

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO HAA 26 OF 2017
(from Nadi CR.727/15)

SUNIL DUTT

v

STATE

Appellant in person
Mr S. Babitu for the State.

Date of Hearing: 26 June 2017
Date of Judgment: 29 June 2017.

JUDGMENT

- [1] On the 19th September in the Magistrates Court at Nadi, the appellant was convicted on his own plea to one count of grievous harm contrary to section 258 of the Crimes Act 2009, having been charged with causing grievous harm to his wife at Nadi on the 25th August 2015.
- [2] He was sentenced on the 22nd November 2016 to a term of imprisonment of 24 months with 18 months to be served before he is eligible to apply for parole.
- [3] The appellant appeals both his sentence and conviction.
- [4] His home made grounds of appeal against conviction are:
 - (i) that the guilty plea is equivocal. He was willing to plea to a lesser charge but the plea was taken as a plea to this charge. He admitted causing harm to the victim but not with an intention to cause grievous harm.
 - (ii) that the learned Magistrate misconstrued the medical findings by placing too much emphasis to the injuries on the head.

- (iii) that the learned Magistrate did not give enough weight to the answers in the cautioned interview and in the charge statement.
- (iv) that the Magistrate erred in not considering a lesser charge.
- (v) (unintelligible)

[5] Against sentence he prays:

- (i) that the Magistrate mistook the facts and thereby imposed a sentence which was wrong in principle considering the circumstances of the case
- (ii) that the appeal be heard and a re-trial ordered or any other such order as the Court sees fit.

[6] The facts of the case agreed to by the appellant at trial are as follows.

[7] In the morning of the 25th August 2015, the Appellant and his victim wife argued over who was to have possession of their mobile phone that day. The Appellant seized the phone by force going off to his place of work. The wife went to the hospital for a pre-arranged medical check but stopped at the Police Station on the way to report the abusive actions of her husband. When they later came back together that afternoon, the husband learned about the Police report and he commenced to attack her. He slapped her on the mouth and punched her chest and buttocks. He then picked up a hammer and hit her on the head with it. Her head was bleeding He locked her in the bathroom and phoned their son to take her to the hospital.

[8] Examination at the hospital revealed a 5cm laceration on her head, a 1cm laceration on her right upper eyelid, swelling over the head and left knee swelling.

[9] In an interview under caution, the Appellant denied punching his wife but admitted hitting her on the head 4 times with the hammer.

The Appeal against Conviction

[10] The appellant appeared before the Magistrate 5 times before his plea was taken. On each occasion he was represented by Counsel, but not the same Counsel. When his plea was taken on the 19th September 2016, he was represented by Ms Salele, a very experienced counsel.

- [11] The record reveals that on not one occasion was there a suggestion that the appellant would be willing to plea to a lesser offence and the various counsel advising him before he entered his plea would surely have fully briefed him on possible sentences that he was facing. His admission in Court to the Summary of facts shows that he was fully aware of the seriousness of the violence occasioned to his wife. The equivocation of plea ground has no merit.
- [12] In his second ground of appeal against conviction the Appellant submits that the witnesses, including the victim, spoke mainly of injuries to the head whereas the medical report is far more wide ranging and the Magistrate did not take this fact into account.
- [13] There is no doubt that the major injury inflicted on the wife that day was a laceration to the forehead occasioned by a blow with the hammer. Other injuries pale into insignificance. It was this serious and potentially fatal injury that was the foundation of the charge of grievous harm, rather than a lesser offence The head is a part of the body which when injured can lead to brain injuries, permanent disabilities or even death and to attack the head with a hammer as the Appellant has admitted is grievous.
- [14] "Grievous harm" is defined by section 4(1) of the Crimes Decree as any harm which
- (a) amounts to a main or dangerous harm: or
 - (b) seriously or permanently injures health or which is likely so to injure health: or
 - (c) extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, member or sense."
- [15] The injury caused to the forehead with the hammer surely amounts to "dangerous harm" if not "likely to seriously injure health" and for such reasons this injury was given more prominence in the minds of both the Magistrate and the witnesses.

The second ground of appeal fails.

- [16] There is nothing in the record to show that the Record of Interview was ever before the Court and with the Appellant represented by Counsel, the Magistrate had no need to call for its production. The appellant's third ground of appeal that it was not considered can only mean that it contained exculpatory answers that he would have wanted the Court to take into account. This would not prevent him from instructing his Counsel to put this information before the Court by way of

mitigation. In any event whatever is in his caution interview has no relevance to his plea and his agreement to the facts.

This third ground of appeal fails.

[17] The appellant is aggrieved that the learned Magistrate did not consider a lesser charge. Section 162 of the Criminal Procedure Act 2009 provides for categories of offences that can be “lessened” but unfortunately the offence of grievous harm is not included.

[18] The Magistrate must in law proceed to hear the charge as laid by the DPP and to convict on that charge if he thinks it has been proved. The only way a lesser charge can replace the one first laid is if representations and submissions to the DPP would convince him to change his mind.

This ground of appeal does not succeed.

The appeal against conviction is dismissed.

Sentence.

[19] The maximum sentence for this offence is one of fifteen years imprisonment and the tariff has been set by this Court in **Patel** HAA030.2011 as a term of imprisonment of between 2 and 6 years. .

[20] The learned Magistrate took a starting point of three years and added three years for what he considered to be aggravating features being:

- premeditation of attack
- breach of trust
- use of a weapon
- seriousness of the injury
- locking her in her room and not sending her immediately for treatment

For these he added a further two years to the sentence.

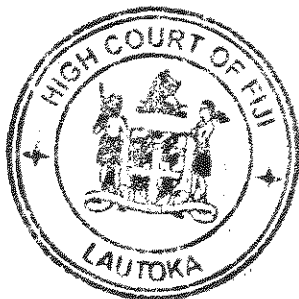
[21] His counsel had filed written mitigation which the Magistrate applied being:

- 47 years old, self employed as a carpenter
- an early plea of guilty
- first offender and remorseful
- provoked by knowledge that wife having an affair with another

- [22] For these he deducted three years from the sentence bringing it down to the final term of 2 years
- [23] He declined to suspend the sentence given that it was a dangerous attack in a domestic violence context.
- [24] The only problem if there be one with this sentence is that one of the aggravating features is not an aggravating feature at all. The seriousness of the injury is represented by the charge itself. However in the view of this Court the remaining aggravating features are sufficient to warrant his lenient two year enhancement.

Discussion

- [25] Serious or grievous harm as a result of domestic violence can only in the most exceptional circumstances be visited with non-custodial sentences.
The Sentencing and Penalties Act 2009 by section 3 adds additional considerations to be made by a sentencing tribunal in cases of domestic violence, and that coupled with the ethos of the Domestic Violence Act bespeaks the intent of the Legislature to eradicate violence within the homes of our citizens and to mete out sentences that would deter would be perpetrators.
- [26] In this Court's view the sentence passed by the Magistrate is not unlawful and represents condign punishment for this dangerous attack on his wife.
- [27] Attacks to the head, especially with a heavy or sharp weapon will always be condemned by the Courts because of the inherent danger of injury to the brain.
- [28] The appeal against sentence is too dismissed



Paul K. Madigan
Judge

At Lautoka
29 June 2017