

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No.: HAA 81 of 2016

SIMIONE SIGAVINAKA

vs.

STATE

Counsel : Mr. S. Luvena [L.A.C.] for the Appellant
Mr. T. Qalinauci for the State

Dates of Hearing : 23 February 2017

Date of Judgment : 24 February 2017

JUDGMENT

- 1] On the 4th August 2016 the appellant entered a plea of guilty to one offence of grievous harm contrary to section **258** of the Crimes Decree 2009. He agreed a set of relevant facts and was convicted that same day.
- 2] He was sentenced on the 3rd October 2016 to a term of imprisonment of 3 years and 8 months' imprisonment with a minimum term to be served of 3 years.
- 3] It is against this sentence that the appellant appeals on the grounds that the Magistrate sentenced him for the wrong offence and that the calculations in the sentence were incorrect.
- 4] The victim of this harm was the Appellant's wife.

- 5] The facts were that on an evening in July 2016 the then accused (appellant) had used a big stone to hit the lower right leg of his wife several times causing her injury.
- 6] Without any evidence of provocation, he proceeded then to hit her right jaw several times with the same big stone and her head. She was in pain and shouted for help but fell into unconsciousness. She regained consciousness when she heard her daughter cry.
- 7] In an interview under caution the accused admitted hitting his wife several times on the leg. A medical report found injuries to the leg, the jaw and the head.
- 8] The maximum penalty for this offence under s.258 is 15 years imprisonment. The Magistrate stated in his sentence that the maximum sentence for an offence under s.255 (Act with intent to cause Grievous Harm) is 5 years imprisonment and then went on to discuss authorities pertaining to this latter offence.
- 9] The maximum penalty for a s.255 offence is not 5 years imprisonment but life imprisonment and so very unfortunately the Magistrate was in error both in the offence he was considering and in its maximum penalty.
- 10] These errors were compounded when the Magistrate committed a mathematical error in his sentence by taking a starting point of 3 years and adding 2 years for aggravating features to reach 5 years (correct) but then deducting 20 months for the early guilty plea and one year for the mitigation proffered. He arrived at a total of 3 years 8 months which was the sentence he passed when the total should have been 2 years and 8 months.
- 11] The Magistrate ordered that the sentence be served "cumulative" to another sentence he was serving because he had previous convictions for domestic violence. "Cumulative" is not a concept known to Fiji's sentencing parameters.
- 12] In the light of these errors, this Court sets aside the sentence passed below and would sentence afresh pursuant to section 256 (3) of the Criminal Procedure Decree 2009.

A New Sentence

- 13] As stated above the maximum penalty for Grievous Harm under s.258, the offence that the appellant was convicted of below, is 15 years imprisonment. The tariff for the offence is between 2 to 6 years (**Felix Patel** HAA30.2012 and **Pauliasi Yasa** (HAC 44.2012).
- 14] This was a particularly violent crime with no provocation indicated and having regard to section 4(3) of the Sentencing and Penalties Decree I note that it was committed in the presence of a child who was reduced to tears.
- 15] For such a crime I take the same starting point as the Magistrate and start my sentence at a term of 3 years imprisonment.
- 16] The aggravating features not subsumed in the starting point are the breach of trust between man and wife, the use of a big stone as a weapon and an attack to the head which is inherently dangerous. For these aggravating features I add a further term of 3 years imprisonment.
- 17] His mitigation advanced below was:
- 40 years old married but separated;
 - 6 year old daughter;
 - carpenter earning \$320 p.w.;
 - remorseful and asking victim for forgiveness;
 - early plea of guilty.
- 18] The appellant has 4 previous convictions in the last 10 years, 3 of which are for assault of the same victim. That record would deny him any mercy from this Court and would allow only his early plea to be recognized as a mitigating factor.
- 19] From the interim total of 6 years imprisonment I deduct 2 years for the early plea of guilty.

- 20] His oral plea for discount for time spent in remand before trial is invalid. He was serving a 10 month term of imprisonment for having assaulted the same victim.
- 21] The sentence I pass is one of 4 years with a minimum to be served before he is eligible for parole to be one of three years. This sentence is to be served concurrently with my other sentence he is serving.
- 22] The appellant was made aware at hearing of my powers to increase sentences as well as reduce them.
- 23] Section 23(1) of the Sentencing and Penalties Decree does not permit me to backdate this new sentence to 3 October 2016 when he was originally sentenced, and therefore the sentence I pass to commence today is one of 3 years 7 months with the minimum term referred to (*supra*) of 3 years.
- 24] A domestic violence restraining order is now issued to protect the wife with strict no contact provisions and it will remain in force until further order from this Court.



**P. Madigan
JUDGE**

**At Lautoka
24th February 2017**