IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 35 OF 2018
(Lautoka Magistrates Court Criminal Case No: 614 of 2014)

BETWEEN : SUBARMANI MUDALIAR

APPELLANT

AND : STATE

RESPONDENT

Counsel:	**Ms J. Singh**	**For Appellant**
	Mr A. Singh	**For Respondent**

Date of Hearing : 19th July, 2018
Date of Judgment : 15th August, 2018

JUDGMENT

1. The Appellant appeals against his sentence imposed by the learned Magistrate at Lautoka on 26th June 2018.

2. The Appellant was convicted after trial on two counts of "Indecently Annoying A Person" contrary to Section 213 (1) (a) of the Crimes Act No. 44 of 2009. The information upon which he was convicted is as follows:

First Count

Statement of Offence

INDECENTLY INSULTING OR ANNOYING ANY PERSON: Contrary to Section 213 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Subarmani Mudaliar on the 7th day of October, 2014 at Lautoka in the Western Division, with intent to annoy the said **Prashant Levaci Kumar** uttered insulting words such as **'Amar nuni pio'** meaning **suck my penis** intending that such words be heard by the said **Prashant Levaci Kumar** which offended his modesty.

Second Count

Statement of Offence

INDECENTLY INSULTING OR ANNOYING ANY PERSON: Contrary to Section 213 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Subarmani Mudaliar on the 7th day of October, 2014 at Lautoka in the Western Division, with intent to annoy the said **Prashant Levaci Kumar** exhibited pornographic material using his mobile phone, intending that such exhibition be seen by the said **Prashant Levaci Kumar** which offended his modesty.

3. The Appellant was sentenced on each count to 20 months', 6 months to be served in prison and remaining 14 months suspended for 5 years. The sentences of imprisonment were to be served concurrently.

4. The appellant appeals on following grounds:

> **THAT** the Learned Magistrate erred in law and in fact when he selected the starting point at the higher end of the tariff which led the sentence being harsh and excessive.

THAT the Learned Magistrate erred in law and in a fact when he did not give cogent reasons as to the selection of the starting point.

THAT the Learned Magistrate failed to consider that the maximum penalty for the offence of indecently annoying a person is 12 months imprisonment and the final sentence being more than the maximum penalty prescribed in the Crimes Act No. 44.

THAT the Learned Magistrate failed to consider a suspended sentence, as the Petitioner was a first offender.

THAT the Learned Magistrate failed to consider Section 4 (1) and (2) of the Sentencing and Penalties Act 2009, thus the sentence to be harsh and excessive.

Facts

5. The victim was 10 year old student at the time of the offence. The Appellant who is a neighbour of the victim had invited the victim to accompany him to the shop. The victim had hesitantly agreed to go to the shop with the Appellant. On half way to the shop the Appellant had asked the victim to suck his 'dick' for money. The victim then went back home and when he was about to have a bath, the Appellant had come home and showed pornographic material stored in his phone. The victim reported the matter to a friend who eventually reported the matter to victim's mother. The victim said it was 'annoying and disgusting'.

Law

6. 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 (Bae v State [1999] FJCA 21; AAU0015u.98s (26 February 1999; House v The King [1936] HCA 40; (1936) 55 CLR 499).

Analysis

7. All grounds can be considered together as they challenge the sentence on the basis that it was harsh and excessive.

8. The maximum penalty for indecently annoying another is imprisonment for one year. There is no set tariff for this offence. In ***State v Yabakiono*** [2016] FJHC 383; HAC77.2014 (9 May 2016) Madigan J observed:

> *"The maximum penalty for indecently annoying another is imprisonment for one year without a tariff having been set; nor need there be one. There are a myriad ways in which a person can be sexually harassed and the sentence will be at the discretion of the court hearing the matter"*

9. The Appellant contends that the Learned Magistrate erred in law and in fact when he selected the starting point at the higher end of the tariff which led the sentence being harsh and excessive.

10. The learned Magistrate took 16 months as the starting point. As Madigan J observed in Yabakiono (supra) there is no set tariff for this offence. The learned Magistrate had selected a starting point above the maximum penalty for the offence. Generally when a tariff is set it is set below the maximum penalty for the offence and, according to recommendation by the Court of Appeal in ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013), the starting point should be picked from the middle or lower range of the tariff. However the maximum penalty for this offence being imprisonment period of one year and no tariff being set I do not see a need to apply the 'Koroivuki principle' to this case. As Madigan J observed in Yabakiono (supra) '*there are a myriad ways in which a person can be sexually harassed and the sentence will be at the discretion of the court hearing the matter'.*

11. However selecting a starting point of 16 months, above the maximum penalty prescribed by the legislation, is illegal and wrong in principle.

12. Having selected a starting point as high as 16 months, the Learned Magistrate increased 4 months on account of aggravating factors. At paragraph 6 of the sentencing Ruling the Learned Magistrate stated *"as aggravation factor I found that this is an insult on a young offender and therefore increase your sentence by 4 months in reflecting the same"*.

13. The Counsel for Appellant argues that the charge itself has the word 'insult' in it or already incorporated in the offence and therefore the learned Magistrate had double counted the same aggravating factor to punish the Appellant twice for this aggravating feature. It is also contended that by selecting a higher starting point the Court had already considered this aggravating feature at tier one of the sentencing process.

