

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 410 OF 2013

BETWEEN: **MANASA NAWAKULA**

Appellant

AND: **STATE**

Respondent

Counsels : **Appellant in person**
Mr. F. Lacanivalu for the Respondent

Date of Judgment : **04th March 2014**

JUDGMENT

1. The appellant was charged before the Sigatoka Magistrate under following counts:

First Count
Statement of Offence

BURGLARY:- Contrary to section 312 (1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

MANASA NAWAKULA on the 15th day of September 2012 at Korotogo, Sigatoka in the Western Division, entered into the dwelling house of Karishma Dutt as a trespasser, with intent to steal therein.

Second Count
Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM:- Contrary to Section 275 of the Crimes Decree No.44 of 2009.

Particulars of the offence

MANASA NAWAKULA on the 15th day of September 2012 at Korotogo, Sigatoka in the Western Division, assaulted Karishma Dutt thereby causing her actual bodily harm.

Third Count
Statement of Offence

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

Particulars of the offence

MANASA NAWAKULA on the 15th day of September 2012 at Korotogo, Sigatoka in the Western Division, insulted Karishma Dutt by laying on top of her. An act of nature likely to offend the modesty of the said Karishma Dutt.

2. The appellant pleaded guilty on 13.9.2013 and admitted the summary of facts the same day. He was convicted and sentenced for 2 years 11 months and 17 days imprisonment for the first count, 9 months imprisonment for the 2nd count and 6 months imprisonment for the 3rd count to run concurrently on 25.9.2013. He is not eligible for parole till he serves 2 years and 6 months imprisonment.
3. The facts of the case are that:

On the 15th day of September, 2012 at about 10.45pm at Korotogo, Sigatoka, Manasa Nawakula (Accused) aged 38 years of Korotogo, Sigatoka broke and entered into the house of Karishma Dutt (PW-1) aged 27 years of Korotogo, Sigatoka with intent to steal therein and also Accused had insulted the modesty of PW-1 by pushing her on the sofa and lying on top of her.

On the above date, time and place PW-1 was watching T.V in her bedroom when she heard the front sliding door of the house open. PW-1 came and checked where she noticed that the sliding door slightly open and the lock damaged. PW-1 was calling her brother through mobile phone who stays next to her house namely Shailendra Dutt (PW-2) aged 40 years of Korotogo. In the process of calling PW-2, Accused came and entered into the house. Accused then hold PW-1 by her neck pressing it hard and pushed her on the sofa. In that Accused went on top of PW-1 and trying to put the cloth in her mouth. PW-1 started screaming and told Accused that she is pregnant and as a result of screaming PW-2 came and noticed Accused inside the house. When Accused saw PW-2 he tried to make his way out of the house through the rear door but he couldn't. Accused then threatened PW-2 by saying that, "If you want to die then come near me". Accused then made his way out of the house from the front door and fled the scene. Accused breath was smelt of liquor.

The matter was reported at the Sigatoka Police Station and DC 2932 Mohammed Shamim was detailed to be the investigating officer into the matter. The matter was investigated and Accused fled from Sigatoka after committing the offence. Accused was arrested on the 6th day of April, 2013 at Nadi. Accused was interviewed under caution and he admitted the offence. Accused was formally charged under Section 312 and 213 of the Crimes Decree No. 44 of 2009.

4. This appeal against the sentence was filed 8.10.2013 within time.
5. The grounds of appeal are :
 - (i) That the sentence imposed by the sentencing Magistrate is harsh and excessive.
 - (ii) That the learned Magistrate failed to consider the mitigation and early Guilty plea properly.
 - (iii) That the learned Magistrate failed to consider the time period in remand.
 - (iv) The period of 2 years and 6 months as non-parole period is unseasonable.
6. Both parties have filed written submissions.
7. The learned Magistrate had selected a starting point of three years for the first count. He had mentioned following guideline judgments.

