

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. 21 of 2014

BETWEEN : **ANASEINI VUTOVUTO**
Appellant
AND : **THE STATE**
Respondent

Counsel : Mr. S. Waqainabete (LAC) for the Appellant
Mr. T. Qalinauci for the State

Date of hearing : 19 September, 7 & 28 November 2014

Date of Judgment : 18 December 2014

JUDGMENT

(Sentences for domestic violence wounding)

1. On the 9th June 2014 in the Magistrates Court at Nasinu, the appellant entered a plea of guilty to a charge of unlawful wounding contrary to section 261 of the Crimes Decree 2009. She was sentenced by the Resident Magistrate on the 4th July 2014 to a term of imprisonment of 18 months

and a domestic violence restraining order was issued against her in favour of her husband as the protected person.

2. The facts upon which she was convicted were that the appellant lived with the complainant who is a Police Officer and they had two young children.
3. On the 23rd March 2014 while both were watching TV, an argument arose as to where the husband had spent the previous Friday night away from home. The argument became heated until this appellant threw a kitchen knife at her husband's stomach. In an attempt to ward off the knife his middle right finger was wounded resulting in profuse bleeding.
4. On agreement to these facts, the appellant (as accused at trial) was convicted.
5. In his sentence, the learned Magistrate found that the aggravating features of the crime were:
 - (1) minimal provocation.
 - (2) degree of violence high.
 - (3) use of knife to inflict injury.
 - (4) abuse of trust.
 - (5) intention to commit more serious injury.
 - (6) attack to stomach – very vulnerable.

And the mitigating features he found to be:

- 1) plea of guilty
- 2) remorse
- 3) apologized to Court
- 4) co-operation with the Police
- 5) first offender
- 6) reconciliation
- 7) no premeditation
- 8) personal circumstances – mother of two young children

6. The maximum sentence for this offence is 5 years imprisonment. There are as yet no guidelines set but in **Suresh Nand Maharaj** HAA 48 of 2010, Goundar J upheld an 18 month sentence for a similar offence.
7. The learned Magistrate took 24 months' imprisonment as a starting point; he added 10 months for the aggravating factors and reduced it by 6 months for the mitigating factors and by a further 10 months for a plea of guilty and the "reconciliation"; resulting in a final sentence of 18 months imprisonment. The Magistrate spent much research and time in reviewing authorities to decide whether to suspend the sentence or not. He decided after much deliberation not to suspend the sentence because it was gratuitous and unnecessary violence in a domestic violence context.
8. Pursuant to section 24 of the Domestic Violence Decree the Magistrate made the compulsory domestic violence restraining order to protect the safety of her husband.

This appeal

9. The appellant by his counsel submits that she was penalized twice by the Magistrate who had found that the degree of violence was high and that a wound resulted but then went on to find the high violence to be an aggravating factor.
10. As a second ground she submits that her crime was of a lesser nature than that penalized in the case of **Suresh Nand Maharaj v. State** HAA 48/1010 where a sentence of 18 months was approved. She says her lesser crime should have attracted a lesser sentence.
11. As a third ground the appellant relies on cases of act with intent to cause serious bodily harm which is a more serious crime and where lesser sentences have been imposed. In particular she relies on **John Trail** HAC 181/11 where the accused was sentenced to one year suspended for two

years for act to cause grievous bodily harm. It was a case of punching and hitting the victim with a piece of timber bringing blood to the head, and causing fracture to the base of the skull.

12. The appellant's last ground is that the sentence is severe given that no disability nor permanent injury resulted.
13. The appellant's counsel is correct in saying that there has not been a tariff set for this offence but it was said by this Court in **Kolinio Sikitara** HAC 67/2010Ltk that a tariff of 9-12 months imprisonment would be appropriate for the offence given that that was the Penal Code tariff and the maximum penalty has not charged. However, as was said in that case and it is repeated now that sentences for wounding in domestic violence cases must attract higher sentences because of the breach of trust. Sentences for this offence when the wounding is serious could extend up to 3 years in domestic violence cases. The starting point taken will depend on the injury inflicted.
14. Making reference to other cases decided with lesser sentences entered is not very helpful. Each case must turn on its own particular facts and the view of the Judge of those facts at the time. It is even worse to compare sentences for different crimes as Mr. Waqainabete would have me do.
15. I now state that the tariff for wounding (s.261) are sentences of imprisonment between 9 and 12 months, but wounding in domestic violence cases creates a tariff of 12 months to 3 years depending on the following factors:
 - 1) the seriousness of the wound.
 - 2) degree of provocation.
 - 3) remorse
 - 4) dangerousness weapon used.
16. As in all domestic violence cases, reconciliation is to be viewed with scepticism. The aggrieved partner will invariably say that he or she has

forgiven the perpetrator and they have reconciled because he/she wants the previous *status quo* to be restored where they each received benefit from each other. A plea of reconciliation can be mitigatory if there is evidence before the Court of genuine reconciliation.

17. In domestic violence cases, the presumption in favour of bail disappears. And so should the possibility of suspension of sentences. A domestic violence offence destroys the fabric of family life and it is a gross breach of trust: for those reasons it can only be in the most exceptional cases that a sentence of imprisonment for domestic violence wounding would be suspended.
18. I agree with the appellant that the Magistrate has seemingly punished her twice by taking a high starting point. By starting at 24 months and saying as he did: *"This high starting point subsumes the serious domestic violence attack"* he should not then go on to add time for "degree of violence being high" and "aiming for a vulnerable area of the body". He was correct in finding that the breach of trust and minimal provocation were valid aggravating factors.
19. Pursuant to section 256 of the Criminal Procedure Decree 2009, I set aside the sentence passed below and proceed to sentence the appellant afresh.
20. I adopt the same starting point of 24 months which is appropriate for the unprovoked violence perpetrated by the appellant on her husband. I add to that 6 months for the aggravating features of breach of trust, minimal provocation and the use of a knife, a dangerous weapon. From the interim total of 30 months imprisonment I deduct 9 months for the appellant's strong mitigating features of being a first offender, of being relatively young with two small children to be concerned for, for the lack of pre meditation and her obvious remorse. The interim term being now 21 months I deduct a full third for her early plea of guilty and co-operation with the authorities.

21. The sentence that the accused will serve will be one of 14 months imprisonment. For the reasons given earlier it will not be suspended. I decline to order a minimum term that she should serve. This sentence is to start on the date of sentence in the Magistrates Court which is the 4th July 2014.
22. The Domestic Violence restraining order issued by the Magistrate is to remain in force until further order.
23. The appeal succeeds to that extent.



A handwritten signature in blue ink, appearing to read "P.K. Madigan", with a large, stylized loop at the beginning.

P.K. Madigan
Judge

At Suva
18 December 2014