

IN THE HIGH COURT OF FIJI  
CRIMINAL JURISDICTION  
AT LAUTOKA

CRIMINAL CASE: HAA 05 OF 2016

BETWEEN : BINESH CHAND

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Miss S. Nasedra for the Appellant  
Mr. J. Niudamu for the Respondent

Date of Hearing : 8th of April 2016

Date of Judgment : 5th of May 2016

JUDGMENT

**Introduction**

1. The Appellant filed this appeal against the sentence imposed by the learned Magistrate in Lautoka on 24th of September 2015 on the following grounds, *inter alia*;
  - i) *That the sentence is manifestly harsh and excessive,*
  - ii) *That the learned sentencing Magistrate erred in law in giving a non-parole period which is in breach of Section 18(4) of the Sentencing and Penalties Decree 2009,*

2. The learned counsel for the Appellant and the Respondent consented to conduct the hearing of this appeal by way of written submissions. Hence, I invited them to file their respective written submissions, which they filed accordingly.

### **Background**

3. The Appellant was charged in the Magistrate's court for one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Decree and one count of Breach of Bail Condition, contrary to Section 26(1) of the Bail (Amendment) Decree No 28 of 2012. The Appellant initially had pleaded not guilty for these two counts. Hence, the matter proceeded to hearing. The prosecution called their witnesses to prove the charges against the Appellant. At the conclusion of the prosecution's case, the Appellant informed the court that he wished to change his plea. The Appellant then pleaded guilty for these two counts. Having satisfied that the plea of guilty by the Appellant was voluntary and the Appellant had properly comprehended the consequence of his plea, the learned Magistrate convicted him for these two counts. The learned Magistrate then sentenced the Appellant for a period of seventeen (17) months of imprisonment for the offence of Assault Causing Actual Bodily Harm and six (6) months of imprisonment for the offence of Breach of Bail Condition. Both sentences are to be served concurrently. The learned Magistrate has further ordered that the Appellant is not eligible for parole for a period of twelve (12) months. The Appellant now appeals against the said sentence of the learned Magistrate.

### Submissions of the Parties

4. The learned counsel for the Appellant submitted in her written submissions that the learned Magistrate has added twelve months for the aggravating factors in the sentencing, which is harsh and excessive. She further submitted that the learned Magistrate has erred in law by selecting twelve months of non-parole period, which is in contravention with Section 18 (4) of the Sentencing and Penalties Decree.
5. The learned counsel for the Respondent in his written submission conceded that the learned Magistrate has relied on wrong principles of sentencing. He submitted that the learned Magistrate has considered the same facts for selecting the starting point and then for the aggravating facts. The learned counsel for the Respondent further conceded that the learned Magistrate has erroneously ordered twelve month of non-parole period, which is in contravention with Section 18 (4) of the Sentencing and Penalties Decree.

### The Law and Analyses

6. Having briefly outlined the factual and procedural background of this appeal, I now turn onto the first ground of appeal, that is the sentence imposed by the learned Magistrate is manifestly harsh and excessive.
7. The Fiji Court of Appeal in Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998 held that;

*'It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence.'*

8. The Appellant and the Respondent did not dispute the applicable tariff for the offence of Assault Causing Actual Bodily Harm. The learned Magistrate has selected twelve months as the starting point, which is actually within the accepted tariff limit for this offence. The learned Magistrate has then added another twelve months for the aggravating factors. He had then reduced 2 months for the mitigation factors. Further one month was rescued for the plea of guilty. He has reduced 4 months for the time the Appellant had spent in remand custody prior to the sentencing. The final sentence is seventeen months.

9. The learned Magistrate in paragraph twelve of his sentence has stated that;

*"Having consideration over the surrounding circumstances of the offending, the nature and seriousness of the injuries caused and facts highlighted under Section 4(3) of the Sentencing and Penalties Decree 2009, I select a starting point at the higher end of the tariff band for this offence. Thus I commence your sentence at 12 months imprisonment"*

10. The learned Magistrate has not specifically explained in the sentence what he has actually considered as the surrounding circumstances of the offending. He has

then considered the following factors as aggravating circumstances of this offence, *inter alia*;

- i) *Blatant breach of trust of the complainant which she reposed on you as her de-facto husband,*
- ii) *Assaulting the complainant in violation of a court order,*
- iii) *Unprovoked attack on complainant,*
- iv) *Complainant assaulted in front of children at a primary school,*

11. The Fiji Court of Appeal in *Naikелеkelevesi v State [2008] FJCA 11; AAU0061.2007 (27 June 2008)* has succinctly discussed the applicable and structured approach in sentencing, where their lordships held that;

*“In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.*

*In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been*

*proven before it following a trial or as in this instance the facts that were outlined to the appellant after his guilty was entered and he was convicted, to which he voluntarily admitted. In doing this the court is taking cognizance of the aggravating features of the offence”.*

