IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 50 OF 2016

BETWEEN : SULIANO RAIVOLITA

APPELLANT

AND : STATE

RESPONDENT

COUNSEL : Ms. U. Baleilevuka for the Appellant

Mr. J.B. Niudamu for the Respondent

Date of Hearing: 23rd January, 2017

Date of Judgment: 06th February, 2017

# JUDGMENT

1. The Appellant was charged at the Magistrates Court at Nadi with one count of Indecent Assault contrary to Section 212 (1) of the Crimes Decree, 2009.

2. The Appellant pleaded guilty to the above charge and the matter proceeded to sentencing on 30th of August 2016. The Appellant was sentenced to 17 months' imprisonment with a non-parole period of 11 months.

**Grounds of Appeal**

3. Being dissatisfied with the decision of the Magistrate's Court, the Appellant filed his appeal against conviction and sentence on the 28th September 2016 which are as follows:

**Conviction**

(i) That the plea is equivocal based on the followings:

- *The learned Magistrate erred in law and in fact when he failed to give sufficient time to the Appellant to read his disclosures and seek legal advice before he could take his plea.*

- *The learned Magistrate erred in fact and law when he failed to give the Appellant sufficient time to seek further legal advice.*

**Sentence**

(2) *The learned Magistrate erred in law and in fact when he failed to take into account the Sentencing and Penalties Decree into account when sentencing the Appellant.*

(3) *The learned Magistrate erred in law and fact when he imposed a custodial sentence on the Appellant despite pleading guilty in the first instance and also been a first time offender.*

4. The Appellant admitted the following summary of facts:

*On the 31st day of July, 2016 between 4.00 am to 5.00 am at Korovuto, Nadi, one Suliano Raivolita 32 years [Accused] Electrician of Korovuto, Nadi, indecently assaulted Perina Lawanuku 21 years [Complainant] Cleaner of Korovuto, Nadi, by touching her breast and buttocks.*

*Accused is Complainant's uncle and staying together in the same house.*

*On the above mentioned date, time and place, complainant was at home after coming back from Nadi Town. Accused who was also at home awake after coming back from a funeral gathering at Nadi Back Road called complainant out of the house and took her to a spot about 15 meters away from their house. There at the spot accused asked complainant why she was out at night and also why she brought a boy home. Accused after scolding complainant then touched complainant's breast, complainant told accused to stop but accused kept on touching her breast. Complainant then tapped accuser's hand to avoid him. After that complainant stood up and whilst she was standing up, accused touched her buttocks and told complainant not to tell anyone. Complainant went home then borrowed her uncle's mobile phone to call her friend namely Ratu Jope Qereqeretabua PW-2 and informed him about what the accused did to her.*

*Matter was reported to Police whereby accused was arrested and interviewed under caution where he admitted the allegation.*

**The Law**

5. Since the Appellant was convicted upon his own plea of guilt, he is only allowed to appeal against the sentence pursuant to Section 247 of the Criminal Procedure Decree, which states that;

> *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates court, except as to the extent, appropriateness or legality of the sentence"*

6. In ***Nalave v State*** [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) Fiji Court of Appeal discussed the approach of the appellate courts in determining appeals against conviction that were entered upon a plea of guilty, where the Fiji Court of Appeal held that;

> *"It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v. Vent (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).*

7. In ***Maxwell v The Queen*** *(1996) 184 CLR 501, the High Court of Australia at p. 511 said:*

> *"The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered".*

8. The Fiji Court of Appeal in ***Tuisavusavu v State*** [2009] FJCA 50; AAU0064.2004S (3 April 2009) held that the onus is on the Appellant to establish that the plea of guilt was not unequivocal. The Fiji Court of Appeal in Tuisavusavu (supra) held that;

> *'The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see Bogiwalu v State [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (Liberti (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*
>
> *Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no*

*doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132);*

***"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*** *(emphasis added)*

9. It is well settled that a sentence imposed by a lower court should be varied or substituted with a different sentence on appeal only if it is shown that the sentencing judge had erred in principle or where the sentence imposed is excessive in all the circumstances.

