IN THE HIGH COURT OF FIJI

AT SUVA

[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 41 OF 2016

IN THE MATTER of an Appeal against conviction from the decision of the Magistrate's Court of Fiji at Suva in Criminal Case No. 791 of 2016.

BETWEEN : **IMANUELI TUNI**

APPELLANT

AND **STATE**

RESPONDENT

Counsel : Appellant in Person
Ms. Sujata Lodhia for the Respondent

Date of Hearing : 6 September 2017

Judgment : 5 December 2017

JUDGMENT

[1] The Appellant was charged before the Magistrates Court at Suva in Criminal Case No. 791 of 2016 with one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act No. 44 of 2009 ("Crimes Act"), as follows:

CHARGE

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

IMANUELI TUNI, on the 29th day of April 2016, at Suva in the Central Division, assaulted **LEONE NAKUA**, thereby occasioning him actual bodily harm.

[2] On 16 May 2016, the same day on which the charge sheet and disclosures were filed, the Appellant pleaded guilty to the charge, on his own free will, and also admitted to the summary of facts.

[3] On 16 September 2016, he was sentenced to a term of 2 months imprisonment, which term was suspended for three years. He was also imposed a fine of FJ$300.00. In default of fine, he was imposed a period of imprisonment of 30 days. The Learned Magistrate made order that FJ$150.00 out of the fine to be paid to the complainant as compensation for his injuries.

[4] Aggrieved by this Order, the Appellant submitted an Appeal to the Registry of this Court on 13 October 2016. The Appeal was filed in person and was filed within time.

[5] Therein the Appellant states the following:

"I am glad to have been given the right of appeal against my conviction. It is true that I have pleaded guilty on the charge which I have been convicted and sentenced for two months imprisonment suspended for three years. However, I am not happy with the three hundred dollars fine because the Court had refused to have my witness (victim) testify on my behalf as to the cause of the offence. I told the police and have requested the Court to call the victim who indecently assaulted my daughter that led to the commission of the offence. The Court had failed to consider and weigh the degree of provocation in the case. For this reason, a retrial is warranted to have the three hundred dollars fine quashed. I feel, the three hundred dollars fine to be given to the victim is a double jeopardy, having regards to the first punishment I received

from the fact, that my daughter had been indecently assaulted by the victim and to give additional fine of three hundred dollars to the victim is not fair. I am in no doubt, if my request to have the victim in Court was allowed it would draw a different conclusion. Therefore, I strongly ask for a retrial or alternatively to have the $300 fine quashed."

[6] As can be seen from the above, the Appellant has filed the Appeal both against his conviction and sentence.

[7] When this Appeal was called before me, the Appellant was again explained his right to Counsel. However, the Appellant chose to waive his right to Counsel and submitted that he wishes to appear on his own behalf.

[8] Written submissions were filed by both the Appellant and the State. In his written submissions the Appellant has formulated three grounds of appeal. He submits that the learned Magistrate erred in law when he ignored the defence of provocation, unfairness and double jeopardy.

Provocation

> The Police knew from their investigations that I was provoked from the nature of indecent assault on my daughter by the complainant. This was admitted in my presence and I also mentioned in my police statement.

Unfairness

> The Learned Magistrate had been requested to have the witness (complainant) to testify on my defence but was rejected. I submit if only this witness was allowed to give evidence that would enable the Court to assess the nature of provocation caused by the complainant. The Court had every opportunity to turn my plea to have the case go for full hearing on the defence of provocation which was the reason of committing the offence.

Double Punishment

> The first punishment I received came from indecent assault upon my daughter by the complainant and to give an extra three hundred dollars ($300.00) to the complainant is not fair and double jeopardy. I strongly submit, to have a retrial or alternatively, to have the three hundred dollars quashed.

[9] Grounds one and two are inter related and are grounds of appeal against the conviction; whilst ground three is an appeal against the sentence.

Grounds One and Two

[10] It is clear from the proceedings that, on 16 May 2016, the very day on which the charge sheet and disclosures were filed, the Appellant entered an unequivocal plea of guilt. Further, the Appellant also admitted to the summary of facts.

[11] In the circumstances, it was not necessary or required for the Learned Magistrate to call witnesses to give evidence so as to assess the nature of provocation, as stated by the Appellant. Therefore, the first two grounds of appeal are without merit.

Ground Three

[12] This ground is in relation to appeal against sentence.