*'The tariff for burglary committed with theft was discussed in **State v Driu** [2011] FJHC 107; HAC 143.2010 (3 February 2011)*

*The tariff for the offence of burglary as founded on the basis of the provisions of the old Penal Code, was 18 months to 3 years in imprisonment (**State v Mikaele Buliruarua**[2010] FJHC 384; **Tomasi Turuturuvesi v State** [2002] HAA 086/2002. The tariff set for the offences involving burglary and larceny under the Penal Code was 1-4 years in imprisonment (**Cavuilagi v State** [2004] FJHC 92). In **State v Mikaele Buliruarua**[2010] FJHC 384 case, the tariff set for the offence of burglary under the Penal Code, was made applicable in relation to the offences of burglary under the Decree.'*

8. Then the learned Magistrate had stated that *'The accepted tariff for burglary of domestic premises is three years imprisonment as held in **Tabekusi** HAC 95-113 of 2010 and **Isei Donumaivanua** HAC 259 of 2012, both Lautoka matters.'*
9. Although the learned Magistrate had followed correct Guide line judgment **Tabekusi v State** the tariff given there is 2 years to 3 years after trial. In **State v Mucunabitu** [2010] FJHC 151; HAC 017.2010 (15 April 2010) it is held that the accepted tariff is 18 months to 3 years.
10. Then the learned Magistrate had identified following aggravating factors:
 - (i) Invasion at night,
 - (ii) Destroying fixtures to the property,
 - (iii) Attacking the complainant and causing fear and alarm to her safety and security, and
 - (iv) Making threats to the complainant's brother when he came for her assistance.

Two years were added for the above.

11. Then two years were deducted for the early guilty plea and other mitigating factors. The mitigating factors identified by the learned Magistrate are:

- (i) The accused cooperated with the police. He admitted the allegation when he was first questioned by the police and he also came to the station on his own volition.
- (ii) The accused was not able seek forgiveness from the complainant, as there is an order for him to keep away from the complainant. He was planning to do a traditional ceremony by presenting yaqona to the complainant. The appellant had promised the Magistrate he will seek forgiveness from the complainant at the first available opportunity if the court order is relaxed for the same purpose.
- (iii) The accused had identified his weakness which is that of alcohol consumption and he is trying his level best to overcome it for his own good.
- (iv) The accused lives in the village and undertakes the village work imposed by the chief.
- (v) The accused deeply regrets what he did and seeks the mercy and forgiveness of the Court. He now fully understands the consequences of his action, which has caused great embarrassment in the village not only to him but to his family. He had learned the lesson from what happened in this case. He now realizes the consequences of his action, which has caused great embarrassment in the village not only to him but to his family. He has learned for the mistake and promises that he would not re-offend again.

12. Further 14 days were deducted for the time period in remand arriving at the final sentence of 2 years 11 months and 17 days.

13. Pursuant to Section 18 (1) of the Sentencing and Penalties Decree, 2009, the accused was directed to serve 2 years 6 months imprisonment before he could be granted parole.

14. The learned Magistrate had erred in arriving at the above sentence on following grounds:

- (i) He had erred by selecting 3 years imprisonment as the tariff for the burglary.
- (ii) He had erred by not giving a separate deduction for the early Guilty plea.
- (iii) He had violated the Section 18 (4) of the Sentencing and Penalties Decree by ordering a period less than 6 months of the full sentence as non-parole period.

15. State in their submissions have conceded above (i) and (ii) and invited this Court to impose a new sentence.

16. In **Basa v State** [2006] FJCA 23; AAU 0024.2005 (24 March 2006) the Court of Appeal held that:

“The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.”

17. It was held in **Naikelekelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) that *“Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.”*

18. Section 18 (4) of the Sentencing and Penalties Decree provides:

‘Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.’

19. This background warrants this Court to exercise its powers in terms of Section 256 (3) of the Criminal Procedure Decree to quash the sentence passed by the Magistrate in respect of the 1st count and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff.

20. Accordingly I take a starting point of 2 years and add 1 year for the aggravating factors mentioned above. I deduct 6 months for the mitigating factors mentioned above. Further 1 year to be deducted for the Guilty plea. Final sentence is 1 year and 6 months.

21. The sentences for the 2nd count and 3rd count are appropriate and within the tariff.

22. According to the totality principle, all sentences to run concurrently.

23. Appellant had served 5 months and he was in remand for 15 days. Therefore period of 5 ½ months to be deducted from the final sentence.

24. Appellant is not a first offender. He has 32 previous convictions. Therefore a suspension of the sentence is not appropriate.

25. Appellant to serve 1 year and 15 days imprisonment from today.
26. Having considered the nature of the relationship you had with the complainant, I order a permanent **Domestic Violence Restraining Order (DVRO)** in place, identifying complainant Karishma Dutt as the protected person. You are hereby ordered not to have any contact with the complainant directly or by any other means, unless otherwise directed by this Court.
27. Appeal is allowed. Sentence is varied.

Sudharshana De Silva
JUDGE

AT LAUTOKA
04th March 2014

Solicitors: Appellant in Person
Office of the Director of Public Prosecution for the Respondent