10. The Fiji Court of Appeal in ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) observed:

*"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 relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499).*

11. In ***Sharma v State* [2015] FJCA 178; AAU48.2011 (3 December 2015)** the Fiji Court of Appeal discussed the proper approach to be taken by an appellate court when called upon to review the sentencing discretion of a court below:

*"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.*

## Analysis

### Conviction

**Ground (i) –*Equivocality of the Guilty Plea***

12. The record of the proceedings of the Magistrates court does not show that the plea was equivocal. Furthermore, the Appellant has not provided any material to suggest that the plea was equivocal or made under a circumstance that he could not understand the consequence of it.

13. The Appellant pleaded guilty to the offence when the matter was first called in the Magistrate's Court at Nadi on the 11th of August 2016. His right to be represented by a Counsel was duly explained but he opted to represent himself. The Appellant opted for his charge to be read in English. He confirmed receiving full disclosures. He could have asked for time to further study the disclosures if he wished to. It was then that the charge against him was read to him which he understood. He then entered a plea of guilty on his own free will and not due to any pressure or threat to do so. He informed the Court that his plea was unequivocal. He admitted the summary of facts which constituted all the elements of the offence.

14. The Counsel for the Appellant in her submission states that the Appellant did not understand the consequences of representing himself and also that the sentence entails five years' imprisonment. There is no material or evidence to suggest that the plea of the Appellant was equivocal. The entry of a plea of

guilty upon grounds advanced by the Appellant nevertheless constitute an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. I find that the first ground of appeal has no merit and fails accordingly.

15. In ***Singh v The State*** [1994] FJHC 158; Haa0041d.94s (26 October 1994) Pain J observed the following:

> *"For a plea of guilty to be equivocal, it must be made in circumstances that show it is not a complete admission of guilt to the charge. The Court is concerned with what occurred at the hearing before the Magistrate. Something must have occurred to indicate that there was something doubtful or ambiguous in the plea given. It was expressed in the following words at page 323 of the decision in the R v Rochdale Justices Ex parte Allwork that I have earlier mentioned:*
>
> > *"It is a plea which must be equivocal. In other words, the equivocality must be shown by what went on before the Magistrates Court. As Lord Parker CJ. pointed in the Maryle Bone Justices case (supra). The fact that the Defendant has subsequently thought better of the plea or has in some ways changed his mind is not sufficient on its own. It must be apparent to the Justices that the Defendant is saying, "I am guilty but": for instance "I plead guilty to stealing but I thought the article was mine," that type of situation. If there is no such evidence, then that is the end of the matter. The issue of equivocality has gone and the Crown Court will proceed to deal with the appeal against the sentence."*

16. The record of the Magistracy shows a completely regular hearing with the Magistrate adopting correct procedures to ensure that the Appellant was fully aware of the nature of the charges and agreed with the facts presented. There was nothing whatever that the Appellant did at the hearing to raise the slightest suspicion that there was any qualification to his plea of guilty. The Magistrate therefore rightly proceeded to sentence him as required by law. The plea in these circumstances cannot be regarded in any way as equivocal.

17. The authorities cited above make it quite clear that in these circumstances an appellate court should not proceed further into the matter and can only consider an appeal against the sentence. Section 247 of the Criminal Procedure Decree applies and this court can only consider an appeal as to the extent or legality of the sentence.

**Sentence**

*Ground (ii) -Sentence is Harsh and Excessive*

18. The maximum sentence for Indecent Assault is 5 years' imprisonment. Tariff is a sentence between 1 and 4 years. The more serious the assault, the higher will be the sentence.

