IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 30 of 2018
[Magistrates' Court Criminal Case No. 570 of 2014]

BETWEEN	:	**VIKASHNI DEVI**
		APPELLANT
AND	:	**STATE**
		RESPONDENT
Counsel	:	**Ms N Sharma for the Appellant** **Ms S Kiran for the Respondent**
Date of Hearing	:	**27 June 2018**
Date of Judgment	:	**10 August 2018**

JUDGMENT

[1] This is a timely appeal against sentence only.

[2] The appellant was charged with one count of criminal intimidation contrary to section 375(1) (a) of the Crimes Act. The charge alleged that the appellant on 10 June 2014 at Nadi without lawful excuse threatened the complainant with a cane knife with the intent to cause alarm to her. The appellant was convicted on her own guilty plea in the Magistrates' Court at Nadi, and on 3 May 2018, she was sentenced to 18 months' imprisonment – 1 year to serve in prison and 6 months suspended for 2 years.

[3] The facts of the case were that the complainant was a tenant at the appellant's house with a shared toilet and bathroom facility. On the day in question, the appellant and the complainant had an argument over the use of the toilet by the complainant's niece. The argument started after the appellant denied the niece access to the toilet by locking the door of her flat. When the complainant insisted on the appellant to open the door, the appellant came out hurling abuse and swinging a cane knife at the complainant. The complainant's niece was standing with her, holding a 6-month old child in her arms. The complainant had to push her niece away to prevent her being hit with the knife. In the process, the child's head hit the wooden door. The matter was reported. Under caution, the appellant admitted swinging the cane knife at the complainant.

[4] The grounds of appeal are as follows:

(a) That the starting point of 18 months is excessive having regards to the facts of the case.
(b) That the learned sentencing Magistrate erred in law and in fact by failing to consider that the appellant was a 1st offender with previous good character.
(c) That the learned sentencing Magistrate erred in law by failing to give a discount for the guilty plea by the Appellant although late.
(d) That the learned sentencing Magistrate erred in law by failing to give a cogent reason for not suspending the sentence.
(e) The sentence is harsh and excessive.

[5] Sentencing discretions can only be reviewed on limited grounds for errors of principles or facts (*Naisua v State* Cr App No CAV0010 of 2013 (20 November 2013)).

[6] The first complaint relates to the starting point. The learned magistrate used 18 months as a starting point and then made adjustments to reflect the mitigating and aggravating factors. The appellant's contention is that the learned magistrate selected

a high starting point of 18 months from the tariff for serious criminal intimidation that she was not charged with. The appellant was charged with criminal intimidation with the intention to cause alarm contrary to section 375(1) of the Crimes Act. The maximum penalty prescribed for this offence is 5 years imprisonment. There is no established tariff for this offence.

[7] A more serious offence of criminal intimidation is provided by section 375(2) of the Crimes Act. The intention required under section 375(2) is to cause grievous harm. The maximum penalty for serious criminal intimidation is 10 years imprisonment. In *State v Baleinabodua* [2012] FJHC 981; HAC145.2010 (21 March 2012), Temo J suggested that the tariff for serious criminal intimidation should be from 12 months to 4 years imprisonment. In that case it was said that "serious cases should be given the sentence in the upper range, while less serious cases should be given sentences at the lower end of the scale".

[8] In paragraph 13 of the sentencing remarks, the learned magistrate referred to the case of *Baleinabodua* and pitched the appellant's case as 'middle and upper range of violence'. After pitching the case as 'middle and upper range of violence' the learned magistrate selected 18 months as a starting point and then added 1 year to reflect the aggravating factors such as the use of a weapon, hurling of abuse to the complainant and exposing a child to the offence.

[9] It is a settled principle that an offender cannot be punished for a more serious offence for which he or she had not been charged or convicted of (*Vakalalabure v State* [2006] FJSC8; CAV0003U.20045 (15 June 2006)). The appellant was not charged with serious criminal intimidation. The charge alleged that the appellant intended to cause alarm to the complainant. The charge did not allege that the appellant intended to cause grievous harm to the complainant. By selecting a starting point from the tariff for serious criminal intimidation, the appellant was being punished for a more serious

offence that she was not charged or convicted of. In doing so, the learned magistrate made an error of principle in exercising his sentencing discretion.

[10] The second and third complaints relate to the discount or lack of it for the appellant's previous good character and guilty plea. In his sentencing remarks, the learned magistrate gave a discount of 1 year for the appellant's mitigating factors and personal circumstances. The mitigating and personal circumstances identified by the learned magistrate were as follows:

- 30, Domestic Duties, married with 3 children and resides at Korovuto, Nadi.
- Accused taken a progressive approach and admitted to the offence.
- Seek leniency from the Court since she is a first offender.
- She is remorseful.
- She promises not to reoffend.
- The action was not premeditated.
- She acted out of frustrations.
- Seek that Court gives a second chance.

[11] The appellant's previous good character was considered as a mitigating factor and an appropriate discount was given to reflect the fact that the appellant was a first time offender. The second complaint is not made out.

[12] No discount was given for the appellant's guilty plea. The learned magistrate said that the appellant had changed her plea on the third hearing date, the case been pending since 2014. While a late guilty plea may indicate lack of genuine remorse, an offender may still be entitled to some discount for saving the State the expense of a contested trial. If the appellant had pleaded guilty after the complainant or any other witnesses for the prosecution had given evidence, then it would have been correct not to give any discount for the late guilty plea.

[13] However, in the present case, although the guilty plea was entered late, the prosecution had not called any evidence to prove the charge. The prosecution was relieved from discharging the burden of proof from calling evidence to prove the charge due to the appellant's guilty plea. Some discount should have been given to the appellant's guilty plea to reflect the utilitarian value of that plea, that is, the plea has saved the State the expense of a contested trial (*Mataunitoga v State* [2015] FJCA 70; AAU125.2013 (28 May 2015)). The failure to give discount for the utilitarian value of the guilty plea is an error of principle.

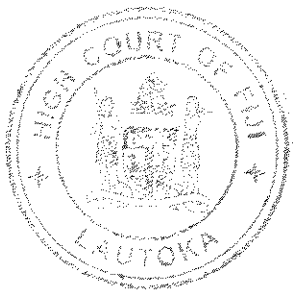
[14] The fourth and fifth complaints can be dealt together. In his sentencing remarks, the learned magistrate gave the following reasons for partially suspending the sentence:

> (1) A cane knife lethal weapon. It should never be used to casus (sic) threat to anyone.
> (2) In view of the seriousness of the case, and considering that Accused is a mother of 3 children and a first offender, a combination deterrence and rehabilitation is necessary for the purpose of the sentence.
> (3) For that reason, I will partially suspend the sentence.

[15] The use of a cane knife to intimidate the complainant was an aggravating factor. The offence was committed in the presence of a child. Fortunately, no one was injured. However, it must have been a frightening experience for the complainant, her niece and the child. A prison sentence was justified regardless of the appellant's personal circumstances and her previous good character. The primary purposes of the punishment are to denounce such conduct and deter others.

[16] A comparable case is *State v Nacagibalavu* [2013] FJMC 297; Criminal Case 316.2012 (8 August 2013). In that case the offender was sentenced to 6 months imprisonment for hurling abuse at a couple and causing alarm with a cane knife.

[17] The appeal is allowed. The sentence imposed in the Magistrates' Court is set aside and substituted with a sentence of 6 months' imprisonment effective from 3 May 2018. Suspension is inappropriate.



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Hon. Mr Justice Daniel Goundar

Solicitors:

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