

SEMISI BOTAKI v STATE (HAA0015 of 2012B)

HIGH COURT — APPELLATE JURISDICTION

5 MADIGAN J

26 July, 1 August 2012

10 **Criminal Law — appeals — appeal against conviction and sentence — assault occasioning actual bodily harm — discretion whether or not to record conviction — domestic violence — aggravating features — doubly jeopardy — attack to victim’s head — drunkenness — lenient — Crimes Decree s 275 — Sentencing and Penalties Decree s 16(1)(c).**

15 The appellant pleaded guilty to a charge of assault causing actual bodily harm. He was convicted and sentenced to seven months’ imprisonment. The appellant appealed against his conviction and sentence.

Held –

20 (1) Just because an offender will lose his job, and just because he will be affected economically does not mean that it is mandatory for a Magistrate to invoke s16(1)(c) of Sentencing and Penalties Decree. Where a Magistrate has exercised his discretion, within the bounds of his power, it would be in very exceptional circumstances that an appellate court would interfere with that exercise. This is particularly so in cases of domestic violence as it would not be in the spirit of the Domestic Violence Decree to not record a conviction against a perpetrator.

25 (2) It would appear that the Magistrate fell into error in adding time for aggravating features, when he had already used those factors to arrive at his starting point. Although there appears to be some degree of “double jeopardy” in the sentencing process, there was not enough emphasis on the fact that the attack focused on the victim’s head, which is an aggravating feature of the most serious degree.

30 (3) In this instance, drunkenness is not a factor which goes either to aggravation or to mitigation. The offence is committed with basic intent and not specific intent, and intoxication is therefore no excuse, nor is it aggravating to the offence.

Appeal against conviction and sentence dismissed.

P. Lomaloma for the Appellant.

35 *M. Fong* for the State.

Madigan J.**[DOMESTIC VIOLENCE]**

40 [1] On the 9th July 2012, in the Magistrates Court at Labasa, the appellant entered a plea of guilty to one charge of assault causing actual bodily harm contrary to s 275 of the Crimes Decree 2009. He was sentenced on the same day to seven months’ imprisonment. He now seeks to appeal his conviction and his sentence.

The facts agreed by the appellant in the lower Court are as follows:

45 “On the 7th July 2012 the victim, the accused’s wife, was at home with her two children while the appellant was at a neighbour’s house drinking beer. After sometimes (sic) the accused came to their home and requested the victim for the money he had given her earlier that day. The victim told the accused that she had used the money to buy food and other staff (sic) for the family. The accused got angry, took out their iron and threw at victim which landed on her head. After which accused then again pulled
50 out one of their drawer and with bang the said on victim’s head. Victim could not tell (sic) anything after as she felt dizziness.

The victim was taken to hospital for medical examination with the following injuries sustained:

Swelling and bruising on left forehead

Multiple bruises 15 x 2 cm

5 12 x 3 cm

10 x 4 cm

Associated swelling

Accused, after a report to the Police, was locked in a cell as he was under the influence of alcohol. Under caution he admitted assaulting his wife."

10 [3] The appellant is 32, his wife 27. He is the Vice Principal of a local secondary school. He has worked as a teacher for 16 years and has a clear record. He had been drinking alcohol on the day in question. The alcohol led to the argument and subsequent assault.

15 [4] In his sentence the learned Magistrate after recording a conviction and then discussing the authorities took a starting point of 8 months imprisonment. He added eight months to that for aggravating features which he considered to be a breach of trust in the husband-wife relationship; use of an iron and a drawer as weapons; the fact that the assault was to her head; that he was drunk; and the medical findings. He deducted 3 months for the guilty plea, and a further 3
20 months for mitigating factors which he held to be his professional experience, his drinking on the day, reconciliation with his wife and promise not to drink or re-offend any more.

25 **The Appeal Against Conviction**

25 [5] The appellant by his Counsel prays that the Magistrate should have taken s 16(1)(c) of the Sentencing and Penalties Decree into consideration and not order a conviction to be entered. He submits that as he is a first offender and as he is the Vice Principal of a Secondary School at risk of losing his job, it is a
30 suitable case for not recording a conviction.

Section 16(1) of the Sentencing and Penalties Decree reads as follows:

"S 16(1) In exercising his discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including –

35 (c) The impact of a conviction on the offender's economic or social well being, and on his or her employment prospects."

[7] The operative word in this section is "discretion". Just because an offender will lose his job, and just because he will be affected economically does not mean that it is mandatory for a Magistrate to invoke the provisions of this Section.
40 Where a Magistrate has exercised his discretion within the bounds of his power that it would be in a very exceptional circumstances that an appellate court would interfere with that exercise.