19. Having analyzed the sentencing pattern in Fiji, Shameem J in ***Rokota v The State*** [2002] FJHC 168; HAA0068J.2002S (23 August 2002) observed the following:

> *"From these cases a number of principles emerge. Sentences for indecent assault range from 12 months' imprisonment to 4 years. The gravity of the offence will*

*determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.*

*These are the general principles which affect sentencing under section 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a five year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these".*

20. In this case, the learned Magistrate imposed a sentence in the lower end of the tariff. Having considered the objective seriousness of the offence, he selected a starting point of 2 years from the lower end of the tariff. He increased the sentence by one year for aggravating factors, namely, breach of trust -considering the relationship between the offender and the victim, impact on the victim, *modus operandi* used to commit the offence, continuous offending despite resistance and accused's attempt at concealing the offence.

21. Sentence was decreased by 18 months to reflect following mitigating circumstances: youth of the accused, early guilty plea, expression of remorse, and

him seeking forgiveness from Court and victim. He further reduced one month for accused's remand period and imposed a final sentence of 17 months' imprisonment with a non parole period of 11 months.

22. The learned Magistrate has considered sentencing principles enshrined in the Sentencing and Penalties Decree and guideline judgments in arriving at the final sentence. There is no apparent reason for a different sentence to be imposed on the facts placed before the learned Magistrate.

*Ground (iii) -Imposition of Custodial Sentence*

23. As the sentence fell below two years, the learned Magistrate addressed his mind to see if this was a fit case to suspend the sentence. Having recorded valid reasons, he imposed an immediate custodial sentence.

24. The learned Magistrate had stated at paragraph 15 of the sentencing Ruling that the offence committed is a serious one and in addition to this, the victim will have a very serious psychological effect. He cited ***Balaggan v State*** [2012] FJHC 1032; (24 April 2012) where it was observed that "*...a young and first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation*".

25. According to observation made by Shameem J in ***Rotoko*** *(supra)*, a non-custodial sentence will only be appropriate in cases where the ages of the victim and the offender are similar, and the assault of a non-penetrative and fleeting type. There was a considerable age gap between the Appellant and the victim. Accused was

31 and the victim was 21 years of age at the time of offending. Accused is victim's uncle and was in a gross breach of trust situation. Furthermore, the offending took place in a domestic environment. Although the assault was non-penetrative, it cannot be said that offending was of fleeting type. Appellant took the victim 15 meters away from their house and, while scolding her for bringing a boy home, touched her breast and, despite her resistance, he kept on touching her breast. While the victim was standing up in protest, he touched her buttocks.

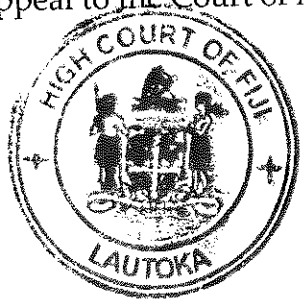
26. The Counsel for Appellant has cited a case from the magistracy where a suspended sentence had been imposed on an adult offender who had committed two indecent assaults on a child student despite their age difference. With respect, this Court is not bound by this decision of the Magistrates Court which had apparently been decided against the sentencing principles advocated by superior courts discussed above.

27. Counsel for Appellant further submits that the learned Magistrate had failed to give due consideration to the fact that the Appellant and victim had reconciled after the incident and even a letter had been written to the DPP to withdraw the charge against the Appellant.

28. As a matter of principle, a sentence imposed for an offence of domestic violence should be determined by the seriousness of the offence, not by the expressed wishes of the victim. Furthermore, the court must be satisfied that such a wish is genuine, and that giving effect to it will not expose the victim to a real risk of further assaults. The learned Magistrate is justified in not giving effect to the alleged reconciliation effort which may have been induced by threat made by, or by a fear of the Appellant who was a person in authority in a domestic setting.

29. For these reasons the grounds advanced on behalf of the Appellant cannot be sustained. The Appeal against conviction and sentence is dismissed. The conviction recorded and sentence imposed by the learned Magistrate are affirmed.

30. 30 days to appeal to the Court of Appeal.




**Aruna Aluthge**
**Judge**

**At Lautoka**
**06th February 2017**

**Solicitors:** **Iqbal Khan and Associates for the Appellant**
**Office of the Director of Public Prosecution for the Respondent**