IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 27 OF 2024

(LAUTOKA MAGISTRATES COURT CASE NO. 460 OF 2024)

BETWEEN **SAULA MALATOLU**

Appellant

AND **STATE**

Respondent

Counsel: Appellant in Person
Ms R. Talei Pai for Respondent

Date of Hearing: 29 October 2024
Date of Judgment : 08 November 2024

JUDGMENT

1. The Appellant was charged with one count of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act 2009 and one count of Breach of Domestic Violence Restraining Order contrary to Section 77(1) (a) of the Domestic Violence Act 2009.

2. On 23 July 2024, he pleaded guilty to Count 1 (Assault Causing Actual Bodily Harm) of his own will and pleaded not guilty to Count 2 (Breach of Domestic Violence Restraining Order). He agreed to the summary of facts on Count 1 read in Court. Being satisfied that the guilty plea

was unequivocal, the Learned Magistrate convicted the Appellant. The Appellant does not dispute the conviction entered.

3. The facts agreed by the Appellant are that *on 28 June 2024, the complainant was at home when the accused came, knocked on the door and started to swear at the complainant, saying, "Caiti Tamamu" meaning fuck your father, "Magaitinamu" meaning your mothers vagina, "sonalevu" meaning big ass etc. The complainant was also accused of having an affair. The complainant, whilst in her vehicle trying to go to Lautoka Police Station, the accused came and blocked the way where he also picked a stone and threw it at the complainant, which caused her injuries.*

4. On 23 July 2024, the Appellant was sentenced to an imprisonment term of 7 months and issued a permanent DVRO.

5. Being aggrieved by the sentence, the Appellant filed this appeal on 26 August 2024, six days out of time. On 19 September 2024, he filed the amended grounds of appeal against the sentence, which are as follows:

   (a) The Magistrate did not consider the period the Appellant was in remand.
   (b) The Magistrate did not consider that he was of good character and was a first offender, so he imposed a custodial sentence.
   (c) The Magistrate did not look at all relevant matters regarding the domestic assault.
   (d) The sentence was harsh and excessive.

6. The Supreme Court in **Kumar v State; Sinu v State**[1] outlined the following factors that an appellate court should take into consideration when it deals with the issue of extension of time of appeal. Gates CJ (as he then was) stated thus:

> [4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:
> (i) The reason for the failure to file within time.
> (ii) The length of the delay.

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[1] [2012] FJSC 17; CAV0001.2009 (21 August 2012)

(iii) Whether there is a ground of merit justifying the appellate court's consideration.

(iv) Where there has been substantial delay, nonetheless, is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

7. Although the Appellant has not given reasons for the delay, the length of the delay is only six days and hence not substantial. The Respondent concedes that the appeal Ground (a) is meritorious. In Kumar v State ; Sinu v State (supra), it was further observed:

> [8] In *Rhodes* 5 Cr. App. R 35 at 36 it was said:
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> > "A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."
>
> [9] The approach was explained shortly in *The Queen v Brown* (1963) SASR 190 at 191:
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> > "The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration."

8. The granting of an extension of time will not be unfairly prejudicial to the Respondent. Therefore, the application for an extension of time should be granted.

9. It is appropriate to deal with the substantive appeal for the sake of convenience.

10. The Court of Appeal in **Kim Nam Bae v The State**[2] explained the approach to be taken by appellate courts in dealing with a sentence appeal as follows:

> It is well-established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499).

[2] AAU0015 of 1998S (26 February 1999)

Ground (a) – The time spent in Remand

11. Section 24 of the Sentencing and Penalties Act provides as follows:

> 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.

12. The law requires any period during which the offender was held in custody before the trial to be regarded by the court as a period of imprisonment already served by the offender. The State concedes that the Appellant was in remand for approximately one month (23 days) before he was sentenced. The Learned Magistrate, in his Sentence Ruling, has not considered the time the Appellant was held in remand. Of course, the sentencing court has the power to disregard the time spent in remand if it decides otherwise. However, the court must give reasons as to why it decided not to deduct the remand period from the imprisonment term. The Learned Magistrate has not given any reasons for doing so. Therefore, this ground should succeed.

