

**ELIZABETH JOSEPH v STATE (HAA0030J of 2004S)**

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

2, 8 April 2004

10 **Criminal law — appeals — appeal against conviction and sentence — assault occasioning actual bodily harm — whether sentence imposed wrong in principle, harsh and excessive — Penal Code s 245.**

15 In 2003, the Appellant came to the house of Dinesh Prasad (Dinesh) and drank yaqona with the latter. At about 9 am, the Appellant argued with Sushila Devi (Sushila), the legal wife of Dinesh and Dinesh gave the Appellant a stick to beat Sushila. Sushila reported what happened to the police and Dinesh and the Appellant were given a warning. At 2 pm, the Appellant and Dinesh went into the bedroom because the Appellant said she had a headache and she wanted to sleep with Dinesh. Later, when Dinesh brought his underwear for his wife to wash, the Appellant took out a penknife and tried to stab Sushila. Sushila tried to protect herself but received a cut on her hand.

20 The Appellant was convicted of assault occasioning actual bodily harm and sentenced to 4 months' imprisonment for assaulting Sushila. The Appellant appealed against sentence and conviction claiming that the conviction was not supported by evidence and that the sentence was not appropriate because the Appellant was a first offender with a 12-year-old son.

25 **Held** — The evidence of the complainant Sushila supported the conviction. The use of a penknife and the act of the Appellant in going to the house of Sushila to assault her amounted to a serious offence. An assault using a weapon was a serious matter in that custodial sentence was required. In all the circumstances, the 4-month term imposed was not excessive.

30 Appeals dismissed.

**No cases referred to**

*S. Matawalu* for the Appellant

*K. Bavou* for the State

35 **Shameem J.** The Appellant was convicted of the following offence, on her plea of not guilty:

*Statement of Offence*

40 **ASSAULT OCCASIONING ACTUAL BODILY HARM:** Contrary to Section 245 of the Penal Code, Act 17.

*Particulars of Offence*

ELIZABETH JOSEPH d/o CHANDRA JOSEPH, on the 21st day of May, 2003 at Suva, in the Central Division, assaulted SUSHILA DEVI d/o RAM NARAYAN, occasioning her actual bodily harm.

45 She was convicted on 13 February 2004 and sentenced on the same day to 4 months' imprisonment. She now appeals against conviction and sentence. Counsel informed me that of the 4-month term imposed, she has served 1 month in custody and has now been released to serve the balance extra-murally.

50 Her grounds of appeal are that the conviction is not supported by the evidence, and that the sentence was wrong in principle because the Appellant is a first offender with a 12-year-old son. At the hearing of this appeal, counsel also sought

leave to argue an additional ground of appeal, that is, that the prosecution had failed to disclose the prosecution case to the Appellant. However the prosecution produced by affidavit and annexure, a disclosure certificate signed by the Appellant, acknowledging receipt of the prosecution documents so this ground has no merit at all. The Appellant says that she should have got fresh disclosure after the charge was amended to the lesser charge of assault occasioning actual bodily harm (the original charge being act with intent to cause grievous harm). However as the evidence on both charges were exactly the same, I see no prejudice to her at all.

10 The evidence led at the trial was that Sushila Devi is the legal wife of Dinesh Prasad with whom she has had three children. It was not in dispute that the Appellant was having an affair with Dinesh Prasad. On 21 May 2003, the Appellant came to their home at 9 am and started to drink yaqona with Dinesh Prasad. She started to argue with Sushila Devi, and Dinesh Prasad gave the Appellant a stick to beat Sushila Devi which Sushila Devi reported the matter to the police, and the police gave the Appellant and Dinesh Prasad a warning.

At 2 pm, the Appellant and Dinesh Prasad went into the bedroom because the Appellant said she had a headache and she wanted to sleep with Dinesh Prasad. After a while Dinesh Prasad brought his underwear for his wife to wash. The Appellant then took out a penknife which Sushila Devi identified, and tried to stab Sushila Devi. When Sushila Devi tried to protect herself she received a cut on her hand. The medical report described the cut as a 4 cm long and 1 cm deepcut on the right little finger. Sushila Devi told the doctor the same thing she told the court and was reported to be distressed.

25 Under cross-examination, Sushila Devi said that she did not hit the Appellant in retaliation and that the Appellant was always visiting their house and was naked there.

Sushila Devi reported the matter to the police and showed the police the penknife used on her. The Appellant was interviewed under caution. She said that she often visited Dinesh Prasad at his home and that on her visits she did not speak to his wife. She said she did not hit Sushila Devi with a penknife. She did not offer any explanation for Sushila Devi's injury.

The Appellant in her sworn evidence adopted her caution statement in evidence in chief. Under cross-examination she was not asked how Sushila Devi received her injury. However when she had cross-examined the investigating officer, she had suggested to him that Dinesh had cut the Appellant's finger with a "toy".

The Appellant called Dinesh Prasad as her witness. He said that his wife, Sushila Devi had thrown a toy at him and that he had hit her with the toy. He said that his wife had lied on oath and that she had now left the house.

In his judgment the learned magistrate clearly accepted the complainant's version of the facts. He said that the injury was consistent with being caused by a sharp object and that the police had seized the penknife on the day of the assault. He commented that the defence witness Dinesh Prasad had been sitting in the courtroom throughout the trial, and said that it was obvious to him that Dinesh Prasad was protecting his mistress. He accepted the prosecution version of the facts and convicted the Appellant.

Given the nature of the evidence, his findings are unsurprising. The Appellant said nothing about a toy in her caution statement and only mentioned a toy for the first time in her charge statement in July. Further, both she and Dinesh Prasad were strangely non-specific about the exact nature of a toy which could cause a

4 x 1 cm cut on Sushila Devi's finger. I note that Sushila Devi said she had been cut on the left hand, while her medical report stated that an injury had been found on her right hand. I do not think that this inconsistency cast doubts on her evidence. Clearly the learned magistrate had no difficulty accepting the evidence  
5 of the complainant.

The evidence supported the conviction and the appeal against conviction is dismissed.

The Appellant is a first offender and has a young son. The court found the offending to be serious because of the use of the penknife and the fact that the  
10 Appellant went into the home of Sushila Devi to assault her. He took into account the fact that she had been invited there by Dinesh Prasad but was unable to pass a non-custodial sentence. He sentenced her to 4 months' imprisonment.

The Appellant says this is harsh and excessive. I do not agree. An assault using a weapon is a serious matter, normally requiring a custodial sentence. A starting  
15 point of 12 months' imprisonment might have been appropriate in this case with a discount of 6 months for good character and the circumstances of her child. A term of 6 months' imprisonment might have been appropriate. In all the circumstances, the 4-month term imposed is not excessive, nor wrong in principle.

20 The appeal against sentence is also dismissed.

*Appeals dismissed.*

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