

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 012 OF 2015

BETWEEN: **RICKY BINESH PRASAD**

Appellant

A N D: **STATE**

Respondent

Counsel: Mr. S. Sharma for Appellant
 Ms. K. Semisi for Respondent

Judgment: 02nd July 2015

JUDGMENT

1. The appellant was charged with the offence of Criminal Intimidation contrary to section 375 (1) (a) of the Crimes Decree No. 44 of 2009 in the Magistrate's Court Nausori.
2. On 08/04/2015 the appellant pleaded guilty to the charge and on admitting the summary of facts the learned Magistrate convicted the appellant on his own plea of guilty.
3. The appellant was sentenced to 9 months imprisonment on 11.05.2015. The appellant appealed against the above sentence on the following grounds:
 1. That the Learned Trial Magistrate erred in law and in fact by not considering the genuine remorse of the appellant in approaching

the victim for reconciliation after the appellant was charged for the offence.

2. That the Learned Trial Magistrate erred in law and in fact not considering that the victim received minimum injuries and not taking into consideration that the accused and the victim lived peacefully after their marriage and the appellant was a first offender and never ever assaulted the victim prior to this incident.
3. That the Learned Trial Magistrate erred in law and in fact in not calling the victim in court to confirm reconciliation when the counsel for the appellant informed the court that the appellant and the victim has reconciled.
4. That the learned Trial Magistrate erred in law and in fact in not excising the discretion judicially in imposing a custodial sentence taking into account the well settled guidelines of sentencing.
5. That the Learned Trial Magistrate erred in law and in fact in concluding that the appellant inflicted the injuries on the victim by beer bottles when there was not such specific medical report to rely upon.
6. That the Learned Trial Magistrate erred in law and in fact in not taking into account that the appellant had gainful employment and sole bread winner of the family and his wife who is the victim and the two children aged five years and six months were dependent on the appellant.
7. That the Learned Trial Magistrate erred in law and in fact in not carefully analyzing the special circumstances of the appellant in suspending the sentence before imposing a custodial term which is high and excessive.
8. That the Learned Trial Magistrate erred in law and in fact in not giving detailed and specific reasons as to why suspended sentence is not available to the appellant.

9. That the appellant reserves the right to add amend or alter the grounds of appeal upon receipt of the court record.
4. At the hearing of the appeal, the counsel for the appellant confined his appeal to two grounds:
 1. That the learned Magistrate did not approach the victim for reconciliation and that the Learned Magistrate erred in law and in fact in not calling the victim in court to confirm reconciliation when the counsel for appellant informed court that the appellant and victim has reconciled.
 2. That the learned Magistrate erred in law and in fact in not giving detailed and specific reasons as to why suspended sentence is not available to the appellant.
5. I considered the submissions made by both counsel for appellant and the respondent with the relevant case authorities.
6. Counsel for the appellant submitted that the learned Magistrate did not consider that the parties have reconciled and that the learned Magistrate could have inquired from the victim about the reconciliation. Further it was submitted that as the appellant is a first offender and that he is the father of two young children, the learned Magistrate should have suspended the sentence imposed on the appellant.
7. Counsel for the respondent submitted that the Learned Magistrate has rightly considered the tariff and was correct in not suspending the sentence.
8. The following summary of facts was admitted by the appellant.

The appellant and the victim were husband and wife living with their 2 children. The appellant was 30 years old and the victim was 27 years old.
9. On seeing a message 'Happy Diwali' on the appellant's mobile phone the victim questioned the appellant. When the appellant denied any knowledge

of the message the victim called the phone number and found out that it was a lady named 'Pinky' who was their neighbour and also that she had been calling the appellant before. During the conversation between the victim and the neighbour the appellant started throwing stones and beer bottles on the victim. The victim ran inside the house and locked the door to save her life. The appellant broke open the door, took a cane knife and put it on the victim's neck and threatened to kill her where she fell unconscious and later regained conscious.

10. This is a domestic violence offence and is not reconcilable. However if the parties have genuinely reconciled, the Court may take that into consideration when deciding on the sentence.
11. On reconciliation of domestic violence cases, Hon. Justice Madigan in case of Anaseini Vutovuto v. State Criminal Appeal No. 21 of 2014 (18 December 2014) said:

"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."

12. In the instant case the learned Magistrate in paragraph 8 of the sentencing judgment said:

"His counsel also submitted that the parties have reconciled however without the complainant confirming to this court I am not accepting the reconciliation as a genuine one."

13. This shows that the defence counsel has informed the learned Magistrate that the parties have reconciled. The court record shows that on 08.04.2015 the day the appellant pleaded guilty to the charge, in mitigation the defence counsel has informed court that the parties have reconciled. Although the learned Magistrate stated in her judgment that without the complainant confirming it she would not accept it as a genuine reconciliation, the court record does not

show that the learned Magistrate inquired about the reconciliation from the complainant. I find that it was improper for the court to come to a finding that the reconciliation was not genuine without even inquiring from the complainant whether what the accused said was in fact correct.