[13] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Court of Appeal of Fiji held:

> *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 CLR 499).”*

[14] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate, the Appellant must demonstrate that the Learned Magistrate fell into error on the following grounds:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

[15] These principles were reaffirmed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013).

[16] In terms of Section 275 of the Crimes Act “A person commits a summary offence if he or she commits an Assault Causing Actual Bodily Harm.” The prescribed penalty for this offence is a term of imprisonment for 5 years.

[17] In ***State v. Tugalala*** [2008] FJHC 78; HAC 25S of 2008S (29 April 2008); Her Ladyship Madam Justice N. Shameem said:

*"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months imprisonment. The High Court said in **Elizabeth Joseph v. The State** [2004] HAA 030/04S and **State v. Tevita Alafi** [2004] HAA073/04S, that it is the extent of the injury which determines sentence. The use of a pen knife for instance, justifies a higher starting point. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate. In domestic violence cases, sentences of 18 months imprisonment have been upheld (**Amasai Korovata v. The State** [2006] HAA 115/06S).”*

[18] In ***Jonetani Sereka v. The State*** [2008] FJHC 88; HAA 27 of 2008 (25 April 2008); His Lordship Justice Daniel Gounder held:

*“The tariff for 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 (**State v Anjula Devi**, Criminal Case No. 04 of 1998 Lab.).”*

[19] His Lordship Justice Vincent Perera in ***Anaiasa Naqialawa v. State*** [2017] FJHC 484; HAA 15 of 2017 (29 June 2017); stated:

> **"***It is pertinent to note that 12 months is only a one fifth of a 5 year imprisonment which is the maximum sentence for the offence of assault causing actual bodily harm under section 275 of the Crimes Act. All in all, I am of the view that it is appropriate to have 12 months imprisonment as the higher end of the tariff for the said offence.*
>
> *Needless to say, the selecting of a starting point is not that difficult where the relevant sentencing tariff indicates the lower end of the imprisonment term applicable to a particular offence as opposed to other sentencing options that may be considered.*
>
> *If the sentencer decides that an imprisonment term is the appropriate punishment for an offender who is convicted of the offence of assault causing actual bodily harm under section 275 of the Crimes Act and not to opt for an absolute or conditional discharge, it is important for the sentencer to have a clear opinion on the minimum imprisonment term the offence should attract considering its objective seriousness. In my view, an imprisonment term of 3 months would appropriately reflect the objective seriousness of the offence of assault causing actual bodily harm under section 275 of the Crimes Act."*

[20] Considering the above authorities, I held in the case of ***State v. McPherson*** [2017] FJHC 890; HAC 42 of 2016 (22 November 2017); that the tariff for the offence of Assault Causing Actual Bodily Harm should range from 3 months to 12 months imprisonment.

[21] Having considered all the facts and circumstances, in the instant case, the Learned Magistrate picked three months imprisonment as the starting point for the sentence. Since the Appellant had pleaded guilty at the first available opportunity, the Magistrate has reduced one third (one month) from the sentence and arrived at a sentence of two months imprisonment.

[22] In terms of Section 26 of the Sentencing and Penalties Act No. 42 of 2009, the Learned Magistrate has decided to suspend the sentence for three years.

[23] In addition to the above, acting in terms of Section 31 of the Sentencing and Penalties Act, the Learned Magistrate has imposed a fine of $300.00 against the Appellant. The

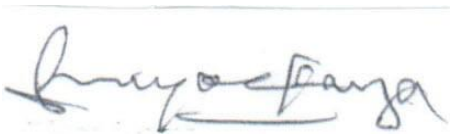
Magistrate ordered that from the said fine, $150.00 should be paid to the complainant as compensation for his injuries.

[24] The Appellant states that imposing of the fine and compensation is unfair and is double jeopardy. This Court cannot agree with this contention. It was well within the powers of the Learned Magistrate to impose the said fine and compensation. Therefore, this ground of appeal is without merit.

[25] In any event, the Appellant has informed that he has paid the fine of $150.00 to Court and paid the balance sum of $150.00 to the complainant in this case.

Conclusion

[26] In the light of the above, the conviction and sentence imposed by the Learned Magistrate is affirmed and this appeal is dismissed.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

At Suva

This 5th Day of December 2017

Solicitor for the Appellant : Appellant in Person.

Solicitor for the Respondent : Office of the Director of Public Prosecution, Suva.