IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 41 of 2020

BETWEEN : **HONG YANG LI**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. M. Vasiti for the Appellant.
: Mr. A. Singh for the Respondent.

Date of Submissions : 29 July, 2022
Date of Hearing : 02 August, 2022
Date of Judgment : 16 August, 2022

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Nadi for one count of serious assault contrary to section 277 (b) of the Crimes Decree, 2009. It was alleged that the appellant on 4th May, 2016 assaulted PC 5200 Shivneel Prasad in the due execution of his duty.

2. On 6th May, 2016 the appellant pleaded not guilty. On 13th July, 2018 the hearing proceeded, prosecution called two witnesses. After the court ruled that the appellant had a case to answer on 13th May, 2019 the defence opened its case. The appellant gave evidence and also called one witness.

On 21st May, 2020 the appellant was found guilty and convicted as charged.

3. On 17th June, 2020 after considering the mitigation advanced by the appellant the learned Magistrate sentenced the appellant to 6 months imprisonment.

4. The brief facts were as follows:

On 4th May, 2016 at about 18:40 hours the complainant PC 5200 Shivneel Prasad accompanied by PC 5332 Parmesh were on vehicle patrol along the Queens Highway in Nadi when they noticed a vehicle was parked in the middle of the road. The complainant signaled to the driver the appellant to stop the vehicle.

The appellant did not stop but continued driving, after a chase the appellant stopped the car. When the appellant was approached he smelt of liquor, a road side breath test was done and the appellant was taken to Namaka Police Station. The dragger machine operator was not available so the appellant was taken to the Nadi Police Station.

By the time they reached Nadi Police Station the time for testing breath had expired, the appellant was again taken to Namaka Police Station. At the Namaka Police Station the appellant asked for the keys of his vehicle since he wanted to smoke. After returning from the car the appellant alleged that his money from the car was missing. The complainant asked the appellant to lodge a police complaint.

An argument broke out between the two and as the complainant was walking towards Namaka Police Station the appellant grabbed him from behind and assaulted him. The matter was reported and the complainant was medically examined.

The medical report showed the following injuries:

a) *Tenderness and bruising over right zygomatic arch;*
b) *Superficial laceration over anterolateral aspect of left elbow measuring 3 cm x 1 cm;*
c) *Tenderness on active movement of left hand.*

The appellant was arrested, caution interviewed and charged.

5. The appellant being aggrieved by the sentence of the Magistrate's Court filed a timely appeal in this court.

6. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

APPEAL AGAINST SENTENCE

7. The appellant relies on the following grounds of appeal:

1. *That the Learned Magistrate erred in law and fact in failing to properly consider section 16 of the Sentencing and Penalties Act 2009 and provide specific reasons based on which the appellant did not qualify for a non-conviction order.*

2. *That the Learned Magistrate erred in law and fact in concluding that the appellant did not qualify for a non-conviction.*

3. *That the Learned Magistrate erred in law and fact in setting 9 months as the starting point for the sentence which is excessive.*

4. *That the Learned Magistrate erred in law and fact in failing to consider the circumstances in which the assault occurred such as:*

   a) *PC Prasad and PC Parmesh had stopped the appellant around 6.40 pm;*

   b) *The appellant was taken from Namaka Police Station to Nadi Police Station and back to Namaka Police Station;*

   c) *When they returned to the Namaka Police Station, the appellant alleged items stolen from his vehicle;*

   d) *The appellant was never charged with an offence relating to the reasons for which he was initially taken into custody by PC Prasad and PC Parmesh; and*

   e) *It had not been established that the appellant had been consuming alcohol above the legal limit.*

5. *That the Learned Magistrate erred in law and fact in failing to consider the nature of the injuries to PC Prasad and applying it to the starting point of sentence.*

6. *That the Learned Magistrate erred in law and fact in failing to consider that the appellant was a first time offender.*

7. *That the Learned Magistrate erred in law and fact in stating that the appellant evaded the court from 31 March 2020 when Fiji had closed its borders due to COVID-19.*

8. *That the Learned Magistrate erred in law and fact in drawing a negative inference to the appellant's absence from 31 March 2020 when Fiji had closed its borders due to COVID-19 by 31 March, 2020.*

9. *That the Learned Magistrate erred in law and in failing to properly apply section 4 and section 26 of the Sentencing and Penalties Act 2009.*

10. *That the Learned Magistrate erred in law and in fact in failing to apply the appellant's specific circumstances when considering a suspended sentence.*

11. *That the Learned Magistrate erred in law and fact in failing to suspend the appellant's sentence of 6 months imprisonment.*

DETERMINATION

LAW

8. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"*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. AAU0015 at [2]. 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."

