

IN THE HIGH COURT OF FIJI  
CRIMINAL JURISDICTION  
AT LAUTOKA

CRIMINAL CASE: HAA 116 OF 2016

BETWEEN : THE STATE

APPELLANT

AND : KALIVATI WAQA  
SAVENACA NAROBA  
ILIESA BAVIA

RESPONDENTS

Counsel : Ms Luisa Latu for the Appellant  
Mr Kevueli Tunidau for the Respondent

Date of Judgment : 10th of February 2017

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the sentence imposed by the learned Magistrate at Ba on the following grounds *inter alia*,

- i) *That the learned Magistrate erred when he failed to give reasons as to the Sentence passed on the Respondents,*

*ii) That the learned Magistrate erred when after considering the facts of the case, made a non-conviction order on all Respondents,*

*iii) That the aforesaid sentence passed on all the Respondents is manifestly lenient having regards to all the circumstances of the case.*

2. The learned counsel for the Appellant and the Respondents inform the court that they wish to conduct the hearing by way of written submissions. I accordingly directed them to file their respective written submissions, which they filed as per the direction. Having considered the Petition of Appeal, respective written submissions of the parties and the record of the proceedings of the Magistrates' Court, I now proceed to pronounce my Judgment as follows.

### **Background**

3. The three Respondents were charged in the Magistrates' Court of Ba for six counts of Assault Causing Actually Bodily Harm and two counts of Common Nuisance. The Respondents pleaded guilty for all these counts on the 30th of December 2015. The learned Magistrate then imposed a fine of \$100 on each of the Respondent for each of the eight counts. He further ordered that all these fines to be served concurrently, making the actual amount to be paid by one Respondent as \$100. The learned Magistrate then ordered a non-conviction in respect of the three Respondents pursuant to Section 16 of the Sentencing and Penalties Decree. Aggrieved with the said sentence, the Appellant files this Petition of Appeal.

## The Law and Analysis

4. The Fiji Court of Appeal in Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015) has discussed the applicable approach of the appellate court in dealing with appeal filed against the sentence imposed by lower court, where the Fiji Court of Appeal held that;

*“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”.*

5. Gounder JA in Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015) held that;

*“It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:*

- i) Whether the sentencing judge acted upon a wrong principle;
- ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;
- iii) Whether the sentencing judge mistook the facts;
- iv) Whether the sentencing judge failed to take into account some relevant consideration.

*Reasons for sentence form a crucial component of sentencing discretion. The error alleged 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). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)"*

6. For the convenience of determination, I shall consider the first and second ground together. The Applicant argues that the learned Magistrate has failed to give reasons for his conclusion and erred in imposing a non-conviction in respect of the three Respondents.
7. Section 15 (1) (f) of the Sentencing and Penalties Decree has given the Sentencing Court a discretion to impose a fine on the offender with or without recording a conviction.
8. The factors that need to be taken into consideration by the court in exercising its discretion whether to record a conviction or not, have been stipulated under Section 16 (1) of the Sentencing and Penalties Decree, where it states that;

*"In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including-*

*i) The nature of the offence,*

*ii) The character and past history of the offender; and*

*iii) The impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects,*

9. Hon Chief Justice Gates in State v Batiratu [2012] FJHC 864; HAR001.2012 (13 February 2012) expounded the following guidelines if the court contemplates of discharging the accused without a conviction. Hon Chief Justice Gates held that;

*The effect of the cases and the purport of the more detailed provisions of the Sentencing and Penalties Decree with regard to discharges can be summarized. If a discharge without conviction is urged upon the court the sentencer must consider the following questions, whether:*

