IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 10 OF 2019

Magistrates Court case No. 15 of 2019

BETWEEN	**:**	**PIJILA NAIKAWAKAWAVESI**
		Appellant
AND	**:**	**STATE**
		Respondent
Counsel	**:**	**Ms. S. Sharma for the Appellant**
		Ms. D. Rao for the Respondent
Date of Hearing	**:**	**8 July 2019**
Date of Judgment	**:**	**12 July 2019**

JUDGMENT

1. This is a timely appeal filed by the Appellant against her sentence.

2. On the 10th May 2019, the Appellant entered an unequivocal plea of guilty to one count of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act 2009.

3. Upon conviction, the Appellant, on the 29th May 2019, was sentenced to a term of 9 months' imprisonment.

4. Being aggrieved by the sentence, the Appellant filed following grounds of appeal:

    1. THAT the learned trial magistrate erred in law and in fact in taking into account that gross abuse of power and breach of trust constituted aggravating factors when there was no fact of dishonesty.

    2. THAT the learned trial magistrate erred in law and in fact in adding 12 months as an aggravating factor and failed to mention or give reasoning to what constitutes the aggravating factors.

    3. THAT the learned trial magistrate erred in law and in fact in not taking into account her guilty plea and failed to give proper weight to the said guilty plea and further failed to give the one third discount of a guilty plea.

    4. THAT the learned trial erred in law and in fact in not taking into account the circumstances of the offending as the complainant was spreading false rumours about the appellant's company which provoked the appellant in commission of this offence.

    5. THAT the learned trial magistrate erred in law and in fact in not taking into account the special circumstances of the appellant which warrants a suspended sentence.

    6. THAT the learned trial erred in law and in fact in imposing a 9 months custodial sentence which is high and excessive in all circumstances.

5. The following summary of facts was admitted by the Appellant:-

On the 05th day of January, 2019, at about 0800hrs, at Takia Hotel, Labasa one PijilaNaikawakawavesi, 43 years [Accused], Businesswoman of Natogadravu, Tailevu punched one PoloniaSoko 52 yrs [Victim] Domestic Duties, of Davuilevu Housing, Suva whereby [Victim) received injuries as per medical report. Victim was an employee of the accused.

On the above date, time and place (Victim) was at her hotel room when Accused called her for a briefing whilst at the room Accused came in and walk straight to the Victim and punch her face, pulled back her hair and punch on the right cheek. Victim ran to her room whilst Accused followed her inside and knocked her down on the floor and pushed her around the room. Moments later, Accused bodyguard came into the room and stopped the Accused. Whereby victim sustained injuries as per medical report.

Matter was reported to Labasa Police Station whereby PC 5581 Ilaisa-Nayasi was appointed to be the Investigating Officer. (Victim) was medically examined and injuries were sustained as per medical report. (Accused) was later brought in under arrest and was caution interviewed. She was later charged for count of Assault Causing Actual Bodily Harm Contrary to Section 275 of Crimes Act of 2009. (Accused) is appearing in custody at Labasa Magistrate Court.

6. It is well settled that a sentence imposed by a court lower should be varied or substituted with a different sentence on appeal only if it is shown that the sentencer had erred in principle or where the sentence imposed is excessive in all the circumstances.

7. The Fiji Court of Appeal in ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) observed:

> "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) 55 CLR 499).

Analysis

8. The main contention of the appeal is that the sentence imposed by the Learned Trial Magistrate is harsh and excessive in all the circumstances of the case. Therefore, all the grounds of appeal can conveniently be dealt with together.

9. The maximum sentence prescribed for Assault Causing Actual Bodily Harm is an imprisonment term of five years and the tariff 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. (*JonetaniSereka v The State* 2008,FJHC 88, HAA027,2008), (*State v Anjula Devi*, Crim Case No 04 of 1998) (*Basa v State* [2014] FJHC 518; HAA12.2014 (15 July 2014).

10. Madigan J in ***State v Sikitora*** [2010] FJHC 466; HAC067.2010L (22 October 2010) observed that;

> "The cases of Elizabeth Joseph v State [2004] HAA 03 of 2004 and State v Tevita Alati [2004] HAA 73 of 2004 establish a tariff of 9 months to 12 months imprisonment, the severity of the wound being the

> determining factor in the starting point. However sentences of 18 months imprisonment have been upheld in domestic violence cases (*AmasiKoro-vata* v State [2006] HA 115 of 2006]"

11. Madigan J in ***State v Prasad*** [2015] FJHC 493; HAA010.2015 (3 July 2015) stated the following;

> "A "normal" punishment for a domestic violence assault is a term of imprisonment for a period of between 9 and 12 months with an enhancement up to 18 months if the assault be considered serious"

12. The Learned Trial Magistrate identified the tariff as being between suspended sentence and 18 months' imprisonment. She cited ***State v Vocevoce***[2017] 15; HAA 27.2016 (23 January 2017), an appeal judgment delivered by Rajasinghe J.

