appellant
 Mr. E. Samisoni for Respondent

Date of Hearing: 05th June 2023

Date of Judgment: 06th July 2023

J U D G M E N T

1. The Appellant was charged in the Magistrate's Court in Suva with two counts of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act. On the 22nd of February, 2023, the Appellant pleaded guilty to these two offences. The learned Magistrate, on the 24th of February 2023, sentenced the Appellant to an imprisonment period of one (01) year, five (05) months and twenty-eight (28) days with a non-parole period of six months. Aggrieved with the said Sentence, the Appellant filed this appeal on the following appeal grounds:

- a) That the Learned Magistrate erred in law and fact by convicting the Appellant.*

b) *That the Appellant wishes to appeal against the sentence which was harsh and excessive in nature.*

2. The learned Counsel for the Appellant specifically stated during the hearing of this appeal that the Appellant does not wish to appeal against the conviction but the Sentence. The learned Counsel further stated that the appeal against the Sentence is founded on the ground that the learned Magistrate erred in law in failing to suspend the Sentence. The learned Counsel for the Appellant further affirmed to the Court that the Appellant is not challenging the length of the Sentence, though there is a miscalculation of the time, which the Respondent conceded.
3. According to the summary of facts tendered in the Magistrate's Court, the Appellant had assaulted his wife in front of his 9-year-old daughter. When the daughter reacted to his violent assault against her mother, the Appellant also assaulted the nine-year-old daughter, causing her bodily harm.
4. In an appeal against the Sentence, the Appellate Court will examine whether the sentencing Magistrate had fallen into error in exercising his/her sentencing discretion. In doing that, the Appellate Court would take into consideration the following factors:
 - i) Whether the sentencing Magistrate acted upon a wrong principle;
 - ii) Whether the sentencing Magistrate allowed extraneous or irrelevant matters to guide or affect him;
 - iii) Whether the sentencing Magistrate mistook the facts;
 - iv) Whether the sentencing Magistrate failed to take into account some relevant consideration.
5. The errors in sentencing discretion may be apparent either from the reasons given in the Sentence or by making inferences from the length of the Sentence. (*vide; Saqainivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)*). In doing that, the Appellate Court will determine whether the Sentence given by the lower Court is within the permissible

range. Even if there has been an error in exercising the sentencing discretion, the Appellate Court will still dismiss the Appeal if the Appellate Court considers the Sentence given by the lower Court comes within the permissible sentencing range. (*vide; Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)*)

The Correct Sentencing period

6. I shall first draw my attention to the mathematical miscalculation of the final sentencing period. I have no doubt this was an unintentional oversight by the learned Magistrate. As agreed by both Counsel, the final Sentence should be one year, three months and 28 days. I do not find any reasons to change the non-parole period of six months. I accordingly allow this ground raised by the Appellant.
7. Though the learned Counsel for the Appellant argued in his written submissions that the learned Magistrate erred in adding four years to the starting point on the ground that this was domestic violence perpetuated against the wife and nine years old daughter, I find the final Sentence is still within the acceptable sentencing range for the offences of this nature. Be that as it may, the learned Counsel for the Appellant specifically stated during the hearing that the Appellant's contention is against the imposition of a custodial sentence and not against the length of the Sentence. Hence, I do not wish to discuss further the correctness of the length of the Sentence.

Suspended Sentence

8. I now draw my attention to the contention that the learned Magistrate erred in law in failing to suspend the Sentence. The Appellant submits that the Sentence ought to have been suspended.
9. Section 26 (1) of the Sentencing and Penalties Act states that:

“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”

10. Accordingly, it is a discretionary power of the sentencing Court to impose a suspended sentence. If the Court contemplates suspending a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.
11. The learned Magistrate, in paragraphs 12, 13 and 14 of the Sentence, has given detailed reasons why she decided not to suspend this Sentence. The learned Magistrate had considered the mitigation factors of the Appellant, which suggested that the Appellant was ready to rehabilitate. Then the learned Magistrate balanced the mitigation factors against the factual background of this offending. The learned Magistrate found that the Appellant had extended his domestic issues with his wife to his nine-year-old daughter by assaulting her when she was scared of his violent behaviour towards his wife. On that basis, the learned Magistrate had found the primary objectives of the Sentence as deterrence, denouncement and punishment.
12. In sentencing an offender for an offence involving domestic violence, the Court must consider the factors that are outlined under Section 4 (3) of the Sentencing and Penalties Act, which states that:

“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 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 minimize 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 behavior; 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 behavior, or is willing to undertake such counselling or seek such assistance."*


13. The learned Magistrate had accurately considered that the first offence was committed in the presence of the child victim. Then the Appellant assaulted the child victim when she was shocked and cried due to the violent conduct of the Appellant. Hence, I find no error in law and fact in the learned Magistrate's conclusion of not imposing a suspended sentence. Therefore, I do not find any merit in this Appeal.

14. The orders of the Court:

- a) The Appeal is allowed only to correct the actual sentencing period,
- b) The Sentence dated 24th of February 2023 is set aside and replaced with a sentence of one year, three months and twenty-eight days, effecting from 24th of February 2023. Moreover, the Appellant is not eligible for parole for a period of 6 months.

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




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Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

06th July 2023

Solicitors.

Amrit Chand Lawyers for Appellant.

Office of the Director of Public Prosecutions for the Respondent.