IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 68 OF 2017

BETWEEN: HAFIZ SHER KHAN

Appellant

AND:

STATE

Respondent

Counsel: Appellant in Person

Mr. R. Uce for Respondent

Date of Hearing: 06th September, 2017

Date of Judgment: 06th October, 2017

JUDGMENT

1. This is a timely appeal filed by the Appellant against conviction and sentence.

2. The Appellant was charged in the Magistrates Court at Lautoka with one count of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act of 2009.

3. On the 28th of March, 2017, the Appellant pleaded guilty to the charge and admitted the summary of facts in respect of the offence. Accordingly, the Learned Magistrate convicted the Appellant as charged.

4. On the 20th of April, 2017, the Learned Magistrate sentenced the Appellant to 12 months' imprisonment and activated 6 months imprisonment which had been suspended in CF 751/16. The Learned Magistrate ordered both sentences to be served consecutively and thereby the total sentence imposed on the Appellant is 18 months' imprisonment.

5. The Appellant filed his written submissions in support of his Notice of Appeal. The Counsel for Respondent filed a helpful written submission in response.

GROUNDS OF APPEAL

6. In the Notice of Appeal, the Appellant appearing in person submits the following grounds of appeal against conviction (the grounds are reproduced verbatim):-

   I. *That the Learned Trial Magistrate erred in law when he failed to consider that even though the plea of guilty plea on lesser charge as advised by the prosecution;*

   II. *That the Learned Trial Magistrate erred in law when he failed to give a 1/3 discount on the guilty plea;*

   III. *That the Appellant was denied and deprived of the mercy and leniency after pleading guilty on the first available opportunity thus saving the court's time and resources.*

   IV. *That the Learned Trial Magistrate erred in law and in fact in not directing to the medical report finding the injuries sustained or inflicted to the victim was not that alleged by the victim and the witness.*

7. The Appellant submits the following grounds of appeal against sentence: -

   i. *That the Learned Magistrate erred in law that he mistook the facts and imposed the sentence which is wrong in principle in all the circumstances of the case.*

8. The Appellant filed his submission on 28th July 2017 and has submitted the following additional grounds of appeal against conviction and sentence:-

   i. *That the Learned Trial Magistrate erred in law when the Complainant and Accused was reconciled. But the Learned Magistrate failed to consider that even though and give his direction in sentence.*

   ii. *That the Learned Trial Magistrate erred in law to give the concurrently sentence.*

   iii. *That the Learned Trial Magistrate erred in law when he gave consecutively sentence which was active.*

   iv. *That the Learned Trial Magistrate erred in law when he misdirected the law and direct himself.*

   v. *That the Learned Trial Magistrate erred in law when he failed to give much weight and attention to the mitigating factors which the Appellant loss his house under fire on 13th April 2017 before sentence.*

9. It appears that the grounds of appeal against convictions submitted by the Appellant in paragraphs 6 (ii) an (iii) above deal with issues relating to sentence. Therefore, the Court will consider these grounds separately with the other grounds of appeal against sentence.

10. The additional grounds of appeal submitted by the Appellant in his written submissions are all in respect of issues relating to the sentence and will accordingly be dealt in response to the grounds of appeal against sentence.

APEPAL AGAINST CONVICTION

11. Section 246 of the Criminal Procedure Act 2009 provides that an appeal can be filed in the High Court against a judgment, sentence or order from the Magistrates Court.

12. However, Section 247 provides a limitation to the right of appeal where an accused person has pleaded guilty to the charge and has been convicted on such plea, except as to the extent, appropriateness or legality of the sentence.

13. In ***Rabo v State*** [2014] FJCA 49: AAU0016.2012 (14 April 2014), the Court referred to the case of Nalave v State Criminal Appeal No. AAU004, which held that:

> *"In Nalave v State Criminal Appeal No. AAU004, the Full Court summarized the principles regarding equivocal plea at paragraphs 23 and 24 as follows:*
>
> *"It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v. Vent (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132.*
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> *In Maxwell v The Queen (1986) 184 CLR 501, the High Court of Australia at p. 511 said:*
>
> *The plea of guilty must however be unequivocal and not made in circumstances suggesting that it's not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered."*

14. The Appellant first appeared before the Lautoka Magistrates Court on 28th March, 2017. He was represented by a counsel from the Legal Aid Commission when the charge was read to him. The Appellant had pleaded guilty. The Court Record noted that the guilty plea was on his "own free will". Thereafter the Appellant admitted the summary of facts whereupon the Learned Magistrate convicted the Appellant accordingly [Court Record on pages 6 – 7].