13. Rajasinghe J in the said judgment had referred to all the cases cited above. In view of the above mentioned case authorities, it is clear that the tariff identified by the Learned Trial Magistrate is applicable only when the assault is serious or it involves domestic violence. In the present case, the complainant has not sustained serious injuries. There is no domestic relationship between the complainant and the Appellant. Therefore, the Learned Magistrate should have identified the tariff between a suspended sentence and 12 months' imprisonment.

14. The Learned Trial Magistrate selected 9 months as the starting point from the upper range of the tariff. She has not given any reason for doing so. As a matter of good practice, the starting point should have been picked from the middle or lower range of the tariff [***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013)]. When this practice is not followed the sentencer is expected to record reasons.

15. The Learned Trial Magistrate added 12 months to reflect the aggravating factors listed at paragraphs 9-12 of the Sentence Ruling. The Appellant contends that the Learned Trial Magistrate fell into error in adding 12 months to reflect aggravating factors and failing to give reasons as to what constitutes the aggravating factors. (Grounds 1 and 2)

16. The Learned Trial Magistrate from paragraphs 9 to 12 of the Sentence Ruling clearly mentions what she considered the aggravating features to be. Each of those factors had resulted in the starting point being enhanced by one year.

17. One of the aggravating factors was the gross abuse of power and breach of trust. The Appellant finds fault with this consideration when there was no evidence of dishonesty in the offending.

18. The Appellant admitted that the complainant is one of her employees in the company of which she was the Managing Director. By virtue of her position, the Appellant was in an authoritative position *vis-a-vis* the complainant. When an authority is vested in a person over another, the law deems that such authority is held in trust and would be exercised fairly and justly. Furthermore, the Appellant was in an employer-employee relationship with the victim whereby the complainant was entitled to be treated according to employment laws of the country. If the complainant was found to be at breach of that relationship (by spreading false rumours), she could have been dealt with in a decent and acceptable manner. A physical assault to discipline an employee is no doubt an abuse of power.

19. The breach of trust is considered as an aggravating factor in sentencing even in cases where there is no evidence of dishonesty. For example, when a sexual offence is commit-

ted on a known person, the courts in Fiji have considered the offence to have been committed in breach of trust amounting to an aggravating factor.

20. In deciding the appeal in ***Senilolokula v State*** [2017] FJCA 100; AAU0095.2013 (14 September 2017), (a rape case), the Court of Appeal regarded the defendant's abuse of authority and his breach of trust as overlapping. The court opined that the two elements were so interconnected that they should have been treated as different sides of the same coin. The Learned Trial Magistrate in the present case had considered both aggravating factors (breach of trust and abuse of authority) as a single aggravating factor thus avoiding the perceived double counting. Therefore, there is no error here on the part of the Learned Trial Magistrate.

21. The Appellant also finds fault with Learned Trail Magistrate's consideration of the fact that an unprovoked attack was carried out on an employee in response to a work related incident. It is submitted by the Counsel for Appellant that the Learned Trial Magistrate should have considered that the alleged spreading of false rumours by the complainant about Appellant's company was provocative.

22. The Appellant in her capacity as the Managing Directress of the company no doubt had at her disposal appropriate disciplinary measures that could have been taken if she found the complaint about the alleged false rumours to be truthful. In the circumstances of this case, it cannot be said that the complainant had offered a provocation given that disciplinary measures were available to the Appellant to deal with the situation. A physical assault on an employee as a disciplinary measure is highly unwarranted and disproportionate to the provocation alleged to have been offered by the complainant.

23. In view of the above mentioned reasons, enhancement of 12 months (which is the top end of the tariff), to reflect the aggravating features is not justified.

24. In mitigation, the Learned Trial Magistrate gave an allowance of 2 months for personal circumstances, 6 months for her clean record and further 4 months for the early guilty plea to reach a final sentence of 9 months' imprisonment.

25. The Appellant contends that the Learned Trial Magistrate fell into error in not taking into account Appellant's early guilty plea and failing to give a proper weight (1/3 discount) to this mitigating factor.

26. The Learned Trial Magistrate has in fact considered the early guilty plea and has given a discount of 4 months albeit less than a 1/3 discount. There is no hard and fast rule that a 1/3 discount must essentially be allowed. Sentencing is not a mathematical exercise. The sentencer, having taken into account the surrounding circumstances, the stage at which the guilty plea is entered has a discretion to determine the gamut of the discount. Therefore, in determining the extent of the discount, the Learned Trial Magistrate has not fallen into any error.

