IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 01 of 2017

BETWEEN : **ATONIO RACIKA**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel	:	Ms. U. Baleilevuka for the Appellant.
	:	Ms. L. Latu for the Respondent.
Date of Hearing	:	25 April, 2017
Date of Judgment	:	28 April, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellant was charged in the Magistrate's Court with one count of Grievous Harm contrary to section 258 of the Crimes Act.

[2] It was alleged that the Appellant on the 24th day of July, 2016 at Lautoka unlawfully and maliciously did grievous harm to Waisake Matea.

[3] On 16 September, 2016 the Appellant pleaded guilty to the charge and also admitted the summary of facts after it was read and explained to him. Upon being satisfied that the Appellant had entered an unequivocal plea the learned Magistrate convicted the Appellant.

[4] After hearing mitigation on 24 January, 2017 the learned Magistrate sentenced the Appellant to 30 months imprisonment.

[5] The Appellant filed a timely appeal against his sentence as follows:

(i) That the Learned Trial Magistrate misdirected himself as to the application of section 4 (2) (j) of the Sentencing and Penalties [Act] 2009 in failing to suspend the sentence of the accused.

(ii) That [the learned Magistrate] erred in law and in fact by failing to give sufficient weight to the accused character and the mitigating factors imposing a custodial sentencing that the accused was a first time offender.

(iii) The sentence is manifestly too harsh and excessive in all the circumstances of the case.

(iv) That the Learned Magistrate erred in law and in fact in taking into consideration irrelevant matters and disregarding relevant matters in sentencing the Appellant.

SUMMARY OF FACTS

[6] The Appellant admitted the following summary of facts after it was read and explained to him:

"On the 24th July, 2016 at about 1700hrs at Vunato, Lautoka ***ATONIO RACIKA*** *(B-1) 38 yrs, chief security of Sandalwood St, Lautoka unlawfully [and] maliciously did grievous harm to* ***WAISAKE MATEA*** *(A-1) 35 yrs, security officer of Vunato, Lautoka.*

On the above mentioned date, time and place (A-1) was at home drinking liquor with (B-1). After a while [an] argument developed whereby (B-1) was swearing at (A-1)'s brother. (A-1) wanted to confront (B-1) when he was held back by his brother. (B-1) went and punched (A-1) whereby (A-1) fell to the ground. (B-1) then stepped on (A-1) face whereby he received injuries as fractured jaw.

The matter was reported to police by (A-1) whereby (B-1) was arrested in custody, interviewed under caution whereby he admitted to the offence. (B-1) was later charged for the offence of Grievous Harm whereby he was kept in custody for court."

[7] The court is grateful to both counsel for filing helpful written submissions in addition to their oral submissions.

GROUNDS OF APPEAL

GROUND ONE

"That the Learned Trial Magistrate misdirected himself as to the application of section 4 (2) (j) of the Sentencing and Penalties [Act] 2009 in failing to suspend the sentence of the accused.

[8] The learned Counsel for the Appellant submits that section 4 (1) and (2) of the Sentencing and Penalties Act provides a guideline for the

sentencing of an offender. Counsel contends that the learned Magistrate failed to take into consideration section 4 (2) (j) of the Sentencing and Penalties Act when sentencing the Appellant.

[9] Counsel relies on case authorities where the offenders were charged with act with intent to cause grievous harm and further states that in the present situation the Appellant did not use a weapon and that he was provoked by the victim who had instigated the argument.

[10] In sentencing an offender the sentencing court exercises a judicial discretion. An Appellant who challenges this discretion must demonstrate to the Appellate Court that the sentencing court fell in error whilst exercising its sentence discretion.

[11] The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"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. AAU0015 at [2]. 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."

[12] The first limb of the appeal advanced by the Appellant is that the learned Magistrate misdirected himself as to the application of section 4 (2) (j) of the Sentencing and Penalties Act.

[13] Section 4 (2) (j) of the Sentencing and Penalties Act states:

"(2) In sentencing offenders a court must have regard to –

...

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant of the commission of the offence..."

[14] At paragraphs 5 and 6 of the sentence the following is mentioned about mitigating factors:-

Paragraph 5

"You a first offender and have offered a plea in mitigation. You are 38 years of age, married with two children. You are working as a chief Security at BLK Company and earning $1,300.00 a month."

Paragraph 6

"The mitigating factors are that, you have pleaded guilty at the earliest available opportunity and have saved court time and resources. This is an indication of remorse on your part. You are seeking forgiveness from this

court and promised not to re-offend. You have reconciled with the victim and this was confirmed in court."

