IN THE HIGH COURT OF FIJI
APPELLATE JURISDICTION
AT LABASA

CRIMINAL APPEAL: HAA 27 OF 2018

BETWEEN : **ATONIO QEREWAQA**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Appellant in Person
Ms. A. Vavadakua for the Respondent

Date of Hearing : 13th February 2019
Date of Judgment : 14th February 2019

JUDGMENT

1. The Appellant was charged in the Magistrates' Court in Taveuni with one count of Criminal Intimidations, contrary to Section 375 (a) (iv) of the Crimes Act. The particulars of the offence are that;

Statement of Offence

CRIMINAL INTIMIDATIONS: Contrary to Section 375 (a) (iv) of the Crimes Act of 2009.

Particulars of Offence

> ***ATONIO QEREWAQA*** *on the 12th day of January 2018 at Nailutua Settlement, Taveuni in the Northern Division without lawful excuse threatened* ***RUSILA LUTU*** *with a cane knife with intent to cause alarm to said* ***RUSILA LUTU.***

2. Subsequent to his plea of not guilty to the charge, the matter had proceeded to the hearing. The hearing was commenced on the 18th of October 2018 and concluded on the same date. The complainant gave evidence for the prosecution and the appellant had given evidence for the defence. The learned Magistrate in his judgment dated 19th of October 2018, found the appellant guilty to the offence as charged. On the same day, the learned Magistrate sentenced the appellant to a period of 14 months imprisonment without setting any parole period. Aggrieved with the said conviction and the sentence, the appellant filed this appeal in person. I find that the grounds of appeal which the appellant filed in person are not perfectly articulated as of the legal counsel. I now reproduce his grounds of appeal in verbatim as follows.

   i) *The Appellant with the leave of the Court would like to forward the above application for leave to appeal against the sentence in criminal case no. 27 of 2018 at Taveuni Magistrate Court dated 19 October, 2018.*

   ii) *The Appellant felt aggrieved and dissatisfied with the sentence imposed and seeking extension of time to have his inherent grounds heard and determined within a reasonable time.*

   iii) *That the sentencing Court relying heavily on the prosecution version of facts that was full of inconsistencies and fatal of lies undermining the integrity of the Appellant's honesty contending this matter in question.*

iv) *In para 08, page 03 of his sentencing paper, the learned Resident Magistrate had taken into consideration the last suspended term of 02 years since the Appellants Court sitting in 2011 which was already cleared.*

v) *That the learned Resident Magistrate overlooked the fact that both parties had reconciled in Court vowing that this present case be discharged accordingly.*

vi) *That the circumstances of the offending carries no further weight but only deprive the Appellant's truth that he was provoked and confronted that defiantly outweigh his uncontrolled emotions.*

vii) *That the cane knife in question was actually a broken knife that was not tendered in Court.*

viii) *That the sentence ordered by the Court was manifestly harsh and excessive in all circumstances of the case to an Appellant who was making an effort and should have been commended and given the leniency of the Court since his last offence was in 2011.*

ix) *That the Court should have mindful that this was a non-custodial matter that should have not attract an imprisonment sentence pertaining to its minor perception and their attempted reconciliation in Court was in fact prejudiced and injustice to the Appellant.*

3. Having taken into consideration the above grounds of appeal, I could transform them into more precise way in order to properly understand the grounds against the conviction and the grounds against the appeal.

4. The appeal against the conviction is founded on the following grounds, that;

i) The learned Magistrate has failed to properly take into consideration the inconsistent nature of the evidence given by the complainant,

ii) The learned Magistrate has failed to take into consideration that the Appellant was provoked and confronted,

iii) The learned Magistrate has not taken into consideration that the cane knife was actually a broken knife, which was not tendered in evidence during the hearing.

5. The appeal against the sentence is based upon the following grounds that;

i) The learned Magistrate has not taken into consideration in the sentence that the parties were reconciled in court.

ii) The sentence is harsh and excessive,

iii) The learned Magistrate has given weight to the previous convictions of the appellant when he imposed a custodial sentence to the appellant,

Appeal Against the Conviction

Ground I

6. The first ground of appeal against the conviction is based upon the contention that the learned Magistrate has failed to properly take into consideration the inconsistent nature of the evidence given by the complainant.

