

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 18 OF 2014

BETWEEN: EDWIN ELVIN KUMAR

Appellant

AND: STATE

Respondent

Counsels: Mr. E. Maopa for the Appellant
Mr. A. Singh for the Respondent

Date of Hearing: 12 August 2014

Date of Judgment: 14 August 2014

JUDGMENT

1. The appellant was charged before the Nadi Magistrate Court with one count of Assault Occasioning Actual Bodily Harm contrary to Section 275 of the Crimes Decree.
2. The facts of the cases are that the appellant assaulted the complainant, his wife as she refused to reconcile a previous assault case. The appellant had slapped her once and cut her on the left arm with a cane knife. According to medical report, there is a small cut.
3. The appellant pleaded guilty on 19.5.2014 on the first day. He was sentenced on 2.6.2014 for a period of 15 months imprisonment. Eight months of that imprisonment was suspended for 3 years and he had to serve 7 months imprisonment.
4. This appeal against the sentence was filed within time on 20.6.2014.

The ground of appeal is:

- (i) That the said sentence as being inappropriate and or does not exist in law.

5. Both parties have filed written submissions.
6. The learned Magistrate had selected a starting point of 15 months after following guideline judgments. He had identified the tariff to be up to 18 months imprisonment.

[7] "The tariff for this offence;"...ranges from a suspended sentence where there is a degree of provocation and no weapon is used, to 9 months imprisonment for the more serious case of assault." (State v Anjula Devi, Criminal Case No. 04 of 1998 Lab.) as cited with approval by Hon. Justice Goundar in Sereka v State [2008] FJHC 88, HAA 027.2008 (25 April 2008) Justice Madigan in held in State v Sikitona [2010] FJHC 466; HAC 067.2010L (22 October 2010) that cases of Elizabeth Joseph v State [2004] HAA 03 of 2004 and State v Tevita Alati [2004] HAA 73 of 2004 establish a tariff of 09 months to 12 months imprisonment, severity of the wound being the determining factor in the starting point. However, sentences of 18 months imprisonment have been upheld in Domestic Violence cases (Amasi Korovata v State [2006] HAA 115 of 2006)"
It is therefore clear that when this offence falls under the definition of domestic violence the tariff would range up to 18 months imprisonment.

7. The learned Magistrate had taken a starting point of 15 months giving following reasons.

"[8] It is clear from the Summary of facts that there is no reasonable degree of provocation on the part of the complainant for you to have initiated the incident. The complainant had received a moderately serious injury as a result of this assault. Further, it is revealed that the incident have been spurred by the refusal of the complainant to reconcile with you in respect of the first assault case. Thus considering above and the fact that the victim is your wife and as such this offence being an offence of domestic violence, a prison term is warranted at this instance and this court is of the view that your sentence should start at a relatively higher end of the tariff range."

8. Then he had added 12 months for the following reason given:

"[10] The manner in which you have acted towards the complainant, your own wife, reflects cruelty. You have further assaulted the complainant with a dangerous weapon. Moreover you have assaulted the complainant whilst at her own residence which had rendered the security at her own house unsafe. I consider above factors to have aggravated the offence and as such increase your sentence by 12 months, making your sentence 27 months."

9. Then he deducted 3 months for personal circumstances, 1 month for the time period in remand, another 1 month for being a first offender and 7 months for the guilty plea. The final sentence was 15 months.

10. The learned Magistrate had considered the suspension of the sentence and decided to suspend part of the sentence. He had stated:

"[26] Hence your final sentence in effect, is 08 months imprisonment term suspended for 3 years and 07 months imprisonment to serve in custody."

11. State in their submissions has conceded that the learned Magistrate erred in law when he took a higher starting point for this case considering that the injuries were moderate. Further it is stated that learned Magistrate in using the word 'and' in paragraph 26 of his sentence had actually passed 2 sentences for one offence.

12. The tariff for the offence is settled.

In **State v Tugalala** [2008] FJHC 78; HAC 025S.2008S (29 April 2008) Hon. Madam Justice Nizat Shameem identified the tariff as follows:

*"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months imprisonment. The High Court said in **Elizabeth Joseph v The State** [2004] HAA 030/04S and **State v Tevita Alafi** [2004] HAA 073/04S, that 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, sentence of 18 months imprisonment have been upheld."*

In **Sereka v State** [2008] FJHC 88; HAC 027.2008 (25 April 2008) Hon. Mr. Justice Daniel Gounder held that:

"The tariff for assault occasioning actual bodily harm ranges from a suspended sentence where there is a degree of provocation and no weapon is used, to 9 months imprisonment for the more serious cases of assault."

In **Raisoqoni v State** [2011] FJHC 32; HAA 004.2011 (7 February 2011) Hon. Mr. Justice Daniel Gounder held that a sentence of 6 months was within the tariff for a case of Assault causing actual bodily harm where the injured person was the spouse of the appellant. The victim had suffered lumps, bruises, laceration and swellings over her head and face.

In **State v Kumar** [2011] FJHC 341; HAA 020.2010 (9 June 2011) Hon. Mr. Justice Paul K. Madigan had ordered a sentence of six months imprisonment suspended for 2 years. The Respondent had caused his wife several injuries including swollen face, bruises around both eyes, swollen lips, superficial cuts on the head and broken tooth.

In **Chand v State** [2011] FJHC 593; HAA 024.2011 (23 September 2011) Hon. Mr. Justice Paul K. Madigan held that a sentence of 4 months was well within the tariff for appellant


who had pushed and punched his wife causing her to fall and hit her head on the stud of the house.

In **Botaki v State** [2012] FJHC 1250; HAA 015.2012 (1 August 2012) Hon Mr. Justice Paul K. Madigan held that a sentence of 7 months will not be interfered with, ordered against an appellant who had caused swelling and bruises on the head of his wife by assaulting with an iron.

13. The learned Magistrate had followed relevant tariff judgment and arrived at a correct starting point. However he fell into error when he added 12 months more for almost same grounds to select a starting point at the higher end.
14. 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 and pass other sentence which reflects the gravity of the offence within the acceptable range of tariff.
15. Accordingly, I take a starting point of 15 month considering the aggravating factors. I deduct 2 months for the mitigating factors. Further 5 months to be deducted for the guilty plea. When 1 month in remand is deducted the final sentence is 7 months. This sentence is operative from 02.06.2014.
16. I do not suspend that sentence as this offence was committed while another case is pending against the appellant for assaulting his wife.
17. The appellant is explained the final Domestic Violence Restraining Order as ordered by the learned Magistrate.
18. The appellant is warned that breach of the restraining order is a criminal offence under the Domestic Violence Decree.
19. Appeal allowed. Sentence varied.
20. 30 days to appeal to the Court of Appeal.

At Lautoka
14th August 2014




Sudharshana De Silva
JUDGE

Solicitors: **Office of Babu Singh and Associates for the Appellant**
Office of the Director of Public Prosecution for the Respondent