15. The Appellant does not complain that his plea was not unequivocal. There is also nothing in the Court Record to suggest that the Appellant's plea was equivocal.

16. The Appellant in relation to ground 1 submits that the *"Learned Trial Magistrate erred in law when he failed to consider that even though the plea of guilty plea on lesser*

charge as advised by the prosecution," This ground of appeal is unclear and the Appellant has not elaborated more on this in his written submission. It appears that the Appellant complains about the fact that he had pleaded guilty to a lesser charge.

17. The charge dated 28th March, 2017 is clearly for one count of Assault Causing Actual Bodily Harm. The Court Record sates: *"Charge read and explained and understood in the English language"*. The Appellant pleaded guilty to the charge, admitted the summary of facts and was convicted accordingly.

18. After the conviction was recorded, the prosecution, on 29th March, 2017, had informed Court that they *"need an adjournment after verify the previous convictions"* and *"need to file an amended charge"*. It is not clear as to how an amended charge could be filed when a conviction has been recorded. In any event, there was no amended charge filed and nothing is reflected in the Court Record to show that an amended charge had been filed after the adjournment on 29th March, 2017. No application had been made to withdraw the plea tendered on 28th March, 2017. Therefore, there is no indication whatsoever in the Court Record that the Appellant had pleaded guilty to a lesser charge other than the charge filed on 28th March, 2017. Therefore, this ground has no merit and should be dismissed.

19. Since there is no evidence that the Appellant's plea was equivocal, in light of Section 247 of the Criminal Procedure Act 2009, there is no basis for this Court to consider the other ground of appeal against conviction.

20. However, in fairness to the Appellant, Court considered the 2nd ground of appeal against conviction submitted by the Appellant.

21. In respect of 2nd ground against conviction, the Appellant submits that *"the Learned Trial Magistrate erred in law in fact in not directing to the medical report finding the injuries sustained or inflicted to the victim was not that alleged by the victim and the witness."* The Appellant has not elaborated on this ground in his written submission and it cannot be ascertained as to what is his complaint with respect to this ground against conviction other than the fact that it highlights an issue regarding the findings in the victim's medical report.

22. It appears that victim's medical report had been tendered in Court when the summary of facts was read to and admitted by the Appellant. The injuries noted in the medical report are consistent with the assault alleged by the victim. The summary of facts admitted by the Appellant would provide the facts of what is alleged to have occurred and the Court would have relied on the medical report

as to the injuries sustained by the victim as a result of alleged assaulted by the Appellant. It was safe for the Court to convict the Appellant as it is clear that the victim had sustained injuries as a result of being assaulted by the Appellant. Therefore, this ground fails.

APPEAL AGAINST SENTENCE

23. In ***Sharma v State*** *[2015] FJCA 178; AAU48.2011 (3 December 2015),* the Court considered the approach that should be taken in exercising appellate jurisdiction. The Court observed:

> *"In Kim Nam Bae –v- The State (AAU 15 of 1998; 26 February 1999) this Court observed:*
>
> *"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 principles, 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)."*
>
> *"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"*

24. It is noted that some of the grounds of appeal against sentence are repetitive and will be discussed together in this judgment. It is also noted that as with the grounds of appeal against conviction discussed above, the Appellant has not

discussed or elaborated more on each of the grounds of appeal against sentence in his written submissions other than providing case authorities that had dealt with the issues in such grounds.

25. The ground 6(II) deals with the issue of early guilty plea and the one third deductions given to reflect the same by the sentencing Magistrate.

26. As noted above, the Appellant first appeared before the Lautoka Magistrates Court on the 28th of March, 2017. On the same day, the charge was read to the Appellant and he pleaded guilty when he was represented by a counsel. Appellant had tendered the guilty plea at the earliest available opportunity.