7. The complainant had given evidence during the course of the hearing in the Magistrates' Court. She has stated that the appellant came to her with a cane knife, while she was

talking with one of her friends at the house of the said friend. The house of the appellant was also situated closed to the said house. The appellant is the complainant's brother-in-law. He came towards her and shouted at her, blaming that she has spread rumours about him in the village. He had then banged the cane knife on the tin wall of the house. The little child of her also got scared and fallen down due to the bang on the tin wall. The complainant was not cross examined by the appellant.

8. The appellant in his evidence, had admitted that he had gone to the house where the complainant was talking with her friend. He had further admitted that he went there with a cane knife. According to the evidence given by the appellant, he had pulled the tin with the knife and said that he did not bang on the tin wall of the house. The appellant has stated that he went there to ask them to stop the shouting as he was sleeping inside his house.

9. At no point of time, during the hearing, the evidence of the complainant was challenged or suggested otherwise. As learned magistrate found in paragraph 13 of his judgment, the evidence of the appellant actually corroborated the version of the prosecution than creating any doubt in the case of the prosecution.

10. In view of these reasons, there was no inconsistency in the evidence given by the complainant and the learned Magistrate has accurately taken them into consideration in his judgment. Therefore, I do not find any merits in the first ground of appeal against the conviction.

Ground II

11. The second ground of appeal against the conviction is based upon the contention that the learned magistrate has failed to take into consideration that the appellant was provoked. The appellant in his evidence had stated that he was angry as his sleep was disturbed by the shouting. He had then went out with his cane knife to see who was shouting.

12. The learned Magistrate in paragraph 7 of his judgment has discussed the version of the appellant but has refused to accept it as the learned Magistrate found the evidence given by the complainant is credible. The learned Magistrate has further found in paragraph 11 that the evidence of the complainant is sufficient to prove the elements of the offence beyond reasonable doubt.

13. Accordingly, I do not find any merits in the second ground of appeal against the conviction.

Ground III

14. The appellant argues that the learned Magistrate has failed to take into consideration that the knife was actually a broken one and it was not tendered in evidence during the trial.

15. There is no evidence elicited either from the prosecution or the defence, about the condition of the cane knife. The appellant in his evidence has actually admitted that he came to the complainant's place with a cane knife.

16. In view of the reasons discussed above, I do not find any merit in this ground as well.

Appeal Against the Sentence

17. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach of the Appellate Court in intervening into the sentences imposed by the lower courts, it states;

> *'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 of the relevant considerations, then the appellate court may impose a different sentence.'

18. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** 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".

Ground I

19. The first ground of appeal against the sentence is based upon the contention that the learned magistrate has failed to take into consideration that the parties have reconciled in the sentence.

20. Having carefully perused the record of the proceeding in the Magistrates' Court, I do not find any evidence to support that the parties have reconciled for this dispute. The appellant in his evidence has stated that he wishes to reconcile, that cannot be taken into consideration as a proper reconciliation. The appellant had not submitted that he had reconciled with the complainant during his submissions in mitigation. Hence, there was no evidence or materials before the learned Magistrate to consider such a reconciliation in the sentencing. Hence, I find this ground of appeal against the sentence has no merit as well.

Ground II

21. The maximum penalty for criminal intimidation contrary to Section 375 (a) (iv) of the Crimes Act is five years imprisonment. Justice Sunil Sharma in **Sadriu v State [2017] FJHC 216; HAA65.2016 (15 March 2017)** has found the applicable tariff for criminal intimidation is between 6 months and 2 years of imprisonment, where his lordship held that;

> *"I note that there is no tariff fixed for the offence of Criminal Intimidation under section 375 (1) (a) of the Crimes Decree and the parties have not been able to provide any case authorities on the tariff for this offence. In my view an acceptable tariff would be a sentence between 6 months and 2 years imprisonment. Serious cases should be given a sentence in the upper range whilst less serious cases should be given a sentence at the lower end of the scale"*

22. The learned Magistrate in his sentence has clearly taken into consideration the above maximum penalty and the applicable tariff limit. He has elected 12 months as the starting point and increased it by 4 months for the aggravating factors and reached to interim period of 16 months imprisonment. Having considered the mitigation grounds, the learned Magistrate has given 4 months discount. However, in paragraph 6 of the sentence, the learned Magistrate has made a mathematical error in deducting the discount

for the mitigation from the interim period of 16 months, where he has concluded the final sentence as 14 months imprisonment, instead of 12 months. Most probably, this must be an oversight or unintended mistake. Therefore, the final sentence should be 12 months imprisonment and not 14 months imprisonment. I accordingly set aside the final sentence of 14 months imprisonment and replace it with a 12 months' imprisonment, effecting from 19th of October 2018.

