

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATES COURT
Exercising extended jurisdiction

CRIMINAL APPEAL NO. AAU 139 OF 2017
(Magistrates Court No. 267 of 2012 at Nausori)

BETWEEN : **THE STATE** *Appellant*

AND : **SHAHADATT KHAN** *Respondent*

Coram : Calanchini P

Counsel : Ms S Kiran for the Appellant
Mr V Kumar for the Respondent

Date of Hearing : 16 September 2019

Date of Ruling : 3 October 2019

RULING

[1] Following a trial in the Magistrates Court at Nausori exercising extended jurisdiction the respondent was convicted on two counts of Assault Causing Actual Bodily Harm and one count of an Act Intended to Cause Grievous Harm. On 18 September 2017 the respondent was sentenced to 10 months imprisonment on count 1, 13 months

imprisonment on count 2 and 24 months imprisonment on count 3. The sentences were ordered to be served concurrently and were immediately suspended for a period of 36 months on condition that the respondent not re-offend.

[2] This is the appellant's timely application for leave to appeal sentence pursuant to section 21(2) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion: **Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

[3] The grounds of appeal are:

- “1. *The learned Sentencing Magistrate erred in law and fact when she failed to impose a custodial sentence given the aggravating factors of the case and the seriousness of the injuries sustained by Rozina Begum and Asraf Khan.*
2. *The learned trial Sentencing Magistrate erred in law when she failed to expressly articulate the exceptional circumstances that warranted a suspension of the sentence.*”

[4] The first ground of appeal is somewhat ambiguous. The issue raised by the ground cannot be the failure of the Magistrate to impose terms of imprisonment. The Magistrate has imposed prison terms but has suspended them. The issue raised is that the sentences should not have been suspended. The second ground concerns the absence of reasons or insufficient reasons for suspending the sentence.

[5] The power of the court to suspend a sentence of imprisonment is found in section 26(1) of the Sentencing and Penalties Act 2009 (the Sentencing Act) which states:

“On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.”

[6] The discretion to impose a suspended is wide in its terms and there are no further guidelines in the section to assist a court to determine under what circumstances it may be appropriate to suspend a sentence. The only assistance that is provided in the legislation is section 26(2) which states that:

“A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceedings for more than one offence:-

- “(a) Does not exceed 3 years in the case of the High Court; or*
- (b) Does not exceed 2 years in the case of the Magistrates Court.”*

[7] It would appear that the Magistrate has taken the order that the sentences be served concurrently as being sufficient to enable the court to apply section 26(1). This is not raised as an appeal ground by the State. However what section 26(2) implies is that the option of suspending a sentence of imprisonment is available for less serious offences where the head sentence does not exceed 3 years or 2 years depending upon the sentencing court.

[8] On that basis it is appropriate to consider the maximum sentences that apply to the offences for which the respondent was convicted. The offence of assault occasioning actual bodily harm carries a maximum sentence of 5 years imprisonment under section 275 of the Crimes Act 2009. This offence is classified as a summary offence. On the other hand the offence of act intended to cause grievous harm carries a maximum sentence of life imprisonment under section 255 of the Crimes Act. This offence is classified as an indictable offence.

[9] Although it may be argued that the convictions for the two offences under section 275 of the Crimes Act, being summary offences with a maximum sentence of 5 years

imprisonment are amenable to suspended sentences, the position in relation to the conviction for the more serious offence under section 255 of the Crimes Act is quite different. It is arguable that the learned Magistrate has not attached sufficient weight to the matters that are clearly relevant when sentencing for a conviction on a count under section 255 of the Act. Under the circumstances leave to appeal against sentence is granted.

Order:

Leave to appeal sentence is granted.



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL