

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 031 OF 2022**

**BETWEEN** : STATE

**AND** : PAULA GADE

**Counsel** : Ms N Ali for the State  
Ms R Nabainivalu for the Respondent

**Date of Hearing** : 3 May 2023

**Date of Sentence** : 30 June 2023

**JUDGMENT**

- [1] The State seeks an enlargement of time to appeal against the sentence that was imposed on the respondent in the Magistrates' Court for an offence of assault causing actual bodily harm.
- [2] On 5 May 2022, the respondent assaulted his de-factor partner and caused bodily injuries to her.
- [3] On 24 August 2022, the respondent was charged with assault causing actual bodily harm and produced in the Magistrates' Court at Suva. He waived his right to counsel and pleaded guilty to the charge at the first opportunity. The prosecution was conducted by the police. On the same day, the learned magistrate imposed a good behavior bound over order for 2 years.
- [4] At the time of the offending, the respondent was an active army officer. He was immediately terminated from his employment.

- [5] The victim was aggrieved by the sentence that was imposed on the respondent. She took her grievance to the Office of the Director of Public Prosecutions. By the time the Office of the Director of Public Prosecutions retrieved the file from the police prosecution office and made a decision to appeal against sentence, the appeal was late by 41 days.
- [6] Section 248 (1) of the Criminal Procedure Act states that every appeal from the Magistrates' Court to the High Court shall be filed within twenty eight days from the decision appeal against. Section 248 (2) of the Criminal Procedure Act gives the Court discretion to enlarge the twenty eight days appeal period for good cause, which include a case where the sanction of the Director of Public Prosecutions is required.
- [7] Section 246 (5) of the Criminal Procedure Act states that the Director of Public Prosecutions is deemed to be party to an appeal where the proceedings involved prosecution by police. Hence, the right of appeal against sentence arising from police prosecution lies with the Director of Public Prosecutions. The Director decides whether to appeal or not against an inadequate sentence.
- [8] In this case, the Director decided to appeal, but by the time he made that decision, the appeal period had expired. Hence, he is seeking an enlargement of time to appeal. Counsel for the respondent concedes that the Director's appeal is arguable, and therefore, she has no objection to the application for an enlargement of time to appeal. Counsel for the respondent seeks a non-custodial sentence in the event the appeal is allowed.
- [9] The grounds of appeal advanced by the State are as follows:
1. That the learned magistrate erred in law and in fact by failing to take into account relevant considerations.
  2. That the learned magistrate erred in principle when she failed to apply the correct tariff resulting in the sentence imposed by the learned magistrate being manifestly lenient.

[10] The first complaint is that the learned magistrate failed to consider that the respondent committed an offence involving domestic violence.

[11] Section 3 (1) of the Domestic Violence Act defines domestic violence as follows:

Domestic violence in relation to any person means violence against that person (the victim) committed, directed or undertaken by a person (the perpetrator) with whom the victim is, or has been, in a family or domestic relationship.

[12] Violence includes infliction of physical injury or threatening of physical injury (s 3(2) of the Domestic Violence Act).

[13] The learned magistrate said that she considered the 'circumstances of offending' but she did not consider the offence was a domestic violence and that the victim was seriously injured.

[14] The learned magistrate was not only obliged to consider the nature and gravity of the offence but also the impact of the offence on the victim and the injury resulting from the offence (section 4 (2) of the Sentencing and Penalties Act). The learned magistrate was also required to consider the effect of the violence on the emotional, psychological and physical wellbeing of the victim (section 4 (3) of the Sentencing and Penalties Act).

[15] The facts admitted by the respondent unequivocally stated that the respondent was in a domestic relationship with the victim at the time when he assaulted her. By failing to consider the statutory sentencing considerations in sentencing for an offence involving domestic violence the learned magistrate erred in law. Ground one succeeds.

[16] There are two limbs to ground two. The first complaint is that the learned magistrate considered the wrong tariff. The second complaint is that the application of wrong tariff has led to a manifestly lenient sentence.

[17] In the sentencing remarks, the learned magistrate made reference to the maximum sentence of 5 years imprisonment for assault causing actual bodily harm and the tariff for the offence being a conditional discharge to 12 months imprisonment. Counsel for the State submits that since the offence involved domestic violence the applicable tariff was 6 months to 18 months imprisonment as set out in *Matai v State* [2018] FJHC 25; Criminal Appeal 108.2017Ltk (26 January 2018):

...it must now be said that the tariff for a domestic violence assault causing actual bodily harm is a wide range of 6 to 18 months, wide enough to cater for all kinds of injuries. It would be only in exceptional circumstances that a suspended sentence would be passed for the offence, given that sending the convict back into the family home could well have perilous consequences. For a second offence on the same victim, a suspended sentence is inconceivable.

[18] The learned magistrate gave no reasons for deviating from the specific tariff for the offence of assault causing actual bodily harm involving domestic violence. She mistook the tariff for the offence and imposed a bound over order for 2 years.

[19] The attack on the 30 year old victim was unprovoked and fueled by alcohol. She was standing outside on a public road with a female friend when the respondent punched and kicked her till she lost consciousness. Her medical report stated that she had suffered multiple facial hematomas, lacerations and a zygomatic fracture consistent with blunt force trauma.

[20] The victim was subjected to ferocious violence and the learned magistrate erred in not considering the gravity of the offence and not applying the applicable tariff for domestic violence assault. The bound over order is manifestly lenient with no deterrent effect on others. Ground two succeeds.

[21] I would allow the State's appeal and set aside the good behavior bound over order.

[22] The respondent is a first time offender, pleaded guilty at the first opportunity and is remorseful. At the time of the offending the respondent was married with children. After he was charged, he lost his employment as a military officer and is currently working as a security guard for a private company to support his family.

[23] The aggravating factors are that the violence was fueled by alcohol and the victim sustained serious physical injuries to her face.

[24] In all circumstances of the case, a term of 6 months imprisonment fits the crime that the respondent committed. There are no exceptional or special circumstances to suspend the sentence.

[25] **Result**

Appeal allowed.

Sentence imposed in the Magistrates' Court is set aside and substituted with a sentence of 6 months' imprisonment.



  
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Hon. Mr Justice Daniel Goundar

**Solicitors:**

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Respondent