23. The final sentence of 12 months imprisonment is within the tariff limit and based on the current sentencing principles and approaches. Therefore, I do not find the sentence is harsh and excessive. Accordingly, I find no merits in the second ground of appeal against the sentence.

Ground III

24. The third ground of the appeal against the sentence is founded on the contention that the learned Magistrate has taken into consideration the previous convictions of the appellant in refusing to suspend the sentence.

25. Section 26 (1) of the Sentencing and Penalties Decree states that;

> *"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances"*

26. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.

27. The Court of Appeal of New Zealand in **R v Petersen (1994) (2) NZLR 533, at 539**, has discussed the appropriate facts that a court should consider in suspending a sentence in an elaborative manner. Eichelbaum CJ in **Petersen (supra)** held that;

> *"Thomas at pp 245-247 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrence the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately".*

28. Eichelbaum CJ in **Petersen (supra),** went on and further held that;

> *"In concluding our consideration of the principles we wish to add this. Understandably, the form of the legislation requires the sentencer to pass through a series of statutory gates, before reaching the point of availability of a suspended sentence. Subject to that however, like most sentencing what is required in the end is an application of common sense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation. In many instances an initial broad look of this kind will eliminate the possibility of a suspended sentence as an appropriate response".*

29. According to the comprehensive observation made by Eichelbaum CJ in **Petersen (supra),** the sentencing court could consider the following factors, though they are not exhaustive, in determining whether it is appropriate to impose a suspended sentence, *inter alia;*

i) The age of the offender,

ii) Previous good record, or a long period free of criminal activity,

iii) The need of rehabilitation,

iv) The likely response of the offender to the sentence,

v) Whether the suspended sentence act as a strong deterrent to the offender,

vi) The gravity of the offence, such as diminished culpability arising through lack of pre-meditation or the presence of provocation.

vii) Whether the offender cooperated with the authority,

30. The learned Magistrate in paragraph 8 of his Sentence has considered the previous convictions of the appellant, the possible response to the suspended sentence based on his repetitive nature of offending and also the purpose of sentence. Having considered these facts, the learned Magistrate has concluded that the circumstances of this case does not warrant a suspended sentence. I find that the conclusion of the learned Magistrate is founded on correct approach and principles. I accordingly find the third ground of appeal against the sentence has no merits.

Domestic Violence Restraining Order

31. The appellant and the complainant are related as in-laws and their relationship comes under the domestic relationship as defined under the Domestic Violence Act. Section 24 (1) (b) of the Domestic Violence Act states that;

b) where a person -

i) pleads guilty to, or is found guilty of, an offence which is a domestic violence offence; or

ii) the Court intends to stay or terminate the proceedings,

the Court must make a domestic violence restraining order under this Decree for the safety and wellbeing of the person against whom the offence or alleged offence was committed;

32. According to the section 24 (1) (b) (i) of the Domestic Violence Act, it is a mandatory requirement to make a domestic violence restraining order, if the accused is found guilty for an offence comes under the Domestic Violence Act.

33. When the appellant was first produced in the Magistrates' Court, the learned Magistrate has accurately made an interim domestic violence restraining order. However, the learned

Magistrate has failed to make a permanent domestic violence restraining order as required under Section 24 (1) (b) (i) of the Domestic Violence Act. Therefore, I make a domestic violence restraining order against the appellant with standard non molestation condition. This restraining order will be in force until this court or any other competence court is varied or suspended it. If the applicant breaches any of the conditions of the restraining orders, he can be prosecuted for an offence under the Section 77 of the Domestic Violence Act.

34. In conclusion, I dismiss this appeal.

35. The Orders of the Court,

i) The Appeal is dismissed,

iii) The sentence of 14 months imprisonment is set aside, and replace it with a sentence of 12 months imprisonment, effecting from 19th of October 2018.

iv) A Domestic Violence Restraining Order with the standard non molestation condition is issued against the appellant pursuant to Section 24 (1) (b) (i) of the Domestic Violence Act.

36. Thirty (30) days to appeal to the Fiji Court of Appeal.

<u>At Labasa</u>
14th February 2019

<u>Solicitors</u>
Appellant in Person
Office of the Director of Public Prosecutions for the State