[8] This is particularly so in cases of Domestic Violence which this case is. The Domestic Violence Decree is clearly a Decree which aims to provide greater
45 protection from Domestic Violence and it would not be in the spirit of this legislation to not record a conviction against a perpetrator.

[9] The appellant has pleaded guilty to the offence and admits facts which go to the elements of the offence. The fact that he holds a career position as a Vice
50 Principal is of no moment. This Court treats perpetrators alike be they poor or rich, of high or lowly status.

[10] The appeal against conviction is dismissed.

The Appeal Against Sentence

[11] The accused in appealing sentence prays:

- (a) That it is harsh and excessive
- 5 (b) The learned Magistrate in assessing seriousness of the offence picked the wrong starting point
- (c) The Magistrate erred in identifying and given improper weight to the aggravating factors
- (d) The Magistrate erred in failing to give proper weight to the mitigating factors
- 10 (e) The Magistrate placed too much emphasis on public deterrence
- (f) The Magistrate failed to take into account the effect of the sentence on the victim.

[12] In looking first at the aggravating features and the eight months added to those; it would appear that the Magistrate did in fact fall into error. All of the features he did say were aggravating were reasons that he used to take the starting point he did. He then added time for these same features in penalizing the accused twice which is unfair. It is however a significant aggravating feature that the accused focused on the head of the victim when attacking her both with the iron and with the drawers and the medical report does indeed note “swelling and bruising on the left forehead”. Any attack to the head is dangerous in the highest degree and the appellant’s admission to “banging the victim’s head” with a drawer is an aggravating feature of the most serious degree. This feature was not subsumed in the starting point but the other features mentioned by the Magistrate were.

25 [13] Although there appears to be some degree of “double jeopardy” in the sentencing process there was not enough emphasis on the attack to the head. This court would therefore not interfere with the addition of 8 months for the aggravating factors.

30 [14] The Magistrate was quite correct in taking into account the previous good record and the plea of guilty when discounting the sentence for mitigation.

[15] The question of reconciliation in a Domestic Violence is a difficult one. It is quite clear that it is not reconcilable offence, it being a domestic violence case and that being so, reconciliation as a mitigating factor is of very dubious value. A female victim will nearly always say that the parties are reconciled because she will fear the loss of the family breadwinner and supporter or she is forced to say it by her accused husband. A sentencing tribunal should always therefore look at a submission of reconciliation with great caution and suspicion. In this case, although the Magistrate has listed reconciliation as a mitigating factor, he later expresses doubts whether it was voluntary or not because the victim did not confirm it in Court. It was a submission of the accused.

40 [16] The Magistrate listed the drinking of alcohol as a mitigating factor, as well as using drunkenness to justify a high starting point for the sentence. This contradiction creates some confusion. Drunkenness in this instance is not a factor which goes either to aggravation or to mitigation. The offence is committed with basic intent and not specific intent and intoxication is therefore no excuse. Nor it is aggravating to the offence.

45 [17] As stated in paragraph 9 (supra) his position as a Vice Principal is of very limited mitigation. As a person of status in the community he should be setting an example to that community and no example is set by a drunken attack on his wife when there is no provocation.

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[18] Mr Lomaloma refers the Court to the medical report which discloses the medical findings of three bruises on the back of the left arm. He submits that those injuries detract from the seriousness of the offence and would suggest that the head was not the main focus of the assault.

5 [19] The arm injuries are unexplained. However in the Court below the appellant admitted assaulting “my wife as outlined in the summary of facts.” The facts speak to two assaults (with an iron and with a drawer) both to the head.

10 [20] In recasting the sentence in the light of the Court’s observation, a starting point of ten months would be appropriate. This reflects the breach of trust, the assault with little or not provocation and the need for severity in domestic violence situations. To this starting point an additional six months should be added for the aggravation of an attack to the head. This brings the sentence to an interim total of 16 months. From this a deduction of four months could be made for the clear record and any other available mitigation. From this total of 12
15 months, a one third deduction is in order for the plea of guilty resulting in a new sentence of eight months’ imprisonment.

[21] Given that this is an appeal and the appellant appears to have the unreasonable expectation that his sentence will be reduced, the original sentence of seven months will not be interfered with. Although this court does not agree with the manner in which it was arrived at, the sentence is lenient and not a day
20 too long in the circumstances.

[22] The appeal against sentence is also dismissed.

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Appeal dismissed.

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