9. The above grounds of appeal some of which are repeated grounds has raised a number of issues which can be easily addressed by the use of sub headings. Essentially, from the arguments raised the thrust of the appeal is that no conviction should have been entered against the appellant and/or a suspended sentence should have been imposed.

A. **Non-conviction order**

Appeal grounds one and two

10. The appellant's counsel argued that the learned Magistrate did not consider section 16 of the Sentencing and Penalties Act and did not provide any reason why she did not enter a non-conviction. Counsel submitted that a discharge without conviction was an appropriate result in this case.

11. When it comes to whether a conviction is to be recorded or not, the law bestows a discretion upon the sentencing court. Section 16 of the Sentencing and Penalties Act gives discretion to the court which must be exercised judicially having regards to all the circumstances of the case including:

(a) the nature of the offence;

(b) the character and past history of the offender;

(c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

12. The appellant had pleaded not guilty, after hearing evidence the learned Magistrate by judgment dated 21st May, 2020 had found the appellant

guilty and convicted him. The learned Magistrate had correctly recorded a conviction after finding the appellant guilty.

13. Considering the nature and circumstances of the offending it cannot be said to be a trivial offending which was against a police officer in due execution of his duty. The maximum penalty under section 277 (b) of the Crimes Act is 5 years imprisonment.

14. The facts of the offending are serious, assaulting a police officer is not to be taken lightly by any court the evidence before the court warranted the recording of a conviction considering the nature and circumstances of the offending. The injuries suffered by the victim were serious as well.

15. The appellant ought to have known the consequences of his actions. The nature of the offending called for a deterrence factor principle to be invoked by the Magistrate's Court which was just in all the circumstances of the case.

16. At the time of mitigation in the Magistrate's Court the appellant had sought a discharge without conviction which was refused by the learned Magistrate. The following paragraph of the sentence is noteworthy:

Paragraph 9

"Considering the facts of your case and mitigation you are not qualifying for a non-conviction order..."

17. It is noted that the learned Magistrate had directed her mind to section 16 and 45 of the Sentencing and Penalties Act and also to the case of *State v David Batiratu [2012] Revisional Case no. HAR 001 of 2012.* In *Batiratu's case* (supra) at paragraph 29, his Lordship Gates C.J (as he was) mentioned the following questions that must be answered if a discharge without conviction is urged upon the sentencing court whether:

"(a) The offender is morally blameless.

(b) Whether only a technical breach in the law has occurred.

(c) Whether the offence is of a trivial or minor nature.

(d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.

(e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.

(f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender."

18. Furthermore, the Sentencing and Penalties Act provides for situations and circumstances where a court can consider a discharge without entering a conviction. Part IX begins with the heading "Dismissals, Discharges and Adjournments", section 43 of the Sentencing and Penalties Act states:

"43. (1) An order may be made under this Part:

(a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;

(b) to take account of the trivial, technical or minor nature of the offence committed;

(c) to allow for circumstances in which it is inappropriate to inflict any punishment other than nominal punishment;

(d) to allow for circumstances in which it is inappropriate to record a

conviction;

(e) to allow for the existence of other extenuating or exceptional circumstances that justify a court showing mercy to an offender."

19. Section 45 specifically governs discharges or releases without conviction as follows:

(1) A court on being satisfied that a person is guilty of an offence may dismiss the charge and not record a conviction.

(2) A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under sub-section (2), and any further conditions imposed by the court.

(3) An undertaking under sub-section (2) shall have conditions that —

(a) that the offender shall appear before the court if called onto do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;

(b) that the offender is of good behaviour during the period of the adjournment; and

(c) that the offender observes any special conditions imposed by the court.

(4) A court may make an order for restitution or compensation in accordance with Part X in addition to making an order under this section.

(5) An offender who has given an undertaking under sub-section (1) may be called upon to appear before the court —

(a) by order of the court;

(b) by notice issued by a court officer on the authority of the court.

(6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding."

20. The Fijian Courts have over the years developed the jurisprudence relating to discharge without conviction. In *State v Patrick Nayacalagilagi and others (2009) FJHC 73; HAC165 of 2007 (17th March 2009)* Goundar J. looked at the principles governing discharge without a conviction under the repealed section 44 of the Criminal Procedure Code.

21. His lordship succinctly outlined the situations where the courts have exercised its discretion in regards to granting a discharge without conviction. His lordship at paragraph 3 mentioned the following:

"Subsequent authorities have held that absolute discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law (State v. Nand Kumar [2001] HAA014/00L; State v Kisun Sami Krishna [2007] HAA040/07S; Land Transport Authority v Isimeli Neneboto [2002] HAA87/02. In Commissioner of Inland Revenue v Atunaisa Bani Druavesi [1997] 43 FLR 150 HAA 0012/97, Scott J held that the discharge powers under section 44 of the Penal Code should be exercised sparingly where direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations."