14. In offence of Criminal Intimidation if the threat is to cause death or grievous harm, the maximum punishment prescribed in section 375 (2) of the Crimes Decree 2009 is imprisonment for 10 years. However the appellant was charged under section 375 (1) (a) where the maximum punishment prescribed is 5 years imprisonment although the admitted summary of facts revealed that the appellant threatened to kill the victim.
15. In case of Basa v. State [2007] FJHC 48, HAA 18 of 2007 (6 August 2007), 18 months of imprisonment was affirmed by the High Court for the offence of Criminal Intimidation. In this case the accused threatened a police officer with a screw driver and was convicted after trial.
16. In Paulina Ulu v. The State (2006) FJHC 54; HAA 080 of 2006, where the accused threatened his father with a cane knife was sentenced to 18 months imprisonment. In this case the accused had two previous convictions, one where the same complainant was involved.
17. Where the accused who habitually caused problems at home as a person addicted to the use of cannabis, and threatened his father with a cane knife was sentence to 12 months after pleading guilty, and was affirmed by High Court in case of Samisoni Mua Rabaka v. State HAA 149 of 2006 (16 February 2007).
18. In case of State v. Aziz [2011] FJHC 639 HAC 189 of 2010 (7 October 2011) where the accused chased after the complainant threatening to chop her after causing death of another person by striking with a cane knife was sentenced to 18 months imprisonment for criminal intimidation.
19. The instant case is of a serious nature which is a domestic violence where the victim is the wife of the appellant. The learned Magistrate correctly considered all the mitigating factors including the early guilty plea, being a first offender and remorse. When consider the line of case authorities

mentioned above and the facts of this case, I find that 9 months imprisonment is correct in law and in principle.

20. Now I turn to consider whether the learned Magistrate erred when she did not suspend the sentence as submitted by the appellant.

21. The learned Magistrate in paragraph 10 of her sentencing judgment said:

"Considering the tariff and the circumstances of the offending I do not find it appropriate to suspend the sentence."

22. In case of **State v. Alipate Sorovanalagi and others** Revisional Case No. HAR 006 of 2012 (31 May 2012) Hon Justice Goundar considering a series of case authorities discussed on suspension of sentence. Goundar J said:

"I accept that the Magistrates' Court has discretion to suspend a sentence if the final term imposed is 2 years or less. But that discretion must be exercised judiciously, after identifying special reason to suspend the sentence. The special reason can vary depending on the facts of each case. In DPP v Jolame Pita (1974) 20 FLR 5, Grant Acting CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Acting CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Acting CJ laid down guidelines for imposing suspended sentence at p.7:

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the

misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

23. In case of **State v. Chand** Criminal Appeal No. AAU0027 of 2000S, the Fiji Court of Appeal referred to what was said in case of R V. Petersen [1994] 2 NZLR 533, on the factors which needs to be weighed in choosing immediate imprisonment or suspended sentence.

"Thomas at pp. 245 – 257 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period of free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrent the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have

to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately”.

24. The accused in the instant case is a first offender. No previous violent behaviour of similar nature had been reported against the accused. It had been an isolated incident although the behaviour was violent. The accused persons in cases of Basa v. State, Ulu v. State and Samisoni Mua Rabaka v. State which were discussed above had previous convictions of similar offences or previous violent behaviour. The appellant is 30 years old and the victim who is the wife is 27 years old. They have two children and the appellant is the sole breadwinner. He was employed as a Processing Officer at Crest Chicken. The appellant pleaded guilty at the earliest opportunity and was remorseful. There is no evidence of premeditation. I find these as special reasons to consider suspending part of the sentence imposed. For the safety of the complainant the permanent Domestic Violence Restraining Order which the learned Magistrate made will be in force.

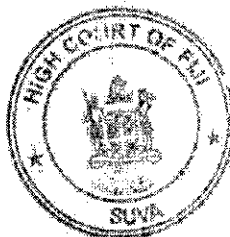
25. In the above premise I find that suspending part of the sentence should have been appropriate. Hence I order the appellant to serve five months in prison and the balance 4 months to be suspended for 2 years.

Summary

26. Appellant is sentenced to 9 months imprisonment and out of the said 9 months, 5 months to be served in prison. Balance 4 months is suspended for 2 years.

27. A permanent Domestic Violence Restraining Order is made identifying the complainant Pranita Singh as the protected person.

28. The appeal succeeds to that extent.




Priyantha Fernando
JUDGE

At Suva

Samusamuvodre Sharma Law for the Appellant

Office of the Director of Public Prosecutions for the Respondent