27. In ***Daunabuna v State*** Criminal Appeal No. AAU120/07 (4 December 2009), the Court held:-

> *"It has been a well-recognized practice in common law to take into account a plea of guilty in the sentence. Most common law jurisdictions have codified the practice in sentencing statutes. In Fiji, the practice is part of the common law".*

28. In ***Navuniani Koroi v. The State*** Criminal Appeal No. AAU0037 of 2002S, the Court said:

> *"It has long been the practice of the courts to reduce a sentence where the accused person has pleaded guilty. In most cases that is a recognition of his contrition as expressed by an early admission and the fact that it will save the witnesses and the court a great deal of time and expense. In offences of a sexual nature, the amount of reduction is generally more because the plea saves the victim from having to attend the trial and relieve her experience in the witness box."*

29. In ***Qurai v State*** [2015] FJSC 15; CAV24. 2014 [20 August 2015]. The Supreme Court held:

> *"[54] There is no pronouncement of this Court in the question of the discount to be given for a guilty plea made a very early stage, although this aspect of the matter was discussed by Madigan JA in his concurring opinion in Rainima v The State [2015] FJCA 17; AAU0022.2012 (27 February 2015) at paragraph [46] where his Lordship was constrained to observe as follows:-*

"[46] Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance. "(Emphasis added)

[55] Having said that, his Lordship agreed with the other Justices of Appeal of the Court of Appeal (Calanchini P and Jayasuriya JA) that, given the very lenient sentence already passed on the appellant in that case, the appeal against sentence should be dismissed.

[56] This Court takes cognizance, as it is bound to in terms of section 4(2) (b) of the Sentencing Decree, the existence in Fiji of a sentencing practice of allowing a discount of one third of the sentence for an early guilty plea. "

30. In light of the above case authorities, it should be accepted that there is well established practice (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. However, this is not a fixed formula applicable to all cases. The amount of deduction given will depend on the circumstances of each case and to be decided on a case by case basis. Specially when the final sentence falls within tariff and the sentence is not excessive, this practice may be dispensed with. One of the relevant considerations is at what stage of the proceeding was the guilty plea made.

31. The Appellant submits that he was denied and deprived of the mercy and leniency after pleading guilty on the first available opportunity thus saving the court's time and resources.

32. It should be noted that the Learned Magistrate had taken a starting point of 12 months' imprisonment and added 6 months for aggravating factors and then deducted 4 months for the early guilty plea and 2 months for other mitigations. Therefore, Learned Magistrate had considered the Appellant's guilty plea and has given 4 months' deduction. This is a separate deduction from the other mitigating factors which is correct in principle. Deduction of 4 months does not tantamount to one third deduction. However, as noted above, there is no strict mathematical formula for the one third deductions. The final sentence of 12 months' imprisonment is still within the establish tariff and therefore, there is no prejudice to the Appellant. This ground should be dismissed.

33. The Appellant submits *"that the Learned Magistrate erred in law that he mistook the facts and imposed the sentence which is wrong in principle in all the circumstances of the case."* The Appellant has not discussed or further elaborated on this ground in his written submissions. There is no indication as to what facts the Appellant claims that the Learned Magistrate had mistaken or what principle had been wrongly applied in sentencing the Appellant. Therefore, there is no merit to this ground.

34. The third ground of appeal against sentence deals with the issue of reconciliation which the Appellant submits that the Learned Magistrate has failed to consider and give direction in sentencing.

35. On page 6 of the Court Record, it is noted under the sub-heading "summary of facts" that there is a *de facto* relationship." This is also outlined in the summary of facts on page 12 of the Court Record. The summary of facts notes in paragraph 1 that "(A-1) and (B-1) are in *de facto* relationship and staying together." This is also reflected in paragraph 3 of the sentence delivered by the Learned Magistrate which is on page 9 of the Court Record.

36. It is trite law that when there is a *de facto* relationship, reconciliation cannot be considered as a mitigating factor during sentencing. In ***Patel v State*** [2011] FJHC 669; HAA030.2011 (27 October 2011), Justice Madigan held:

> *"[8] This is a domestic violence offence and as such it cannot be reconciled. (Part III Section 3 (b) of Domestic Violence Decree). The appellant's ground that the Magistrate did not allow for credit for reconciliation cannot be made out. The victim in this case cannot reconcile with the appellant in order to mitigate this offence. Nor should the Magistrate have allowed it to be a factor in his mitigation "list". Reconciliation plays no part in a domestic violence offence either for or against an accused."*

