

IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 35 of 2023

IN THE MATTER of an Appeal from the decision of the Resident Magistrate Sufia Hamza in the First Class Magistrate's Court at Nasinu in Criminal Case No. 1177 of 2022

BETWEEN: **PRASHANT ANURAAG**

APPELLANT
(Original Defendant)

AND: **THE STATE**

RESPONDENT
(Original Complainant)

For the Appellant: Ms. M. Rakai

For the Respondent: Mr. H. Nofaga and Ms. M Naidu

Date of Hearing: 15th August 2024

Date of Ruling: 24th September 2024

RULING ON APPEAL AGAINST SENTENCE

1. The Appellant was produced in the Nasinu Magistrate's Court on the charge of Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes Act 2009. The complainant was his own brother, Hamendra Manhar Reddy and the charge (Criminal

- Case No. 1177 of 2022) arose from an argument that escalated inside their home in Nasinu.
2. The complainants in this matter were also charged and he was charged in Criminal Case No. 1134 of 2022.
 3. The Appellant took a progressive approach and pleaded guilty on the 29th of August 2023.
 4. The Appellant was then sentenced by RM Sufia Hamza on 13th September 2023 – he was sentenced to 4 months’ imprisonment suspended for 24 months.
 5. Being aggrieved with the sentence the Appellant filed an appeal and relies on 15 grounds of appeal.
 6. The appeal was first called on the 23rd of October 2023 and directions were made for the compiling of the records and a timetable was set for the filing of appeal submissions.
 7. The matter was then fixed for the appeal hearing on the 15th of August 2024.
 8. At the hearing both parties prepared written submissions and made oral submissions as well.

The submissions for the Appellants

9. The Appellant submits that the sentence imposed by the Nasinu Magistrate’s Court was disproportionate to the charge given that he is a first offenders and this was the first time that he has come to Court.
10. The Appellant further submits that the Crimes Act does not define what a domestic violence offence is and further submit that the parties are adult, siblings and the facts

- of these two cases can be distinguished from the normal domestic violence cases referred to by the Magistrate.
11. The Appellant relies on the recent case of Pillay vs State [2024] FJHC 346; HAA 053 of 2023 (6th June 2023). In this cases Justice Aluthge set aside a conviction and quashed the sentence and applied section 45 of the Sentencing and Penalties Act.
 12. The Appellant submits that he entered a guilty plea as they had reconciled and in the plea in mitigation, his counsel had set out the sentencing options available to the Court, including the option not to record a conviction and discharge the Appellant..
 13. The Appellant further submit that the High Court in State vs Kumar [2001] FJHC 340; [2001] 12 FLR 225 (25th July 2001) has ordered that no conviction be entered on the basis that a conviction will cause disproportionately more harm due to loss of livelihood.
 14. Counsel further submits that disproportionate harm was caused to the Appellant, who is a businessman and now cannot travel for work out of the country and he will suffer losses due to this.
 15. The Appellant also submits the authority of State vs Bainivalu Suva Magistrate's Court case No. 203 of 2023, where the Court discharged the Accused without conviction for drunk driving. The Appellants accept that this is not a traffic offence, however the principles are also applicable.
 16. The Appellant therefore submits that the sentence should be quashed and there should be a non-record of the conviction, and the charge should be dismissed, and the sentence should be adjournment of 2 years to check on good behaviour of the Appellants.
 17. Alternatively, the Appellant submit that he be discharged without conviction.

The submissions of the State as Respondents

18. The Appellant was charged with one count of Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes Act 2009. He has pleaded guilty to the same and was sentenced to 4 months imprisonment suspended for 2 years.
19. He initially appealed against both conviction and sentence however, it is apparent that he is now only appealing against sentence.
20. The State submits the case of Kim Nam Bae vs The State (unreported) Criminal Appeal No. AAU 15 of 1998; 26th February 1999, where the Court of Appeal set out the following considerations when assessing an appeal against sentence:
 - (a) Acted upon a wrong principle.
 - (b) Allowed extraneous or irrelevant matters to guide or affect him.
 - (c) Mistook the facts.
 - (d) Failed to take into account some relevant considerations.
21. The maximum sanction for the offence of Assault Causing Actual Bodily Harm is 5 years imprisonment. The tariff for the offence was confirmed in the case of State vs Naqelo [2023] FJHC 697; HAC 173 of 2020 (26th September 2023), which set the tariff for a domestic violence offence ranging from 6 months to 18 months' imprisonment, and a suspended sentence is reserved for exceptional circumstances.
22. The State contends that even though the Crimes Act or Criminal Procedure Act do not define what a domestic violence offence is, the Domestic Violence Act does define what it is. In the context of this case, the Appellant assaulted and caused physical injuries to the complainant, his brothers.
23. The State submits that the Court took the reconciliation into account and the Appellants actually received a lenient sentence as the final sentence is below the current tariff for domestic violence offences.

24. With respect to the application for non-conviction, the Respondent submits that the offence was a domestic violence offence. The State relies on the authority of State vs Batiratu [2012] FJHC 864; HAR 001 of 2012 (13th February 2012) and submit that the Appellant is not morally blameless, as he punched his brother even though he was also assaulted by his two borthers..
25. The State submits that the final sentence is neither harsh nor excessive as the sentence is below the tariff and it is not a custodial sentence, which is against the practice or the precedent in such domestic violence offences.
26. Counsel submits that the appeal is without merit and should be dismissed.

