

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLANT JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 13 of 2023

LODOVIKA T. TOFINGA

vs

STATE

<i>Counsels:</i>	<i>Mr. Chand A</i>	-	<i>for Applicant</i>
	<i>Ms. Kantharia B.</i>	-	<i>for Respondent/ State</i>

RULING

1. This appeal has been filed by the Applicant being aggrieved by the conviction and the sentence passed against her by the learned Magistrate of Suva in the Criminal Case No 502 of 2021.

Background

2. The Applicant had been charged in the Magistrates Court of Suva with one count of *Assault Causing Actual Bodily Harm* contrary to **Section 275** of the **Crimes Act 2009**. On the 3rd day of November 2022 the Learned Resident Magistrate had delivered the judgment and convicted the Applicant.
3. Thereafter, on the 2nd day of March 2023, the Learned Resident Magistrate had sentenced the Applicant to 1 year and 9 months imprisonment with a non-parole period of 6 months. Being dissatisfied with the said conviction and sentence passed by the Learned Magistrate, the Applicant had filed his petition of appeal on 30th March 2023 against conviction and sentence within time.

GROUND OF APPEAL

4. In this matter, the Applicant has enunciated the following grounds of appeal.

Against Conviction

5. It is the submission of the Applicant that the Learned Trial Magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt.

Against Sentence

6. In relation to the sentence the Applicant submits:
 - i. That the Learned Magistrate had acted upon a wrong principle.
 - ii. The Learned Magistrate failed to take account material consideration.
 - iii. The Learned Magistrate had mistaken the facts.
 - iv. The Learned Magistrate had allowed extraneous or irrelevant matters to guide and affect her.
 - v. The Learned Magistrate had failed to properly exercise her discretion in all the facts and circumstances of the case.

7. Defense counsel further informs Court that the Applicant sustained injuries during the altercation with her de-facto partner in this matter and that though the Applicant was produced before a government doctor by the police and a medical examination form was prepared on the same day, that medical examination form depicting injuries on the Applicant was not tendered to the consideration of the Learned Magistrate in this matter.

Submissions of the Respondent

8. Responding to the above grounds of appeal of the Applicant, the Respondent states the following:

Against the Conviction

9. While supporting the conviction passed by the Learned Magistrate, Respondent states:
 - i. That in light of the accused's evidence of assault and the doctor having found the injuries on the complainant plus the evidence of the accused's son and other strings of evidence and their concomitance evolves a strong case against the appellant which is unassailable having regard to the ground she raises.
 - ii. Respondent further alludes that Magistrate considered the evidence in its totality and decided to accept the evidence of the victim as being honest,

truthful and reliable and held accordingly that the prosecution had proved the alleged charges beyond reasonable doubt. It's claimed that what the Applicant thinks is not what that matter but what impression the witnesses had created in their mind of the trial magistrate is that matters.

- iii. The Respondent is of the view that the narrative given by Applicant in her evidence, there were contradictions noted by the Learned Magistrate between the appellant's versions of events and that recounted by the daughter and further significant contradictions between her daughter's account and that of her son's [as noted in paragraph 12 of the Judgment by the Learned Magistrate dated 3/11/22].

Against the Sentence

10. In relation to the sentence imposed by the Learned Magistrate in this matter, while conceding that the Learned Magistrate had imposed a sentence beyond the accepted tariff without giving reasons, the counsel for the Respondent tendered few available authorities in our jurisdiction.
11. According to the counsel for the Respondent, in the case of **State v Tugalele [2008] FJHC 78 (29 April 2009)**, Her ladyship Madam Justice Nazhat Shameem has stated:

"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months imprisonment."
12. Further, the Respondent informs this Court that in **Jonetani Sereki v the State [2008] FJHC 88 (25 April 2008)**, His Lordship Justice Daniel Gounder held:

"The tariff for assault occasioning actual bodily harm ranges from a suspended sentence where there is a degree of Provocation and no weapon used, to 9 months imprisonment for the more serious cases of assault."

13. Highlighting the "domestic violence" situation in this matter, the counsel for the Respondent informs this Court that, **His Lordship Justice Madigan** had seen it fit to impose a "New Domestic Violence Tariff" which is what His Lordship had titled in his Judgment in **Vilame Matai v State [2018] FJHC 25**, (26 January 2018), placing the tariff between 6 – 18 months imprisonment for the offence in issue.

Analysis of Court

14. In considering the judgement of the Learned Magistrate in this matter, it appears that 3 witnesses have given evidence for the Prosecution and two witnesses, including the Applicant had given evidence for the Defense. In her judgement the Learned Magistrate had accepted the version of the Prosecution and rejected the vision of the Defense and convicted the Applicant and imposed a sentence of 1 year and 9 months imprisonment.

Medical condition of the Applicant

15. In this matter, the first witness who testified for the Prosecution was **Dr. Catherine Kim**, the family doctor for the Applicant's family. Referring to the health condition of the Applicant **Dr. Kim** has stated that:

"I am aware of Lodoviko's medical condition. She suffers from anxiety and panic attacks. She has a condition where her sugar level gets low, and she takes substances to manage hypoglycemia otherwise she can have difficulties with her condition which exacerbates her anxiety. She needs Sprite and lollies."