22. In the appeal of *The State v Mosese Jeke Cr. App HAA 010.2010 (2nd July 2010)* Goundar J. substituted a term of 6 months imprisonment

suspended for 12 months. The Magistrate's Court had ordered an absolute discharge. The injuries to the complainant were minor scratches and tenderness as a result of two blows from the blunt side of a cane knife. There were other mitigating factors, however, the imposition of a term of imprisonment was necessary to demonstrate the seriousness with which the court viewed the offence of act with intent to cause grievous bodily harm together with the circumstances of aggravation, particularly the use of cane knife.

23. Goundar J. correctly took into account the seriousness of the offending and at paragraph 11 mentioned about the use of cane knife as:

"...The court would not condone the use of a cane knife in a family conflict. The circumstances of the case warranted imposition of a sentence on the respondent despite his previous good character."

24. The underlying principle emanating from *Batiratu's* case is that public interest plays a dominant role when a sentencer considers whether a discharge without conviction was warranted in a given situation which was mentioned at paragraph 27 in *Batiratu's* case (supra) as follows:

"It is clear from the cases that the public interest in enforcement and deterrence is of some significance when considering whether a discharge can be imposed. Because of the need to enforce safety and public interest lies in imposing a penalty and not a discharge in such cases. Penalties, whether fines or terms of imprisonment may override mitigating factors such as previous good character or other personal issues..."

25. The cases mentioned above takes into account general and specific deterrence which public interest demands in imposing a penalty and not a discharge. In such cases fines or terms of imprisonment will override mitigating factors such as previous good character or other personal

mitigating factors.

26. In *State v Nand Kumar Cr. App. No. HAA014 of 2000 (2 February, 2001)* Gates J. (as he was at the time) in the matter of an appeal from the Magistrate's Court against an order of absolute discharge for the offence of common assault said:

"...The court, in its sentencing remarks, said rightly, it was faced with "a very awkward situation" for this appellant was facing dismissal from his employment if a conviction were to be entered. Nevertheless, a discharge without conviction being entered, was not an appropriate sentence here. Absolute discharges are appropriate only in a limited number of circumstances, such as where no moral blame attaches (R v O'Toole (1971) 55 Cr App p 206) or where a mere technical breach of the law has occurred, perhaps by imprudence without dishonesty (R v Kavanagh (unreported) May 16th 1972 CA)".

27. There is no error made by the learned Magistrate in the exercise of her sentence discretion considering the circumstances of the offending a conviction was justified. The learned Magistrate had correctly referred to sections 16 and 45 of the Sentencing and Penalties Act and to the case of *Batiratu* (supra) and also gave her reasons for refusing to accede to the request of non-conviction from paragraphs 6 to 9 of the sentence.

B. **HIGH STARTING POINT**

Grounds three, four and five

28. The appellant's counsel argued that the learned Magistrate had taken a high starting point of 9 months imprisonment which has resulted in an excessive sentence.

29. I agree that the starting point selected by the learned Magistrate was at the higher side of the tariff (paragraph 10 of the sentence) which was after taking into account the objective seriousness of the offence committed. However, there was no enhancement of the sentence since there were no aggravating factors added. Thereafter a reduction was allowed for the mitigating factors. The final sentence was 6 months imprisonment which is within the tariff. The learned Magistrate had correctly identified the tariff for the offence of serious assault to be from 6 months to 9 months imprisonment.

30. Prematilaka JA sitting as a single judge of the Court of Appeal in *Alfred Ajay Palani vs. State, AAU 111 of 2020 (16 December, 2021)* made a pertinent observation in respect of the importance of the final sentence rather than the reasoning process leading to the final sentence at paragraph 37 which is applicable to the current issue raised by the appellant in the following words:

However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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 (Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015). However, not every sentence within the range would be necessarily an appropriate sentence that fits the crime.

31. The sentence in this case is at the lower end of the tariff which is appropriate for the offence of serious assault.

FAILURE TO CONSIDER THE CIRCUMSTANCES OF THE ASSAULT

32. Counsel argued that the learned Magistrate failed to consider the fact that the appellant was not charged for the offence of drunk and driving because he was found to be below the legal limit permitted to drive. This consideration was not taken into account in sentencing.

33. This submission is misconceived there was no need for the learned Magistrate to consider the circumstances of the appellant's arrest at the Queen's Highway which was on suspicion of drunk and driving some hours prior to the allegation of assault. The allegation of assault came about when the appellant was at Namaka Police Station and he had raised an allegation of theft from his car. No matter what the appellant's circumstances were it did not justify his assault on the complainant. In any event it was in favour of the appellant that due to the laxity of the police officers the time specified for breath testing had expired.