27. However, the Learned Trial Magistrate seems to have fallen into an error when she advanced irrelevant considerations to reject the early guilty plea as being not evidence of genuine remorse. At paragraph 21 of the Ruling the Learned Trial Magistrate observed:

> "I must make clear that while I have given you very close to a full one third reduction, I do not think that your guilty plea was evidence of genuine remorse. The evidence was strong against you. The evidence of the

> complainant alone, if believed would have been sufficient to sustain a conviction. In addition, that there was at least one other eye–witness to the assault you perpetrated- your bodyguard"

28. This formulation of the Learned Trial Magistrate is not technically correct. The conviction was recorded purely on the strength of the unequivocal confession and facts agreed by the Appellant. The Learned Trial Magistrate speculated about the evidence against the Appellant which was not before her in forming the view that the Appellant pleaded guilty because she had a weak case.

29. In her mitigation, the Appellant appearing in person had said:

> "I wish to say that I apologise for what I did. I am very remorseful. I promise that I will not re-offend. I seek a non-conviction as I will lose my job as Managing Director. I am willing to compensate her. I am very sorry"

30. The record shows that the Appellant maintained her guilty plea despite the Learned Trial Magistrate's warning that "a conviction is likely and that a prison term is possible because of the abuse of power".

31. Section 4(2)(g) of the Sentencing and Penalties Act provides that, in sentencing offenders, a court must have regard to the conduct of the offender during the trial as an indication of remorse or the lack of remorse. The section guides the sentencer to appreciate remorse by looking at the conduct of the offender during the trial. For example, when an early guilty plea is tendered, the court may infer that the offender has been remorseful of his/her wrongdoing. Apart from an early guilty plea, confessions, and restitution to the victim made in court may be considered as evidence of such remorse.

32. A review of the authorities reveals that the courts are generally concerned with the issue whether remorse is "true" or "genuine". In ***State v Deo*** [2005] FJHC 64; HAA0008J.2005S (23 March 2005), Shameem J defined what might constitute a genuine remorse.

> "The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology."

33. In ***Aitcheson v State*** [2018] FJSC 29; CAV0012.2018 (2 November 2018), Gates CJ (as he then was) was not prepared to accept that an early guilty plea was necessarily indicative of genuine remorse: "[p.18]

> "The issue is remorse that is genuinely feeling sorry for what the offender has done. Accepting the inevitable of proof of the offender's deeds and therefore pleading guilty is not the same thing. An early guilty plea could form part of that process but courts must assess the early guilty plea along with other factors before arriving at a conclusion that genuine regret, sometimes accompanied (particularly in property offences) by apology and restitution: *State v Deo* Cr. App. No. HAA008 of 2005S 23rd March 2005 Shameem J."

34. Therefore, an early guilty plea may not be regarded as evidence of remorse if the court feels that it was not true or genuine. The Supreme Court in *Aitchison* (supra) accepts that the notion of genuine remorse is best assessed subjectively by the sentencer [p20]:

> "The sentencing judge had not expressly treated the guilty plea as acceptable remorse or as part of the mitigation. That assessment is very much a role for the trial judge, which I do not believe this court should usurp. The judge before whom the plea is tendered, the summary of facts is read, and the mitigation is urged in the presence of the offender, is in a much stronger position to assess remorse and whether it is sincere and acceptable."

35. In view of the above, it is not appropriate for an appellate court to find fault with an assessment of a sentencer as to the sincerity or otherwise of remorse made purely on account of an early guilty plea. In the present case, however, in addition to the early guilty plea, there was other evidence from which a reasonable inference could have been drawn as to the sincerity of Appellant's remorse. Appellant's willingness to pay compensation to the complainant (though not accepted by the complainant) and her apology made in court all point to the sincerity of her remorse.

36. For the above mentioned reasons, I find that the Learned Magistrate has taken irrelevant matters into considerations and failed to take relevant matters into account in mitigating the sentence.

37. In view of the above, the sentence passed by the Learned Trial Magistrate should be set aside and a different sentence imposed. The Appellant is awarded a full 1/3 deduction for the early guilty plea to arrive at a final sentence of 6 months' imprisonment.

38. An immediate custodial sentence is warranted to denounce the offence and the gross abuse of authority.

39. Following Orders are made:

1. The sentence passed by the Learned Trial Magistrate is set aside.

2. The Appellant is sentenced to 6 months' imprisonment with effect from 29th May, 2019.

3. The Appeal is allowed to that extent.

Aruna Aluthge

Judge

At Labasa

12 July 2019

Solicitors: **MessrsSamusamuvodre Sharma Law for Appellant**

Office of the Director of Public Prosecution for the Respondent