

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA19 of 2016
[Magistrates' Court Case No.1243 of 2013]

BETWEEN : **THE STATE** *Appellant*

AND : **JAMES CHARLES PICKERING** *Respondent*

Coram : Hon. Mr Justice Daniel Goundar

Counsel : Ms S Lodhia for the Appellant
Ms T Kean for the Respondent

Date of Hearing : 20 February 2017

Date of Judgment : 27 February 2017

JUDGMENT

- [1] This is a timely appeal by the State against an order made by the Magistrates' Court, discharging the respondent without recording a conviction, after promoting reconciliation between the respondent and the victim. The respondent was charged with assault causing actual bodily harm to his wife and damaging her laptop. On 17 October 2013, the respondent appeared in the Magistrates' Court at Nasinu and was released on bail to appear on 12 November 2013 to confirm receipt of disclosures.
- [2] On 12 November 2013, the respondent informed the presiding Magistrate that he had reconciled with the victim. The learned Magistrate raised the option of discharging the respondent but the police prosecutor reminded him that the law did not allow promotion of reconciliation in domestic violence offences. The matter was adjourned to 22

January 2013 with a directive that the prosecution seek legal advice from the Office of the Director of Public Prosecutions.

- [3] On 22 January 2013, a legal officer from the Office of the Director of Public Prosecutions appeared and sought further time to render an advice in the matter. The learned Magistrate again attempted to promote reconciliation between the respondent and the victim, but he was reminded for the second time by the legal officer that section 154(6) of the Criminal Procedure Decree 2009 did not allow for the promotion of reconciliation in domestic violence cases. The learned Magistrate disregarded the prosecutor's submissions and proceeded to confirm from the victim that reconciliation had occurred between her and the respondent. After receiving the confirmation from the victim, the learned Magistrate discharged the respondent and issued a non-molestation restraining order against him.
- [4] The State seeks to appeal the discharge order on the ground that the order was made in error of law. Both parties have filed helpful submissions. The State's right of appeal is governed by section 246(1) & (6) of the Criminal Procedure Decree 2009.
- [5] The promotion of reconciliation in criminal proceedings is governed by section 154 of the Criminal Procedure Decree 2009. Section 154 states:

(1) In the case of any charge for an offence of common assault or assault occasioning actual bodily harm or criminal trespass or damaging property the court may, in such cases which are —

(a) substantially of a personal or private nature; and

(b) not aggravated in degree —

promote reconciliation and encourage the settlement of the proceedings in an amicable way, on terms of payment of compensation or on other term approved by the court, which may involve —

- (i) the giving of an apology in any appropriate manner;
- (ii) the giving of a promise or undertaking not to re-offend, or to respect the rights and interests of any victim;

- (iii) mandatory attendance at any counselling or other program aimed at rehabilitation; or
- (iv) a promise or undertaking to alter any habits or conduct, such as the consumption of alcohol or the use of drugs.

(2) A court shall only proceed in accordance with sub-section (1) if it is satisfied that it is in the interests of any victim of crime to proceed in such a manner, and the court shall ensure that the victim of the violence does not submit to any proceedings being undertaken in accordance with this section by reason of pressure being exerted in any form.

(3) Upon proceeding in accordance with this section the court may then —

(a) order the proceedings to be stayed for a specified period of time upon the offender entering into any bond to comply with the terms imposed by the court under sub-section (1); or

(b) dismiss the proceedings.

(4) A proper record of every aspect of the outcome of the proceedings is to be made on the court files and in the records of an accused person whose case has been dealt with in accordance with the procedures specified in this section.

(5) The procedures under this section may be applied in connection with any procedure of the court which permits the involvement of traditional and community leaders in the determination of appropriate sentences.

(6) This section does not apply to offences of domestic violence, as defined by the Domestic Violence Decree 2009.

(7) ...

