

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 35 OF 2024

IN THE MATTER of an Appeal against the sentence of the Magistrate's Court of Lautoka, in Criminal Case No. 205 of 2024.

BETWEEN : **VINAY KUMAR**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Ms. Keli Vulimainadave with Ms. Payal Reddy for the Appellant
Ms. Michelle Lomaloma for the Respondent

Date of Hearing : 24 April 2025

Judgment : 10 June 2025

JUDGMENT

- [1] This is an Appeal made by the Appellant against the Sentence imposed against him by the Magistrate's Court of Lautoka, in Criminal Case No. 205 of 2024.
- [2] In the Magistrate's Court of Lautoka, Criminal Case No. 205 of 2024, the Appellant was charged with one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act No. 44 of 2009 (Crimes Act) and one count of Breach of Domestic Violence Order, contrary to Section 77 (1) (a) of the Domestic Violence Act No. 33 of

2009 (Domestic Violence Act). The full details of the charges read as follows [Vide Charge at page 41 of the Magistrate's Court Record]:

First Count

Statement of Offence (a)

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act of 2009.

Particulars of Offence (b)

VINAY KUMAR, on the 6th day of March 2024, at Lautoka, in the Western Division, assaulted **SHIVA NANDANI** thereby occasioning her actual bodily harm.

Second Count

Statement of Offence (a)

BREACH OF DOMESTIC VIOLENCE ORDER: Contrary to Section 77 (1) (a) of the Domestic Violence Act of 2009.

Particulars of Offence (b)

VINAY KUMAR, on the 6th day of March 2024, at Lautoka, in the Western Division, breached the domestic violence restraining order vide Nadi Magistrate's Court CF 211/24 of dated 26th February 2024 by assaulting **SHIVA NANDANI** a protected person.

- [3] The Appellant was first produced in the Magistrate's Court of Lautoka for this matter on 22 March 2024. On 3 September 2024, the Appellant was ready for his plea and had pleaded guilty to the two charges.
- [4] On 24 September 2024, the Appellant had understood and admitted to the Summary of Facts and had been found guilty and convicted of the two charges [Vide pages 9 and 10 of the Magistrate's Court Record]. The Summary of Facts reads as follows [Vide page 18 of the Magistrate's Court Record]:

“On the 6th of March 2023 [Should be 2024], at about 21.00 hours at Nasoki Street, Lautoka, Accused Vinay Kumar [Accused] 35 years old, Self-employed of Nasoki Street, Lautoka, assaulted Shiva Nadani [Complainant] 32 years, Domestic Duties of Yasiyasi, Tavua, causing her injuries as per Medical Report.

The Accused and the Complainant are husband and wife.

On the above mentioned date, time and place, Accused went to visit his daughter at his sister’s place [A-2] Rajini Kumar, 40 years, of Lautoka whereby the Complainant and their daughter was already there. The Accused then asked the Complainant as to why she changed her name in her birth certificate and also asked about her I-Phone. They started to argue and when the Complainant tried to leave the house with her daughter, the Accused punched the Complainant on her left eye which caused her injuries.

Matter was reported to Police and Accused was arrested, interviewed under caution whereby he admitted to the allegation. Accused in doing the above act, he has also breached the Domestic Violence Restraining Order No. 221/24 [Should be 211/24] which was issued by the Court for the protection of the victim dated 26/02/2024. Accused was charged with a count of Assault Causing Actual Bodily Harm contrary to Section 275 (of the Crimes Act) and one count of Breach of Domestic Violence Restraining Order contrary to Section 77 (1) (a) of the Domestic Violence Act 2009.”

- [5] On 11 October 2024, the Sentence was pronounced [Vide Sentence from pages 6-8 of the Magistrate’s Court Record]. The Appellant had been imposed an aggregate sentence of 1 year and 8 months imprisonment, with a non-parole period of 8 months imprisonment.
- [6] Aggrieved by the said Order made by the Learned Magistrate, Lautoka, the Appellant filed this Appeal in the High Court. The Appeal was originally filed in person. This Appeal was received in the High Court on 5 November 2024 and, as such, was a timely appeal.
- [7] This matter was taken up for hearing before me on 24 April 2025. The Learned Counsel for the Appellant and the Respondent were heard. Both parties have filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [8] As per the Appeal filed the single Ground of Appeal taken up by the Appellant is as follows:

Ground of Appeal against Sentence

1. That the Learned Sentencing Magistrate erred in principle in exercising her discretion when failing to impose a partial suspended sentence:

By not considering the general principle for first offenders as stated in **Singh & Others v. State** [2000] FJHC 115; HAA 79J of 2000S (26 October 2000) and **Prasad v. State** [1994] FJHC 132.

The Law

- [9] Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."