[15] At paragraph 8 of the sentence the learned Magistrate states the following aggravating factors relevant to the commission of the offence:-

"In sentencing you, the court have considered that this incident arose from drinking liquor. There was argument between you and the complainant's brother when the complainant tried to resolve the problem when he was assaulted by you. Furthermore, you stepped on the complainant's face when he fell on the ground. The injuries suffered by the complainant were serious where he was treated at Lautoka Hospital and then transferred to CWM Hospital. The specific injuries suffered by the complainant as follows:-

- *Bilateral submandibular swelling;*
- *Bilateral mandibular fracture;*
- *Sublingual hematoma and*
- *Derranged occlusry with anterior open bite."*

[16] A perusal of the sentence shows that the learned Magistrate had taken into account section 4 (2) (j) of the Sentencing and Penalties Act.

[17] In respect of the second limb of this ground of appeal the law accords discretion on the Magistrate's Court to suspend a sentence if the final sentence is two years imprisonment or less.

[18] Section 26 (2) (b) of the Sentencing and Penalties Act states;

"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed...

(b) does not exceed 2 years in the case of the Magistrate's Court."

[19] The final sentence the learned Magistrate arrived at was 30 months imprisonment under section 26 (2) of the Sentencing and Penalties Act the learned Magistrate had no discretion to suspend this sentence.

[20] This ground of appeal is dismissed due to lack of merits.

[21] This court also endorses the comments made in *DPP vs. Saviriano Radovu [1996] 42 FLR 76 (22 May 1996)*, where Fatiaki J. adopted the Practice Direction No. 1/91 issued by Tuivaga CJ. and said at page 80:

"...offences which fall within any of the broad categories ...,namely, (i) offences involving personal violence; ... must be considered prima facie unsuitable to be dealt with by way of a suspended sentence of imprisonment."

GROUND TWO

"That [the learned Magistrate] erred in law and in fact by failing to give sufficient weight to the accused character and the mitigating factors imposing a custodial sentencing that the accused was a first time offender.

[22] Counsel for the Appellant submits that the learned Magistrate failed to give sufficient weight to the Appellant's mitigating factors such as his good character.

[23] Counsel states that the Appellant had pleaded guilty at the first instance, this indicates the Appellant was remorseful, had admitted his mistake and has regretted what he had done. Furthermore the Appellant maintained a clean record for the past 38 years.

[24] At paragraph 10 of the sentence the learned Magistrate allowed deductions for the Appellant's mitigating factors as follows:-

(a) 6 months for early guilty plea;
(b) 2 months for mitigation; and
(c) 1 month for unblemished record.

[25] The total deduction allowed for the early guilty plea, good character and other mitigating factors is 9 months. There is no error by the learned Magistrate in allowing 9 months deduction as per section 4 (2) (j) of the Sentencing and Penalties Act.

[26] This ground of appeal is also dismissed.

GROUND THREE

"The sentence is manifestly too harsh and excessive in all the circumstances of the case.

[27] Counsel for the Appellant submits that the sentence of 30 months imprisonment is manifestly too harsh and excessive considering the fact that the Appellant had reconciled with the victim and had pleaded guilty at the first instance. In respect of the circumstances of the offending counsel submits that both parties were intoxicated with alcohol and that the victim was the one who had provoked the Appellant which led to the argument and assault.

[28] Since the Appellant is alleging provocation by the victim for completeness the following excerpts of the admitted summary of facts are relevant:-

"... (A-1) was at home drinking liquor with (B-1). After a while [an] argument developed whereby (B-1) was swearing at (A-1)'s brother. (A-1) wanted to confront (B-1) when he was held back by his brother..."

[29] In view of the above it is incorrect for the Appellant to blame the victim when the summary of facts does not suggest any provocation by the victim.

[30] The maximum sentence for Grievous Harm under the Crimes Act is 15 years imprisonment and the accepted tariff for this offence is between 2 years and 6 years imprisonment (see *Felix Patel vs. State, Criminal Appeal No. HAA 030 of 2011*).

[31] The final sentence of 30 months imprisonment is correct considering the circumstances of the offending which is at the lower range of the tariff. The learned Magistrate did not err when he arrived at this final sentence.

[32] This ground of appeal is also dismissed.

GROUND FOUR

[33] This ground of appeal was not argued by the counsel for the Appellant.

[34] This court also observes that the act of stomping someone on the head who has fallen to the ground after a punch up resulting in serious injuries (the victim was transferred from the Lautoka Hospital to the CWM Hospital) can be classified as dangerous creating a risk of very

serious injury. The Appellant's behaviour in such circumstances cannot expect mercy from the courts.

ORDERS

(1) The appeal against sentence is dismissed.

(2) The sentence of the Magistrate's Court is affirmed.

(3) 30 days to appeal to the Court of Appeal.

Sunil Sharma

Judge

At Lautoka
28 April, 2017

Solicitors

M/s. Baleilevuka & Associates for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.