IN THE HIGH COURT OF FIJI

AT LAUTOKA

[APPELLATE JURISDICTION]

Criminal Appeal Case No. HAA 03 of 2019

(Lautoka Magistrate's Court Case No 856 of 2016)

BETWEEN	:	ASHWIN CHAND **Appellant**
AND	:	THE STATE **Respondent**
Counsel	:	Appellant in person Ms Naibe for the Respondent
Dates of Hearing	:	27 March and 02 May 2019
Date of judgement	:	08 May 2019

JUDGEMENT

1. This is an appeal against the sentence.

2. The Appellant was charged with one count of assault causing actual bodily harm contrary to section 275 of the Crimes Act. He pleaded guilty before the Magistrate's court on 18 February 2019 and was sentenced to 13 months' imprisonment on 20 February 2019.

3. Now the Appellant seeks the intervention of this court as he is aggrieved by the said sentence of the Magistrate. He filed the following ground of appeal;

"That the sentencing magistrate erred in law and failed to deduct a remand period of (2) months which was served by the applicant [sic]".

4. Although the Appellant has submitted additional appeal grounds after the appeal was heard, he later withdrew those grounds. The Appellant informed the court that he would only rely on the original ground of appeal.

5. Therefore, the only contention of the Appellant is that the learned Magistrate failed to deduct the remand period of two months when he was sentenced.

6. The Respondent concedes that the remand period of two months was not deducted.

7. The learned Magistrate considered the mitigating circumstances itemized in paragraph 6 of the sentence and 3 months deduction is given to the Appellant. However, it does not appear that the time spent by the Appellant in remand custody was taken into consideration by the learned Magistrate when sentencing the Appellant.

8. Section 24 of the Sentencing and Penalties Act states that;

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

9. In **Koroitavalena v State** [2014] FJCA 185; AAU0051.2010 (5 December 2014) the Court of Appeal observed in para 24;

"The period spent in remand before trial should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors as argued by the respondent. The period being not substantial has no effect in giving effect to the provisions of section 24."

10. The Supreme Court in **Sowane v State** [2016] FJSC 8; CAV0038.2015 (21 April 2016) emphasized the importance of deducting the time spent in remand custody in the following paragraphs;

> "[10] However section 24 does not cast any burden on the Corrections Department. The burden is cast upon the court. The provision is mandatory. For the court **shall** regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender, "unless a **court** otherwise orders."
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> [11] By what methodology is that to be done? In the past courts have commenced that process by fixing a sentence on a range approved by decisions of the courts, usually with the authority of one of the appellate courts. The sentencing judicial officer proceeds to give some increase of sentence for specified aggravating factors, and some discount for approved mitigating factors. Within mitigating factors is often included the period spent on remand by the offender in custody awaiting his trial. If this is done, the final term of imprisonment imposed could sometimes fall well below the normal tariff for such offending.
>
> [12] Alternatively the sentencing court could carry out the calculation by the above method, and initially without regard to the period spent in custody, state the sentence for the particular offending. Secondly, the court could go on to set out the actual sentence to be served, after deducting the period of prior custody referred to in section 24. Such a judgment would state what the court's sentence was for the gravity of the offending, and at the same time – by the court's order pursuant to section 24 – set out and hand down the effective sentence that must be served, prior to the consideration of any eligibility for parole, a matter not of sentence but of administrative action within the jurisdiction of the Corrections Department."

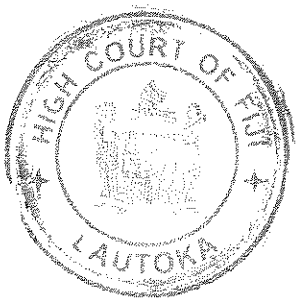
11. In the present case the Appellant had been in remand custody for nearly 2 months from 10 November 2016 to 13 January 2017.

12. The learned Magistrate has not given reasons for not deducting the period spent in remand custody. In view of the above decisions it is very clear that the time spent in remand custody must be considered in arriving at the final sentence unless the court orders otherwise. In the present case the learned Magistrate has erred by not considering the time spent by the Appellant in remand custody. The correct method would have been to deduct the time spent in custody after it was decided not to suspend the sentence.

13. The Appellant is entitled to a discount in sentence to reflect the time he spent in remand custody.

14. In the circumstances the appeal is allowed, and the sentence imposed in the Magistrate's Court is set aside.

15. The sentence is substituted with a term of 11 months imprisonment with effect from 20 February 2019.



Rangajeeva Wimalasena

Acting Judge

Solicitors

Appellant in person

Office of the Director of Public Prosecutions for the Respondent