IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 046 OF 2018

BETWEEN: **THE STATE** **APPELLANT**

A N D: **LEMEKI KALOUBECI** **RESPONDENT**

Counsel: Ms. S. Serukai for Appellant
Ms. L. Manulevu for Respondent

Date of Hearing: 01st February 2019

Date of Judgment: 09th May 2019

J U D G M E N T

Introduction

1. The Respondent was charged in the Magistrate's Court at Nausori with one count of Grievous Harm, contrary to Section 258 of the Crimes Act. He was first produced in the Magistrate's Court on the 9th of May 2018. The Respondent has pleaded guilty to the offence on the 2nd of July 2018. The learned Magistrate has then convicted and sentenced the Respondent to a period of 24 months and suspended the said sentence for a period of 5 years. Aggrieved with the said sentence, the Appellant filed this petition of appeal on the following ground, that:

"That the learned Magistrate erred when he imposed a manifestly lenient sentence against the Respondent given the aggravating factors of the case and the seriousness of the injuries;"

2. According to the summary of facts which was admitted by the Respondent in the Magistrate's Court, that the Respondent had assaulted the complainant with a stick, causing injuries on the complainant. The incident had erupted over the issue that the complainant had brought a cow into the land where the respondent had planted dalo. The complainant had lost a finger due to these injuries.

3. During the course of the hearing of this appeal, the learned Counsel for the Respondent in her submission conceded that the sentence of the learned Magistrate is based upon a wrong sentencing principles and approaches. The learned Counsel further submitted that the respondent is entitled for a custodial sentence instead of a suspended sentence.

The Law

4. 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."

5. Goundar JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship 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, The ground of appeal is founded on the contention that the sentence is manifestly lenient.

7. The maximum penalty to offence of Grievous Harm is 15 years imprisonment. The applicable tariff is between 2 years and 6 years imprisonment. (**Patel v State [2011] FJHC 669; HAA030.2011 (27 October 2011), Racika v State [2017] FJHC 315; HAA01.2017 (28 April 2017**).

8. Sharma J in **Racika v State (supra)** has found that offence of grievous harm involves with personal violence, hence, such offences are *prima facie* unsuitable to be dealt with suspended sentence. His Lordship Sharma found that:

> *"This court also endorses the comments made in DPP vs. Saviriano Radovu* [1996] 42 FLR 76 *(22 May 1996), where Fatiaki J. adopted the Practice Direction No. 1/91 issued by Tuivaga CJ. and said at page 80:*
>
> *"...offences which fall within any of the broad categories ...,namely, (i) offences involving personal violence; ... must be considered prima facie unsuitable to be dealt with by way of a suspended sentence of imprisonment."*

9. The sentence of the learned Magistrate is adversely infested with mathematical errors which would have been avoided if the learned Magistrate had applied more attention and application in drafting and finalizing of the sentence. He had selected 36 months as the starting point. He had then added 2 months and reached to 40 months. The learned Magistrate has given two months discount to the fact that the Respondent was provoked by the complainant and had reached to 38 months. Having taken into consideration other mitigating factors, the learned Magistrate had given 2 years discount and reached to 36 months. Discount of 12 months has been given to the early plea of guilty. Having done that, the learned Magistrate had reached to 24 months as the final sentence.

10. I accordingly set aside the sentence on the ground of mathematical errors. Moreover, I concur with the submissions of the counsel for the Appellant and Respondent where both of them submitted in agreement that the sentence is based upon inaccurate sentencing principles and approaches.

11. The Respondent was provoked by the complainant by bringing in his cow into the land where the Respondent had planted his dalo. Apart from that, the summary of facts has only revealed the nature of the injuries sustained by the complainant. The purpose of the sentencing of an offender of this nature must be founded on the principle of deterrence and protection of the community. Accordingly, I find a period of 2 years imprisonment would serve the purpose of the sentence. Having taken into consideration the age of the Respondent and the opportunity for the rehabilitation, I fix a non-parole period of 15 months pursuant to section 18 (1) of the Sentencing and Penalties Act.

12. 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."*

13. 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.

14. This court in **Hakik v State [2016] FJHC 682; HAA15.2016 (1 August 2016)** found that the following factors, though they are not exhaustive, could be considered by the court if it contemplates in suspending a 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,

15. Having taken into consideration the summary of facts, the mitigating submission of the Respondent in the Magistrate's Court, I do not find any appropriate circumstances to suspend this sentence.

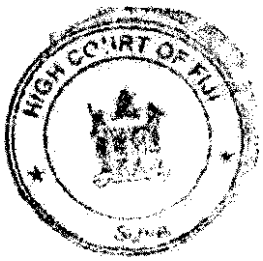
16. The orders of the court:

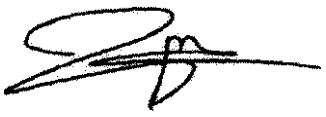
i) The appeal is allowed,

ii) The sentence dated 10th of July 2018 delivered by the learned Magistrate is set aside,

iii) The Respondent is sentenced to a period of two (2) years imprisonment to the offence of Grievous Harm, contrary to Section 258 of the Crimes Act. Moreover, the Respondent is not entitled for any parole for a period of 15 months pursuant to section 18 (1) of the Sentencing and Penalties Act.

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





R.D.R.T. Rajasinghe
Judge

At Suva
09th May 2019

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