NATURE OF THE INJURIES APPLIED TO THE STARTING POINT

34. Counsel argued that the nature of the injuries was applied to the starting point of the sentence, unfortunately counsel was not able to specifically point to this in the sentence. I agree that the starting point was on the higher scale of the tariff, however, there is nothing in the sentence to suggest that the injuries suffered by the complainant was taken in the starting point of the sentence.

C. **FAILURE TO CONSIDER THAT THE APPELLANT WAS A FIRST OFFENDER**

Appeal ground Six

35. The appellant's counsel argued that in mitigation it was put to the court that the appellant was a first offender but the learned Magistrate did not take this factor into consideration in her sentence.

36. A perusal of the sentence shows that the learned Magistrate had complied with the purposes of the sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account as per section 4 (2).

37. It is accepted that the learned Magistrate had not mentioned in her sentence that the appellant was a first offender, however, the reduction that was given to the appellant was reasonable and appropriate. The omission is not fatal when compared to the final sentence.

38. Furthermore, there is no requirement of the law that where there are several mitigating factors each one of them should be dealt with separately. The Supreme Court in *Solomone Qurai vs. The State, Criminal Petition No. CAV 24 of 2014 (20th August, 2015)* stated this very clearly at paragraph 53 in the following words:-

"Although section 4 (2) (j) of the Sentencing and Penalties [Act] requires the High Court Judge to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately..."

39. It is not for an Appellate Court to revisit mitigation which was before the Magistrate's Court at the time of sentencing unless manifest injustice will be caused to the appellant (see *Josaia Leone & Sakiusa Naulumatua vs. State [2011] HAA 11 of 2011 (8 July, 2011).* Here the learned Magistrate had taken into account mitigating factors and allowed a justified reduction in sentence whereby no manifest injustice has been caused to the appellant.

D.**NEGATIVE INFERENCE DRAWN FROM APPELLANT'S ABSENCE**

Appeal grounds 7 and 8

40. The appellant's counsel argued that the learned Magistrate had erred in stating that the appellant had evaded court by not returning to Fiji when it was not possible to do so due to closure of the International borders from Covid-19 virus.

41. At paragraph 12 of the sentence the learned Magistrate stated the following:

"You evaded the court from 31/03/2020 after obtaining a stop departure upliftment stating that your wife is giving birth...your behaviour shows your lack of respect towards the justice system of the country..."

42. I accept the learned Magistrate had mentioned the above in her sentence, however, counsel was not able to point out how this comment had affected the sentence. I have perused the sentence and would like to mention that the above assertion by the learned Magistrate did not affect the final sentence. There is nothing in the sentence that would suggest that any adverse inference was drawn against the appellant due to his absence at the time of the sentence.

43. This ground of appeal is misconceived and frivolous.

E.**SUSPENDED SENTENCE**

Grounds of Appeal 9 to 11 is about the failure of the learned Magistrate to suspend the term of imprisonment. Counsel for the appellant argued that the learned Magistrate did not properly apply sections 4 and 26 of the Sentencing and Penalties Act. The imprisonment term of 6 months was within the ambit of section 26 yet the learned Magistrate did not exercise her discretion in favour of the appellant purely on the grounds of seriousness of the offence as per paragraph 15 of the sentence.

44. There is no doubt that the learned Magistrate under section 26 of the Sentencing and Penalties Act had a discretion to suspend the imprisonment term.

45. At paragraphs 14 and 15 of the sentence the learned Magistrate had directed her mind to whether suspend the sentence or not and she had given a reason why the sentence of imprisonment should not be suspended as follows:

"Assaulting a Police Officer while he was performing duty is considered as a serious offence. I believe that a custodial sentence is warranted to deter offenders who commit offences similar in nature."

46. In order to suspend an imprisonment term the sentencer has to consider whether the punishment fits the crime committed by the offender. In this regard the guidance offered by Goundar J. in *Balaggan vs. State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:-

"Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?"

47. I am satisfied that the term of imprisonment was an appropriate sentence and the learned Magistrate correctly refused to suspend the sentence considering the circumstances of the offending. The principle of deterrence in accordance with section 4 (1) of the Sentencing and Penalties Act was properly taken into account. The circumstances of the offending and the culpability of the appellant called for a custodial sentence.

48. There is no error made by the learned Magistrate when she refused to suspend the final sentence of six months imprisonment. This ground of appeal is dismissed due to lack of merits.

49. All the grounds of appeal against sentence are dismissed due to lack of merits.

ORDERS

1. The appeal against sentence is dismissed due to lack of merits;

2. The sentence of the Magistrate's Court is affirmed;

3. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
16 August, 2022

Solicitors

Messrs. Waqanika Law, Suva for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.