37. In ***State v Kumar*** [2011] FJHC 341; HAA 020.2010 (9 June 2011), Justice Madigan held:

> ***"A domestic violence offence which this obviously is cannot be reconciled*** *and in any event the Court record notes that the victim did not want to reconcile. It is incumbent upon the tribunal or officer of the Court to have regard to the Domestic Violence Decree which came into force on the 1st of December 2009.The Decree was enacted to protect persons, men women and children, from abuse in*

domestic environment and if the Courts do not make findings and ruling within the spirit of the Decree, then that altruistic arm is thwarted."(emphasis added)

38. As per page 7 of the Court Record, the Appellant's counsel had submitted in mitigation that the Appellant had apologized to the victim who was present in court. The Court Record then noted that "not forgiving the Accused." In his Sentence, the Learned Magistrate had also noted that the reconciliation was not accepted by the complainant in court. On this note, the Learned Magistrate did not give any weight to the reconciliation. This is noted in paragraph 6 of page 9 of the Court Record. Therefore the Appellant cannot claim that he had reconciled with the victim who had not accepted his forgiveness. In any event, even if the reconciliation had been accepted by the victim, this cannot be taken as a mitigating factor as per Part III Section 3 (b) of Domestic Violence Act and the decisions in ***Patel v State*** and ***State v Kumar*** (supra) noted above.

39. The fourth ground deals with the issue of consecutive sentence. On page 8 of the Court Record, the Court had noted that "updated previous convictions provided to Court. Accused had committed the offence during the bound over period." In sentencing the Appellant, the court noted the following on page 10 of the Court Record:-

> *"[13] Your sentence stands at 12 months imprisonment. The sentence is below two years which can be suspended pursuant to Section 26(2) (b) of the Sentencing and Penalty Decree. You have committed this offence during your suspended period and a similar type of offence within a period of 5 months and you are not entitled for another suspended sentence"*
>
> *[14] Hazil Sher Khan, you are sentenced to 12 months imprisonment and I will further activate your sentence in CF 751/16 for 6 months imprisonment. Both sentence to be served consecutively and the total term to serve is 18 months imprisonment."*

40. In light of the above sentencing remarks, the issue seems to be whether the Learned Magistrate was correct in not imposing a suspended sentence. The issue is also whether the Learned Magistrate was correct to activate a prior suspended sentence and further, whether it was correct to impose a consecutive sentence instead of a concurrent sentence.

41. It clear that an order for a suspended sentence is a matter of discretion by the sentencing court. In ***Muskan Balaggan*** Criminal Appeal No. HAA 031 of 20131 the Court held that

> *"neither under the common law, nor under the Sentencing and Penalties Decree, there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence."*

42. In paragraph 13, page 10 of the Court Record, the Learned Magistrate had considered whether to suspend Appellant's sentence. The Learned Magistrate had decided not to order a suspended sentence on the basis that the Appellant had committed the offence in this present appeal during a suspended period for a similar type of offence within a period of 5 months. The Appellant did not contest his previous conviction record and the fact that it was for a similar offence to the charge in the present appeal. Therefore, Learned Magistrate's reason for not suspending the sentence is justifiable.

43. The second issue with respect to the fourth ground is in terms of activating a suspended sentence for which the Appellant has not been charged for breaching. The provision of Section 28 of the Sentencing and Penalties Act 2009 is relevant which reads:-

> *(1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits another offence punishable by imprisonment, the offender is guilty of an offence against this section.*
>
> *(2) A proceeding for an offence under sub-section (1) may be commenced at any time up to 3 years after the date on which the offence is alleged to have been committed.*
>
> *(3) Upon charging an offender with an offence under sub-section (1) a warrant to arrest the offender may be issued.*
>
> *(4) If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a fine not exceeding 100 penalty units and in addition the court must restore the sentence or part sentence held in suspense and order the offender to serve it, but if the court considers that exceptional circumstances exist that make this unjust, the court may instead—*

(a) *restore part of the sentence or part sentence held in suspense and order the offender to serve it; or*

(b) *in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or*

(c) *make no order with respect to the suspended sentence.*

(5) Any order for an offender to serve a term of imprisonment under sub-section (4) must be served —

(a) immediately; and

(b) unless the court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that court or any other court.