Ground (b), (c) & (d) Harsh and Excessive Sentence

13. Appeal Grounds (b), (c) and (d) could be considered together under Ground (d) which contends that the sentence imposed by the Learned Magistrate is harsh and excessive.

14. The final sentence imposed by the Learned Magistrate was 7 months imprisonment. In paragraphs 7 and 8, the Learned Magistrate correctly identified the maximum sentence for the offence of Assault Causing Actual Bodily Harm (5 years imprisonment) and the sentencing tariff in a domestic violence case (6 to 18 months' imprisonment)[3]. The sentence is well within the prescribed tariff range.

15 It was contended that the Learned Magistrate without considering that the Appellant was of good character and a first offender had imposed a custodial sentence. In paragraphs 10 and 11 of the Ruling, the Learned Magistrate considered that the Appellant was a first offender and of good character.

[3] Matai v State [2018] FJHC] 25 (26 January 2018)

16. The sentence did not exceed two years. Therefore, the Learned Magistrate has the discretion to fully or partially suspend the sentence under Sections 26(1) and 26(2) (b) of the Sentencing and Penalties Act, if it was satisfied that it was appropriate to do so in the circumstances of the case. However, the imposition of suspended sentence is not automatic even where the offender had no previous convictions and is of good character. The question is whether the imposition of a custodial sentence is warranted in circumstances of the case.

17. In paragraphs 15 and 16 the Learned Magistrate was mindful of the said provisions and cited sentencing remarks of Goundar J in **Balagan v State** [4]where his Lordship observed:

> Whether an offender's sentence should be suspended will depend on a number of factors. These factors will no doubt overlap with some of the factors that mitigate the offence... The final test for an appropriate sentence is- whether the punishment fits the crime committed by the offender.

18. In paragraph 9 of the Sentence Ruling, the Learned Magistrate emphasised the domestic relationship that existed between the Appellant and the victim and the potential breach of the interim DVRO. The Appellant had thrown a stone at the victim when she was attempting to go to the police station to lodge a report against him after being assaulted with filth.

19. The Learned Magistrate also cited (in paragraph 8) **Matai v State**[5] with emphasis where Madigan J observed that:

> 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 circumstances....

20. I must reiterate the words of Madigan J in **Raika v State**[6] where His Lordship observed at [15] & [16] as follows:

> [15] The Appellant's appeal against sentence is again premised on the misconceived notion that account should be taken of the parties' reconciliation. The coming into effect of the Domestic Violence Decree 2009 has precluded the concept of reconciliation being relevant except perhaps, if genuine, to mitigation and even then to a very limited degree. In any event, there is NO evidence of reconciliation in this affair. The whole purpose of the Domestic Violence Decree is to protect the victim

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[4] [2014] HAA 31/11S (24 April 2012) at [20]

[5] [2018] FJHC] 25 (26 January 2018)

[6] [2013] FJHC 383; HAA10.2013 (9 August 2013)

> in a domestic violence situation and it certainly would defeat that purpose if a Court were to send an accused with a known history of violence back into the "matrimonial" home, and thereby put the victim at risk of renewed violence.
>
> [16] Counsel's reliance on pre-domestic violence case law with its often very reactionary and gender-biased dicta on the roles of parties in a relationship cannot in this modern era be sustainable. Harsh sentences will continue to be meted out to perpetrators and protected persons will continue to be protected.

21. There is no evidence before the Learned Magistrate of reconciliation in the matter that was before him. In any event, there were no exceptional circumstances that would justify a suspended sentence. As a matter of practice, suspended sentence is hardly considered in cases of breach of trust and domestic violence. I find no merits in grounds (b), (c) and (d). A custodial sentence of 7 months is neither excessive nor harsh in the circumstances of the case.

22. The following Orders are made:

    i The appeal is partially allowed;

    ii The sentence imposed by the Lautoka Magistrates Court is quashed.

    iii One month is deducted to arrive at an imprisonment term of six months.

    iv. An imprisonment term of 6 months is substituted effective from 23 July 2024.

Aruna Aluthge
Judge

At Lautoka
8 November 2024

Solicitors:
Office of the Director of Public Prosecution for Respondent