12. The learned Magistrate has correctly adopted the offence of Assault Causing Actual Bodily Harm as the base offence in sentencing. It is a correct and appropriate approach, which could avoid punishing the accused twice on same ground.
13. Having correctly adopted the appropriate approach with base offence, the learned Magistrate has fallen into an error by considering the fact that the Appellant assaulted the complainant in violation of court order as an aggravating circumstances of this offence. Apparently, it is the main factual element of the offence of Breach of Bail Condition. Accordingly, it is my opinion that the learned Magistrate has erroneously considered the violation of court order as an aggravating factor for the offence of Assault Causing Actual Bodily Harm.
14. It appears that the issues of provocation and the place of assault are surrounding circumstances of the offending, which the learned Magistrate has considered in selecting the starting point. Thus, he is not allowed in law to consider the same grounds in order to increase the sentence. Moreover, there is no evidence presented in summary of facts whether any form of provocation excited or not. Hence, the finding of learned Magistrate on the issue that this assault was unprovoked is not founded on any evidence.

15. In view of the reasons discussed above, it is my opinion that the learned Magistrate has acted upon wrong principles and has considered wrong and irrelevant factors in reaching the final sentence of seventeen months for the offence of Assault Causing Actual Bodily Harm.
16. I now draw my attention to the second ground of the appeal that is the learned Magistrate erred in law in giving a non-parole period of twelve months in breach of Section 18 (4) of the Sentencing and Penalties Decree.
17. Section 18 (4) of the Sentencing and Penalties Decree states that;  
  

*“Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence”.*
18. In view of Section 18 (4) of the Sentencing and Penalties Decree, the sentencing court is required to fix a period of less than at least six months than the term of sentence when imposing a non-parole period. In this instant matter, the learned Magistrate has fixed twelve months of non-parole period for the seventeen months of imprisonment. The non-parole period fixed by the learned Magistrate is not less than 6 months of the term of the sentence. Hence, I find that the non-parole period fixed by the learned Magistrate in his sentence is in breach of the requirement as stipulated under Section 18 (4) of the Sentencing and Penalties Decree.
19. Having considered the above discussed reasons, I find there is a reason for me to intervene in to the sentence of the learned Magistrate pursuant to Section 256 (3) of the Criminal Procedure Decree. I accordingly quash the sentence of the

learned Magistrate and consider an appropriate sentence in order to reflect the gravity and the appropriate culpability of the Appellant in this offence.

20. I now turn onto consider the level of harm and culpability of this offence in order to determine the applicable starting point. The medical report of the victim reveals that the victim had sustained scratch marks on both left and right arms and also on the left side of the face and legs. I do not find the physical injuries sustained by the victim were serious in nature. There is no any evidence presented before the court to consider any psychological trauma sustained by the victim.
21. The summary of facts reveals that the victim is the de-facto wife of the Appellant. The Appellant came and met the victim while she was dropping her three children at their school. They had an argument, then she went inside the classroom. The Appellant followed her and assaulted in the manner as described in the summery of facts.
22. He has slapped her three time and had not used any weapons. He had pulled her hair and dragged her when she fell on the floor. There is no evidence of provocation and premeditation. Hence, I find the level of harm and the level of culpability in this offending is not high. Accordingly, the starting point should be from the middle range of the tariff. I accordingly select 8 months as the starting point.
23. The Appellant has committed this crime at the primary school and in front of primary school children in the class room. I consider this as a serious aggravating factor against the Appellant. Moreover, I find the appellant had breached the



trust reposed in him by the victim as her de-facto husband. In view of these aggravating factors, I increase 6 months and reach to an interim imprisonment of 14 months.

24. I concur with the finding of the learned Magistrate in respect of the mitigatory factors. I reduce 2 months for it. I further reduce one month for the plea of guilty and further 4 months for the time the Appellant spent in remand custody prior to the sentencing. The final sentence is now seven months of imprisonment.
25. I do not find any reason to intervene with the sentence imposed by the learned Magistrate in respect of the second count of Breach of Bail Condition.
26. I further concur with the reasoning given by the learned Magistrate for imposing a custodial sentence. Hence, I do not suspend the sentence of seven (7) month imprisonment.
27. I do not wish to change the Permanent Domestic Violence Restraining Order issued by the learned Magistrate in his sentence.
28. I accordingly sentence the Appellant for a period of seven (7) months imprisonment for the offence of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Decree and six (6) months of imprisonment for the offence of Breach of Bail Condition, contrary to Section 26(1) of the Bail (Amendment) Decree. Both sentences are to be served concurrently and effective from the 24th of September 2015.

29. Thirty (30) days to appeal to the Fiji Court of Appeal.



**R. D. R. Thushara Rajasinghe**

**Judge**

**At Lautoka**

**5th of May 2016**



**Solicitors : Office of the Director of Public Prosecutions**

**Office of Legal Aid Commission**