*a) The offender is morally blameless.*

*b) Whether only a technical breach in the law has occurred.*

*c) Whether the offence is of a trivial or minor nature.*

*d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.*

*e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.*

*f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender.*

10. The summary of facts of this particular case reveals that the three Respondents had thrown stones at dogs, but it had landed on the house of Mr. Devendra Dutt and Jitendra Dutt. All three Respondents were drunk at that time. The victims came and confronted the Respondents, that led to an argument, whereby the three Respondents assaulted the victims.
11. According to the summery of facts, the victims have only confronted the Respondents because they have thrown stones at their house. The learned Magistrate in his sentence has found it as a most senseless act by the victims, considering the fact that the three Respondents were drunk. The learned Magistrate has then considered the correct tariff for the offence of Assault Causing Actual Bodily Harm, that is from suspended sentence to nine months. **(Gounder J in Jonetani Sereka v The State 2008,FJHC 88, HAA027,2008), (State v Anjula Devi, Crim Case No 04 of 1998) (Basa v State [2014] FJHC 518; HAA12.2014 (15 July 2014).** The learned Magistrate then imposed the above mentioned fine on the Respondents. He has not given any reasons for deviating from the accepted tariff limit of this offence.
12. Gounder JA in **Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013)** has discussed the purpose of the tariff and its applicability in sentencing, where his lordship found that;

*“The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public’s confidence in the criminal justice system is maintained.*

*In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range”*

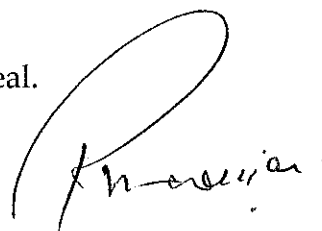
13. In view of the above observation made by Gounder JA in **Koroivuki (supra)**, if the sentence falls below the acceptable tariff limit, the sentencing court is required to provide reason.
14. In the absence of any reasons justifying the deviation from the acceptable tariff limit, I find the sentence of the learned Magistrate is founded on wrong sentencing principles and guidelines.
15. The learned Magistrate has considered the careers of the Respondents and their previous good characters in order to record a non-conviction. The reasons considered by the learned Magistrate do not fall within the test enunciated by Hon Gates CJ in **Batiratu (supra)** in imposing a non-conviction.

16. Having considered the reasons discussed above, I set aside sentence of the learned Magistrate dated 30th of December 2015 pursuant to Section 256 (2) of the Criminal Procedure Decree. Furthermore, I order that a conviction be recorded against each of the three Respondents.
17. I now draw my attention to consider an appropriate sentence in order to reflect the seriousness and the appropriate culpability of the Respondents in this offence.
18. The tariff for the offence of Assault Occasioning Actual Bodily Harm ranges from a suspended sentence where there is a degree of provocation and no weapon used to 9 months imprisonment for the more serious cases of assault. **(Gounder J in Jonetani Sereka v The State 2008, FJHC 88, HAA027,2008), (State v Anjula Devi, Crim Case No 04 of 1998) (Basa v State [2014] FJHC 518; HAA12.2014 (15 July 2014)).**
19. The Respondents were drunk. Summary of facts do not reveal the reason why they have thrown stones at the dogs. They have assaulted six persons. No information provided before the court about the injuries or nature of the assault.
20. All three Respondents have sought forgiveness. They are young first offenders. They have pleaded guilty at the early stage of the proceedings. Therefore, they are entitled for a substantive discount for the early plea of guilt and the previous good characters. Having considered these factors, I convict and sentence each of the Respondent for a period of four (4) months for each of the six offence of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes



Decree and three (3) months of imprisonment for each of the two counts of Common Nuisance, contrary to Section 376 (1) (b) of the Crimes Decree.

21. Having considered the young age of the Respondents and their previous good characters, I find non-custodial sentence would provide them an opportunity to rehabilitate themselves away prison custody. I accordingly suspend the above sentence for a period of three (3) years.
22. If you commit any crime during the period of 3 years and found guilty by the court you are liable to be charge and prosecute for an offence pursuant to section 28 of the Sentencing and Penalties Decree.
23. Appeal is allowed as discussed above,
24. Thirty (30) days to appeal to the Fiji Court of Appeal.

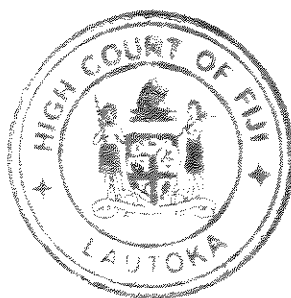


R. D. R. Thushara Rajasinghe

Judge

At Lautoka

10th of February 2017



*Delivered in  
Court by  
Madigan J  
10 Feb 2017*

Solicitors : Office of the Director of Public Prosecutions

**Kevueli Tunidau Lawyers for the Respondents**