14. The Learned Magistrate had increased the sentence by 4 months because of the said aggravating fact. It has to be accepted that the word 'insult' and 'annoy' carry slightly different meanings. 'Insult' is a disrespectful or scornfully abusive remark or action. 'Annoy' is to irritate (someone) or to make someone a little angry. However both actions are intended to make someone angry. Therefor I concede that 'insult' is incorporated in the offence itself. I also accept that the said aggravating feature is deemed to have subsumed in the higher starting point selected. However, the Appellant has insulted a child who was only 10 years old at the time of the offence. Therefore taking into consideration the age of the victim as an aggravating factor is not wrong in principle although an increase of 4 months may not be justified given the higher starting point selected by the learned Magistrate.

15. It should however be noted that there are other aggravating feature in this offending which the learned Magistrate failed to appreciate. The learned magistrate has failed to consider the age gap between the offender and the victim and also the relationship between them. The Appellant is a neighbour of the child victim and the victim had placed much trust on the Appellant when he agreed to go to shop with him. The Appellant is also guilty in repeating this offence. The child victim was also vulnerable.

However I take the view that the final sentence of 20 months' imprisonment above the maximum penalty prescribed by the Crimes Act is illegal.

16. The learned Magistrate has not given any discount in mitigation only because the Appellant had failed to file his mitigation despite an opportunity to do so was given. However the Appellant was a first offender and therefore he deserved a discount on that account.

17. The learned State Counsel agrees that the sentence is excessive bearing in mind the maximum sentence prescribed by the legislation and the sentencing practice in the past. He feels that the sentence ought to be reduced. With learned State Counsel not opposing the appeal, in all the circumstances of this case I also consider that the sentence should be on the high side for this type of offending.

18. Therefore, having considered all aspects of the offence, Appellant and the victim, I would quash the sentence and impose a fresh sentence that is lawful and proportionate to the offences the Appellant had committed.

19. Although the maximum penalty prescribed by the statute is one year, when I read the record of proceedings in this case, I found the circumstances to be serious. When the Appellant committed the first offence he had attempted to have his penis sucked by a child for money. When he failed to satisfy his lustful demand, he had shown pornographic material to corrupt the innocent mind of a child so that he could meet his demand.

20. Having considered the seriousness of the offence and the harm caused to a child victim I select a starting point of 8 months. For aggravating circumstances discussed above, I add 3 months bringing the interim sentence to 11 months imprisonment. Appellant is a first offender. I deduct one month in mitigation. Now the final sentence is 10 months' imprisonment.

21. I therefore set aside the sentence of 20 months' imprisonment and substitute it with a sentence of 10 months' imprisonment on each count.

22. The learned Magistrate at paragraph 8 of his Ruling considered whether the sentence should be suspended as required by Section 26 of the Sentencing and Penalties Act (SPA) because the final imprisonment period fell below 2 years. The Appellant argues that the whole sentence should have been suspended because the Appellant was a first offender and therefore the principle of rehabilitation should have been the primary purpose of the sentencing process.

23. I do not agree with this proposition. The learned Magistrate had suspended 14 months of the sentence and ordered an immediate custodial sentence of 6 months. I think the learned Magistrate was right when he imposed an immediate custodial sentence of six months given the circumstances of this case. The principle of rehabilitation should be rightly balanced with other purposes articulated in Section 4(1) of the SPA. The victim is a vulnerable child and a clear message has to be sent to the society and to the offender that this kind of offences will be dealt with severely by courts. Special and general deterrence should be the primary purpose of the sentence. The protection of community, specially the need to protect children who are highly vulnerable in our society has to be given special consideration by courts when it comes to sentencing an offender in a sex related cases. The breach of trust on the part of the Appellant as an adult neigbour is also a matter to be reckoned with. And also the Appellant has never been remorseful.

24. The learned Magistrate has cited ***State v Nadolo*** [2012] FJHC 1444; HAC143.10 (23 November 2012) where Nawana J observed;

> *"Section 4 of the Decree on 'Sentencing Guidelines', has been founded on the jurisprudential principle of 'balancing competing interests' of the offender, the victim and the society at large. (State v Tilalevu [2010] FJHC 258 HAC 81 of 2010; 20.07.2010).*
>
> *It is, therefore, of paramount importance for any sentence to reflect court's bounden duty of protecting the community and its unhesitant approach of denouncing the commission of the offence within the prescribed parameters under the law. This can be manifested only by deterring the offenders and others who tempt to commit crime"*

25. For all of the reasons stated above, I take the view that the immediate custodial sentence of six months is not disproportionate to the offence the Appellant has committed.

26. The Appellant was sentenced by the learned Magistrate on the 26th June 2018. Having considered the position took up by the State and the illegality of the sentence, the Appellant was released on bail by this court on 19th July, 2018. Therefore he had served nearly one month in prison prior to the bail determination. Therefore I deduct one month from the imprisonment period.

27. Following orders are made:

(i). The Appeal against sentence is partly allowed.

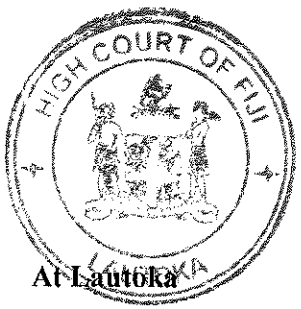
(ii). The sentence imposed by the Magistrate at Lautoka is quashed.

(iii). The Appellant is sentenced to 10 months' imprisonment on each count to be served concurrently.

(iv). 4 months' of which is suspended for a period of two years.

(v). The Appellant had already served nearly one month in prison. Therefore, one month is deducted from the imprisonment period to be served. The Appellant's final imprisonment period is 5 months with effect from toady.

28. 30 days to appeal to the Fiji Court of Appeal.



Aruna Aluthge

Judge

At Lautoka

15th August, 2018

Counsel:- **Legal Aid Commission for Appellant**

Office of the Director of Public Prosecution for Respondent