[6] It is clear that the promotion of reconciliation by the courts in criminal proceedings is discretionary. That discretion can only be exercised in relation to offences of assault, assault causing actual bodily harm, criminal trespass or damaging property, which are of a private nature and not serious (subsection (1)). In exercising the discretion, the interests of the victim is of the paramount consideration. The court must ensure that the victim is freely and voluntarily participating in the reconciliation process (subsection (2)). If reconciliation is promoted then the court must keep a clear record of every aspect of the proceedings (subsection (5)). In the present case, the learned Magistrate failed to comply with subsection (5).

[7] There is a statutory caveat against promoting reconciliation in domestic violence cases (subsection (6)). In other words, the discretion to promote reconciliation is unavailable in domestic violence cases (subsection (6)). The rationale for the caveat is clear. The process of reconciliation has the potential to place the victims of domestic violence who are mostly women under considerable financial, social and emotional pressure to reconcile with their perpetrators despite the violence (*Khan v State* [2002] FJHC 239; HAM0049D.2002S (10 December 2002)).

[8] The respondent was charged with offences that fell within the ambit of subsection (1) of section 154. The question is whether the caveat provided by subsection (6) applied to the charges. Domestic violence is defined in the Domestic Violence Decree 2009 (amended by Act No.31 of 2016) as:

- (a) A personal violence offence committed by the offender against a person with whom the offender is or has been in a family or domestic relationship;
- (b) A property damage offence committed by the offender against a person with whom the offender is or had been in a family or domestic relationship;
- (c) ...

[9] It is not in dispute that the offences in the present case fell within the definition of domestic violence under the Domestic Violence Decree 2009. The respondent assaulted his wife and damaged her laptop when they were in a domestic relationship and living together. There is a long list of case law that says domestic violence offences are not reconcilable (*Raisoqoni v State* [2011] FJHC 32; HAA004.2011 (7 February 2011), *State v Kumar* [2011] FJHC 341; HAA020.2010 (9 June 2011), *Patel v State* [2011] FJHC 669; HAA030.2011 (27 October 2011), *Botaki v State* [2012] FJHC 1250; HAA015.2012 (1 August 2012), *Vutovuto v State* Criminal Appeal No. 21 of 2014 (18 December 2014), *Kissun v State* Cr App No HAA19 of 2013 (13 February 2014), *Prasad v State* [2015] FJHC 477; HAA012.2015 (2 July 2015).

[10] The learned Magistrate was advised twice by the prosecution that the charges being domestic violence were not reconcilable. Unfortunately, the learned Magistrate decided not to apply the law. He gave no reasons for not applying the law. The decision to

promote reconciliation was in breach of section 154(6) of the Criminal Procedure Code 2009 and was unlawful. But that is not the end of the matter. The learned Magistrate did not take the respondent's plea before promoting reconciliation and dismissing the proceedings. The procedure for taking of a plea is provided by section 174 of the Criminal Procedure Code 2009 as follows:

174. — (1) The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge. (underlining mine)

(2) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Decree 2009.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this Decree.

(4) If the accused person refuses to plead, the court shall order a plea of not guilty to be entered.

[11] The dismissal of the proceedings effectively meant that the respondent was discharged without a conviction. A discharge without a conviction is one of the sentencing options provided by section 15 of the Sentencing and Penalties Decree 2009. Sentencing options are only available after a finding of guilt has been made by the court. By not taking the respondent's plea, the Magistrate lacked power to consider the sentencing options, including, discharging without a conviction. The discharge order was unlawful.

Result

[12] For the reasons given, the State's appeal is allowed and the discharge order is set aside. The case is remitted to the Magistrates' Court to take its normal course after the respondent's plea is taken.

[13] The Domestic Violence Restraining Order issued by the learned Magistrate remains in force.

[14] The respondent is ordered to appear in the Magistrates' Court at Nasinu before another Magistrate on Monday, 6 March 2017, at 9 am, for mention to sign fresh bail.



A handwritten signature in blue ink, appearing to read "Daniel Goundar", with a long horizontal line extending to the right.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Respondent