Analysis

27. This an appeal against the sentence – where the sentencing Magistrate correctly identified the maximum sentence and the accepted sentencing tariffs applicable for such offences. After that exercise the Court then went on to impose a sentence that fell below the accepted tariff for such offences.
28. The Supreme Court in the case of Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013 (20th November 2013) stated as follows: -

“[19] 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) 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.

[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in *Chirk King Yam v The State* Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test

is whether the grounds of appeal against sentence are arguable points under the four principles of *Kim Nam Bae's* case.”

29. In the case of Kim Nam Bae –v- State [1999] FJCA 21; AAU 15 of 1998 (26th February 1999) the Court of Appeal stated as follows: -

“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) 55 CLR 499).”

30. In this case the Appellant had sought an order for no conviction to be entered and this was within the power of the Magistrate as sentencer by virtue of section 16 of the Sentencing and Penalties Act.

The relevant section provides as follows: -

“Conviction or non-conviction

16 (1) In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including—

(a) the nature of the offence;

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

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

31. In the sentencing remarks issued on the 13th of September 2023, the Magistrate did not make any reference at all to the above section and instead went straight to imprisonment.

32. This was the case in this case, originally CF 1177 of 2022 therefore the Magistrate failed to take into account a relevant consideration, i.e. the application for no conviction

to be entered. To be fair the Magistrate may have felt that she had to proceed to sentence as she had already entered a conviction, therefore her options for sentencing were limited.

33. The recent authority of Peni Lebaivalu Qalodamu vs State (unreported) Criminal Appeal Case No. HAA 4 of 2024 made it clear that once a Magistrate has entered a conviction, they are functus officio with respect to any further actions in terms of finding guilt, however the Magistrate is not functus with respect to the remainder of the criminal justice process i.e. to prepare the sentence, with the full sentencing options available under the Sentencing and Penalties Act.
34. Section 256 of the Criminal Procedure Act 2009 sets out the powers of the High Court on appeal from a Magistrate's Court.

The relevant section provides as follows: -

“ 256 (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 a 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.”

35. After finding that the Magistrate failed to take into account or referred to the application for non conviction at all, she thereby fell into error and pursuant to section 256 (3) I quash the sentence handed down on the 13th of September 2023.

36. The Appellant had submitted for the Court to use its discretion to not enter a conviction pursuant to section 16 of the Sentencing and Penalties Act.

37. The relevant factors for consideration are as follows: -

- (i) The offending is between three siblings, and the offending happened when a brotherly disagreement escalated into physical violence – the Accused hit the complainant with a pipe in the context of a heated argument. The complainant and his other brother also assaulted the Appellant causing his injuries.
- (ii) They had all reported the matter to the Police in the heat of the moment, however they had reconciled long before the matter came to Court.
- (iii) Each of the siblings need to travel and a conviction against their name will hinder this and may interfere with their future employment prospects and even any prospect for migration overseas.

38. The facts of these two cases are distinguished from the range of cases that have developed the tariff for domestic violence offences as these are adult siblings of equal power, there is no evidence that the violence is a regular occurrence and they are persons of previous good conduct.

39. In deciding whether or not to discharge without conviction, I will apply the three tests set out section 16 (1) (a) as follows: -

(a) the nature of the offence;

This was an offence that lay at the lower end of the scale for such offences, it only received special consideration when it was committed by siblings thereby making it a domestic violence offence with a different, more enhanced tariff.

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

All the parties, the complainant and the Appellant are first offenders and this whole experience has been eye opening and the risk of reoffending is low.

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

The complainant is newly married and is considering migrating and a conviction against his name will detrimentally affect any application.. The Appellant is a businessman and needs to travel for business, this conviction is also affecting him.

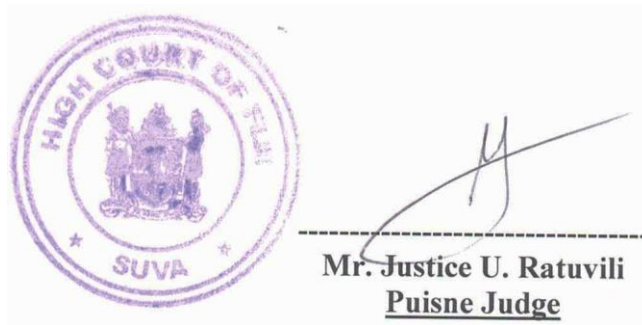
40. After considering the above factors, the circumstances of the offending and the circumstances of each of the three siblings I find that the offending is not commensurate with the tariff. I find that any conviction or sentence of imprisonment will be disproportionately harsh on all the Appellants.

41. I therefore find that it is appropriate to not enter a conviction and I will exercise my discretion to not enter a conviction against them pursuant to section 15 (1) (j) of the Sentencing and Penalties Act 2009.

This is the Ruling of this Court: -

- 1. The sentence handed down by the Nasinu Magistrate’s Court against Prashant Anuraag on 13th September 2023 is quashed.**
- 2. Pursuant to section 256 (3) of the Criminal Procedure Act 2009, I exercise my discretion and discharge the Appellant without conviction pursuant to section 15 (1) (j) of the Sentencing and Penalties Act 2009.**

30 days to appeal



- cc:**
- 1. Sherani & Co, Suva**
 - 2. Office of the Director of Public Prosecutions, Suva.**