

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 19 OF 2019

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Labasa in Criminal Case No. 281 of 2018.

BETWEEN : VINAY VIKASH REDDY

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Appellant appears in person
Ms. Amelia Vavadakua for the Respondent

Date of Hearing : 1 October 2019

Judgment : 16 October 2019

JUDGMENT

- [1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Labasa.
- [2] The Appellant was charged in the Magistrate's Court of Labasa with two counts of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act No. 44 of 2009 (Crimes Act), and one count of Criminal Intimidation, contrary to Section 375 (1) (a) (i) and (iv) and 2 (a) of the Crimes Act 2009.

[3] The Amended Charge sheet filed against the Appellant read as follows:

COUNT ONE

Statement of Offence (a)

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act 2009.

Particulars of Offence (b)

VINAY VIKASH REDDY, on the 6th day of June 2018, at Qelewaqa in Labasa, in the Northern Division, assaulted **MERESIANA CABELAWA** with a stone, causing her actual bodily harm.

COUNT TWO

Statement of Offence (a)

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act 2009.

Particulars of Offence (b)

VINAY VIKASH REDDY, on the 6th day of June 2018, at Qelewaqa in Labasa, in the Northern Division, assaulted **MERESIANA CABELAWA** with a cane knife, causing her actual bodily harm.

COUNT THREE

Statement of Offence (a)

CRIMINAL INTIMIDATION: Contrary to Section 375 (1) (a) (i) and (iv) and 2 (a) of the Crimes Act 2009.

Particulars of Offence (b)

VINAY VIKASH REDDY, on the 6th day of June 2018, at Qelewaqa in Labasa, in the Northern Division, without lawful excuse, threatened **MERESIANA CABELAWA** with injury to her person, with intent to cause alarm to **MERESIANA CABELAWA**.

- [4] Even in the proceedings before the Magistrate's Court the Appellant had appeared in person.
- [5] On 29 May 2019, the Appellant pleaded guilty to the three charges. The Learned Magistrate had been satisfied that the Appellant pleaded guilty voluntarily and on his own free will. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant admitted to the said Summary of Facts. Accordingly, he had been convicted of the three charges.
- [6] On 4 June 2019, the Appellant was sentenced to 14 months' imprisonment. Considering the period of over 6 months spent in remand, the remaining period the Appellant was ordered to serve was 8 months' imprisonment.
- [7] Aggrieved by this Order the Appellant filed an appeal against his conviction and sentence. The said appeal was filed on 15 July 2019 and was filed in person by the Appellant.

GROUND OF APPEAL

- [8] The Grounds of Appeal, which was filed by the Appellant, are as follows (the Grounds stated below are as framed by the Appellant):

Grounds of Appeal Against Conviction

1. That the Learned Magistrate and the Prosecution failed to inform the Appellant that the offence the Appellant is charged with is a non-reconcilable offence. If informed the Appellant would have changed his guilty plea for the third count (Criminal Intimidation).
2. Even the Court did not inform the Appellant when the victim was called for the confirmation of reconciliation.

Grounds of Appeal Against Sentence

1. That the Learned Magistrate failed to deduct the full term served in remand by the Appellant from 8 November 2018 until 4 January 2019, contrary to Section 24 of the Sentencing and Penalties Act (outlined in paragraph 17 of the Learned Magistrate's Sentence).

- [9] Since the appeal was filed out of time, the Appellant sought the Leave of Court for enlargement of time to file this appeal. However, since the appeal was filed only a few days out of time and also since the Appellant was representing himself, the State was not objecting to the Appellant being granted an enlargement of time to file this appeal.
- [10] During the hearing of this matter both the Appellant and the Learned State Counsel were heard. The Respondent also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

THE LAW AND ANALYSIS

- [11] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or

other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[12] Section 247 of the Criminal Procedure Act stipulates that *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[13] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

THE GROUNDS OF APPEAL AGAINST CONVICTION

[14] During the hearing of this matter the Appellant submitted that he does not wish to pursue the Grounds of Appeal against his conviction.

THE GROUNDS OF APPEAL AGAINST SENTENCE

[15] In the case of *Kim Nam Bae v. The State* [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*"...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)."*

[16] These principles were endorsed by the Fiji Supreme Court in *Naisua v. The State* [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in *House v. The King* [1936] HCA 40; [1936] 55 CLR 499; and adopted in *Kim Nam Bae v The State* Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration."*

[17] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

- (i) Acted upon a wrong principle;
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;
- (iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

[18] In *Sharma v. State* [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (R –v- Lee Oosthuizen [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in Naikelekelevesi –v- The State (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in Qurai –v- The State (CAV 24 of 2014; 20 August 2015) at paragraph 48:

"The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability ___."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the

application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] 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."

- [19] In this case the primary ground of appeal raised by the Appellant is that the Learned Magistrate failed to deduct the full term served by him in remand, contrary to Section 24 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act).
- [20] Section 24 of the Sentencing and Penalties Act provides: *"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"*.
- [21] In passing the sentence the Learned Magistrate has referred to the maximum penalty for the offences of Assault Causing Actual Bodily Harm and Criminal Intimidation, as provided for in the Crimes Act and also considered the established tariff for the said offences.
- [22] Based on the objective seriousness of the offences, the Learned Magistrate has selected 12 months imprisonment as the starting point of his aggregate sentence.

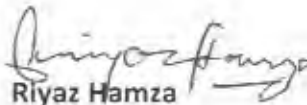
- [23] For the aggravating factors he has added 12 months imprisonment, bringing the sentence to 24 months imprisonment.
- [24] The Learned Magistrate has granted a discount of 3 months to the Appellant for showing remorse. A further 7 months discount has been granted to the Appellant for his guilty plea, thereby bringing the Sentence to 14 months imprisonment.
- [25] At paragraph 16, the Learned Magistrate has clearly stated why he does not wish to suspend the Sentence imposed on the Appellant. This was due to the fact that the Appellant had several previous convictions recorded against his name.
- [26] At paragraph 17 of his Sentence, the Learned Magistrate has stated as follows:
"However, it is observed that you have been in remand custody for this case since 8 November 2018 to this date. It is more than 6 months. The period in remand shall be reduced from your Sentence as part of the Sentence already served pursuant to Section 24 of the Sentencing and Penalties Act. Accordingly, I reduce 6 months from your Sentence. Accordingly, you have to serve 8 months imprisonment for these offences".
- [27] A reading of Section 24 of the Sentencing and Penalties Act, makes it clear that any period of time during which an offender was held in custody prior to the trial of the matter shall, unless a Court otherwise orders, be regarded by the Court as a period of imprisonment already served by the offender.
- [28] In this case, it is clear that the Learned Magistrate has specifically taken into consideration the period the Appellant was held in remand prior to the Sentence. Having done so, the Learned Magistrate has decided or *"has otherwise ordered"* to reduce only 6 months from the Sentence. This was purely within the Magistrate's discretion. It is my view that this Court should not interfere with this decision of the Learned Magistrate.
- [29] Considering all the above, I am of the opinion that the Ground of Appeal against sentence is without merit.
- [30] Therefore, I conclude that this appeal should stand dismissed and the conviction and sentence be affirmed.

CONCLUSION

[31] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Labasa is affirmed.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva

This 16th Day of October 2019

Solicitors for the Appellant :

Solicitors for the Respondent:

Appellant in Person.

Office of the Director of Public Prosecutions, Labasa.