16. In the testimony of the Applicant in Court, referring to her health condition on the day in issue, she had stated:

"I put my hands between wooden spoon and neck and panic attack came and kicked in. I thought I would die.....I said I was going to faint. I asked him for lollies and water. He said no I asked Adele and Matteo for lollies and water, and he said no..... Matteo went into kitchen and brought me a lolly and water."

17. Even in the judgement of the Learned Magistrate she mentions the Applicant's health condition, as below:

"You suffered from anxiety and panic attacks. You have a condition where your sugar levels get low and you need to manage your hypoglycemia and otherwise you are prone to have difficulties with your condition which exacerbates your anxiety."

18. However, confined in the narrow compass of punishing the Applicant, while passing a sentence beyond the accepted tariff in our jurisdiction for the offence in issue, the Learned Magistrate had given no consideration to the health condition of the Applicant and had ignored the medical evidence that was available in Court.

19. In considering the importance of the health of the accused when passing the sentence, this Court wish to consider the pronouncement made by the **South Australian Court of Criminal Appeal** in the case of *R v Smith [1987]*¹ analyzing this aspect, as follows:

“The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a license to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking, ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.”

20. In this matter, as testified by **Dr. Catherine Kim** the Applicant had been suffering from anxiety and panic attacks, where she needs supplements of sugar to ameliorate worsening of her health condition. However, in passing the sentence, there is no mention in the record whether the Learned Magistrate checked with the correctional facilities whether they could cater to address this health requirement of the accused (Applicant) promptly.

21. Further, in comprehending with this situation, this Court finds it relevant to highlight the determination made by the **Court of Appeal of New Zealand** in the case of *R v Lane [1981]*² in relation to the health of the accused when passing the sentence, as below:

“It is obvious that imprisonment will always impose physical and emotional hardship on the person concerned and his family. Where a custodial sentence would impose a particular degree of hardship due to the health or other personal circumstances of the accused, that is a proper consideration to be taken into account by the sentencing Judge. In some circumstances the dominating effect of such considerations may lead to the imposition of a non-custodial sentence where ordinarily there would have to be a sentence of imprisonment.”

¹ [1987] 44 SASR 587

² NZCA [1981] 86

22. Considering the above clear pronouncements in common law jurisdictions, it is perceptible that the Learned Magistrate had ignored the health condition of the Applicant in sentencing, which needs to be rectified by this Court in its final adjudication in the interest of justice.

Medical Examination Form of the Applicant

23. In examining the Magistrate's Court case record in this matter, it appears that a Medical Examination form in relation to the Applicant had not been tendered to the perusal of the Learned Magistrate by either party at the Magistrate's Court trial. However, in considering the Medical Examination Form tendered by the counsel for the Applicant at this appeal, it appears that the same police officer (PC 6001 Rithik) attached to the Namadi police post had produced the Applicant and her de-facto partner for medical examination on the day within a gap of few minutes to two different doctors.

24. In this regard, the Applicant had been produced before **Dr. Josese** at CWM hospital and her partner had been produced before his family doctor **Catherine Kim** and not the doctor in the government hospital. As per the Medical Report of the Applicant, doctor had noticed bruises and lacerations on the neck region and bruises in the back. In relation to these injuries observed on the Applicant, **Dr. Josese** had opined that these have occurred due to blunt force trauma. In this regard, selecting different doctors, i.e., a private doctor and a government doctor by the police for medical examination of the two injured in this matter raises suspicion.

25. In noticing the availability of two Medical Examination Forms, the question arises why the two forms were not produced for the notice of the adjudicating Magistrate when those examinations were conducted on the direction of the police. When considering the fact that the Medical Report of the Applicant was not tendered to the Learned Magistrate by the counsel for the Applicant at the trial, it is pertinent to question whether the Prosecution submitted this Medical Report of the Applicant that was in their custody in the disclosures tendered to the Defense at trial. However, neither the Prosecution nor the Defense has submitted the Medical Report of the accused (Applicant in this matter) for the consideration of the Learned Magistrate in reaching her final verdict at the trial.

Finding of Court

26. This Court is of the view that the Learned Magistrate had pronounced her verdict in this matter in evaluating the evidence presented before her by the Prosecution and the Defense at the trial.

27. However, in considering the above analyzed circumstances in this matter, this Court is convinced that the Learned Magistrate had imposed an over excessive

sentence against the Applicant in this matter and had failed to consider the medical condition of the Applicant in passing the sentence, which was contrary to the well-established practices in common law.

Orders of Court

28. In considering the evidence presented before the Learned Magistrate in this matter by the Prosecution and the Defense, this Court does not intend to interfere with the conviction passed by the Learned Magistrate against the Applicant. Therefore, the appeal against the conviction is dismissed.
29. Further, acting under **Section 256 (2) (a)** of the **Criminal Procedure Act 2009**, this Court vary the sentence passed by the Learned Magistrate. In this regard, this Court reduce the sentence of the Applicant to six (06) months imprisonment commencing from 02nd of March 2023.
30. Parties have thirty (30) days to appeal to the Court of Appeal of Fiji.



A handwritten signature in black ink, appearing to read "Thushara Kumarage", is written over a horizontal dotted line.

Hon. Justice Dr. Thushara Kumarage

At Suva
This 18th day of August 2023

cc: *The Director of Public Prosecutions*
Amrit Chand Lawyers