[10] Section 247 of the Criminal Procedure Act stipulates that *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

The Grounds of Appeal against Sentence

[12] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*“...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 he 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).”*

- [13] These principles were endorsed by the Fiji Supreme Court in **Naisua v. The State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v. The King** [1936] HCA 40; [1936] 55 CLR 499; and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.”*

- [14] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

- (i) Acted upon a wrong principle;
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;
- (iii) Mistook the facts;
- (iv) Failed to take into account some relevant consideration.

- [15] In **Sharma v. State** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

“[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England

there is a statutory duty to have regard to the guidelines issued by the Council (*R –v- Lee Oosthuizen* [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in *Naikелеkelevesi –v- The State* (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in *Qurai –v- The State* (CAV 24 of 2014; 20 August 2015) at paragraph 48:

"The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an

error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

The Ground of Appeal against Sentence

- [16] The single Ground of Appeal against Sentence is that the Learned Sentencing Magistrate erred in principle in exercising her discretion when failing to impose a partial suspended sentence by not considering the general principle for first offenders as stated in decided case authorities.
- [17] With regard to the offence of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act, the Learned Magistrate has correctly identified the tariff for the offence, and has further explained that the said tariff would be enhanced in cases involving domestic violence assaults [Paragraph 4 of the Sentence].
- [18] With regard to the offence of Breach of Domestic Violence Restraining Order, contrary to Section 77 (1) (a) of the Domestic Violence Act, the Learned Magistrate has correctly identified the maximum penalty for the offence as 1 year imprisonment and/or a fine of \$1000.00. She has stated that there is no established tariff for the said offence [Paragraph 5 of the Sentence].
- [19] What must be emphasized is that the Learned Magistrate has considered the aggregate sentence for both offences. Since the offence of Assault Causing Actual Bodily Harm is the more serious offence, she has gone on to state that she would be using the maximum penalty and tariff for the offence of Assault Causing Actual Bodily Harm as her guide [Paragraph 6 of the Sentence].
- [20] Accordingly, the Learned Magistrate has picked a starting point of 9 months imprisonment. Thereafter, the Learned Magistrate has gone on to increase the sentence by 3 years for the aggravating factors which she has identified as domestic violence committed by the Appellant against his wife in the presence of a child and in

light of the violation of the pre-existing protective orders meant to protect against such incidents in the first place. The Learned Magistrate had stated that these factors significantly aggravate the circumstances of the assault [Paragraph 7 of the Sentence].

[21] Thereafter, the Learned Magistrate has considered the personal circumstances of the Appellant and has correctly identified the mitigating factors-that the Appellant was remorseful and that he is seeking forgiveness, that he co-operated with the Police after he was arrested, that he is a first offender and that he had entered a guilty plea at the first available opportunity [Paragraph 8 of the Sentence].

[22] Accordingly, the Learned Magistrate has reduced 3 months for the personal circumstances and a further 1 year for the fact that the Appellant was a first offender and had co-operated with the Police, thereby reducing the sentence to 2 years and 6 months imprisonment [Paragraph 9 of the Sentence].

[23] For the early guilty plea, the Learned Magistrate has given a discount of 1/3 thereby reducing the sentence by further 10 months. The final aggregate sentence was 1 year and 8 months imprisonment (20 months imprisonment). The Learned Magistrate had stated that although the sentence might be on the high end of the tariff for the offence of Assault Causing Actual Bodily Harm, she will not make any further adjustments, since the sentence properly punishes the Appellant for both crimes he has committed [Paragraph 10 of the Sentence].

[24] Section 26 of the Sentencing and Penalties Act No. 42 of 2009 (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.

[25] I concede that in ***Singh & Others v. State*** [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

[26] This was followed In ***Nariva v. The State*** [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

[27] However, it is to be noted that the Appellant in this case is 36 years of age [his date of birth being 20 June 1998] and as such cannot be considered as a young offender. The Learned Magistrate has stated that deterrence is the primary factor to be considered in this case. She has concluded that crimes of domestic violence should stop, and it is in the public interest to ensure that Respondents respect protective orders issued by Court. For the said reasons, she has declined to suspend the sentence imposed on the Appellant [Paragraph 11 of the Sentence].

[28] In the circumstances, I find that the Learned Sentencing Magistrate has duly exercised her sentencing discretion in this matter. Considering all the facts and circumstances of the case, it cannot be said that she erred in principle in exercising her discretion when failing to impose a partial suspended sentence. Therefore, I am of the opinion that the Ground of Appeal against Sentence has no merit.

Conclusion

[29] Accordingly, I conclude that this Appeal against Sentence should be dismissed.

FINAL ORDERS

[30] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The Conviction and Sentence imposed by the Learned Magistrate Magistrate's Court of Lautoka, in Criminal Case No. 205 of 2024 is affirmed.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LAUTOKA

Dated this 10th Day of June 2025

Solicitors for the Appellant :

Office of the Legal Aid Commission, Lautoka.

Solicitors for the Respondent:

Office of the Director of Public Prosecutions, Lautoka.