44. This provision makes a breach of conditions of a suspended sentence of imprisonment an offence. If the offender is found guilty of breach of conditions of a suspended sentence, then the court has discretion to impose a fine and in addition it must restore the whole or part of the suspended sentence unless there are exceptional circumstances.

45. In this present appeal, the Appellant was not charged with a separate offence of breach of suspended sentence. At page 8 of the Court Record, it is noted that the prosecution had provided the Court with an updated previous conviction record and informed the Court that the Appellant had committed the offence during a bound over period. On this basis, the Learned Magistrate appears to have activated the suspended sentence in CF 751/16.

46. In ***Nausa v State*** [2011] FJHC 23; HAA022.2010 (28 January 2011), the Court considered the issue of activating a suspended sentence and stated the following:-

"[6] Apart from punishing the appellant twice for offending while on a suspended sentence (aggravating feature and activating) the Magistrate unfortunately fell into error in activating the previous sentence.

[7] The new laws of procedure and sentencing now in place for one year have completely changed the Courts' approach to suspended sentences. Whereas previously suspended sentences could be activated at the discretion of the tribunal, this is no longer the case.

[8] All judicial officers, all Counsel (including State Counsel) and all police officers should by now know that activation of suspended sentences can only be effected pursuant to section 28 of the Sentencing and Penalties Decree 2009. If a suspect is in breach or thought to be in breach of a suspended sentence he must be charged with breach under section 28(1) and if he is found guilty of the breach then and only then MUST a Court activate the sentence".

47. In light of Section 28 and the above case authority of ***Nausa*** (supra), the Learned Magistrate had fallen into error when he activated a suspended sentence, breeching the conditions of which the Appellant had not been charged for and found guilty of. Therefore, this ground, though vaguely framed, should succeed.

48. The ground of appeal 8(iv) against sentence states *'the Learned Magistrate had erred in law when he misdirected the law and directs himself'*. The Appellant has not discussed or elaborated further on this ground in his written submissions. There is no indication as to what law has the Learned Magistrate misdirected on or what is the basis of this ground.

49. It was held in ***State v Tugalala*** [2008] FJHC 78; HAC025S.2008S (29 April 2008), that the tariff for this offence should range from an absolute or conditional discharge to 12 months' imprisonment. As noted in earlier cases, ***Elizabeth Joseph v. The State*** [2004] HAA 030/04S and ***State v Tevita Alafi*** [2004] HAA073/04S, it is the extent of the injury which determines sentence. The use of a pen knife for instance, justifies a higher starting point. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate. In domestic violence cases, sentences of 18 months' imprisonment have been upheld in ***Amasai Korovata v. The State*** [2006] HAA 115/06S.

50. In view of the fact that this being a domestic violence case, the Appellant has received a lenient sentence. The final sentence of 12 months' imprisonment fell well within tariff. Therefore, this ground has no merits and should be dismissed.

51. The final ground of appeal deals with the alleged failure by the Learned Magistrate to give much weight and attention to the mitigating factor that the Appellant had lost his house in a fire on 13th April, 2017.

52. The Appellant in his written submission has submitted that he had lost his house in a fire before he was sentenced by the Learned Magistrate. He had also attached in his written submission a newspaper article in relation to the fire on 13th April, 2017. This would have been a mitigating factor if it was drawn to Learned Magistrate's attention before sentence. However, there is nothing to indicate in the Court Record that this information was brought to the attention of the Court for consideration as a mitigating factor before the sentence was passed. Therefore, there was no reason for the Learned Magistrate to consider this mitigating factor in his sentence. This ground should fail.

53. The sentence of 12 months' imprisonment imposed on a count of Assault Causing Actual Bodily Harm in a domestic violence case is within the established tariff and should not be interfered with.

54. There is merit to the ground 8 (iii) above. Therefore, the learned Magistrate's decision to activate the suspended sentence imposed in case No. CF 751/16 is quashed.

55. Accordingly, the Appellant is sentenced to 12 months' imprisonment from the date of original sentence (20th of April, 2017). Appeal succeeds to that extent.

56. 30 days to appeal to the Court of Appeal.

HIGH COURT OF FIJI
LAUTOKA

Aruna Aluthge
Judge

AT LAUTOKA
06th October, 2017

Counsel: **Appellant in person**
Office of the Director of Public Prosecution for Respondent