

IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION

Criminal Case No. 396/2023

BETWEEN: **STATE**

PROSECUTION

AND: **SUBEDAR KHAN**

ACCUSED

Counsel: WPC 5006 Maryan Ratucove for Police Prosecution
 Ms. S. Ali for the Accused,

Date of Sentence: 29 November 2024

SENTENCE

Introduction

1. Mr. Subedar Khan, on 26 September 2023, you were charged and produced in Court for 1 count of Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes Act, 1 count of Criminal Intimidation contrary to section 375(1)(a)(i)(iv)(2)(a) of the Crimes Act, 1 count of Common Assault contrary to section 274 of the Crimes Act, 1 count of Breach of Order Suspending Sentence contrary to section 28(1) of the Sentencing and Penalties Act and 1 count of Breach of Bail Condition contrary to section 2(1) of the Bail Amendment Act 2012 and amended section 26 of the Bail Act 2002.
2. On 29 November 2023, you pleaded Not Guilty to the above charges and the matter was adjourned for Trial.
3. On 8 November 2024, the date of Trial, Prosecution filed an Amended Charge. The particulars of the offences are:

Count 1
Statement of Offence

Assault Causing Actual Bodily Harm: *Contrary to Section 275 of the Crimes Act 2009.*

Particulars of Offence

Subedar Khan, on the 24th day of September, 2023 at Yalalevu, Ba in the Western Division assaulted Farishna Anjum thereby occasioning her actual bodily harm.

Count 2
Statement of Offence

Criminal Intimidation: *Contrary to Section 375(1)(a)(iv) and (2)(a) of the Crimes Act 2009.*

Particulars of Offence

Subedar Khan, on the 24th day of September, 2023 at Yalalevu, Ba in the Western Division without lawful excuse threatened to kill Farishna Anjum with a cane knife with intent to cause death to the said Farisha Anjum

Count 3
Statement of Offence

Common Assault: Contrary to Section 274 of the Crimes Act 2009.

Particulars of Offence

Subedar Khan, on the 24th day of September, 2023 at Yalalevu, Ba in the Western Division unlawfully assaulted **Zarine Zoya Khan**.

Count 4
Statement of Offence

Breach of Order Suspending Sentence: Contrary to Section 28(1) of the Sentencing and Penalties Act 2009.

Particulars of Offence

~~Subedar Khan~~
~~Apenisa Kurusaqila~~, on the 24th day of September 2023 at Yalalevu, Ba in the Western during the operational period of suspended sentence vide Ba 476/19 committed other offences which is punishable by imprisonment.

Count 5
Statement of Offence

Breach of Bail Condition: Contrary to Section 25(1)(b) and section 26(1) of the Bail Act 2002 and Bail Amendment Act 2012.

Particulars of Offence

Subedar Khan, on the 24th day of September 2023 at Yalalevu, Ba in the Western being bailed by the Ba Magistrates Court vide Ba CF 317/20 with condition not to reoffend, breached the said bail condition by reoffending.

4. As Count 2 was an indictable offence triable summarily, you elected the Magistrates Court to hear the matter. You then pleaded Guilty to the above charges after it was read and explained to you in English which was your preferred language and you confirmed that you understood the same.
5. I am satisfied that you have fully comprehended the legal effect of your plea and that your plea was voluntary and free from influence, I now convict you and proceed to sentence you for all offences.

Circumstances of the offending

6. According to the Summary of Facts you admitted in Court, you are the husband of Farisha Anjum ('Farisha') and the father of Zarine Zoya Khan ('Zarine'). At the time, Zarine was 10 years of age.
7. On 24 September 2023 at about 4:30am at Yalalevu, Ba, Farisha and Zarine were at home when you came home drunk. You woke Farisha asking her to warm food as you wanted to eat.
8. Farisha then gave you food to eat and went to wash the dishes. Whilst washing the dishes, she heard you swearing and starting to break the chair. Farisha warned you not to shout and swear but you kept on swearing at her.

9. Farisha and Zarine then decided to go to their neighbour's house as you were acting in a violent manner. As they were about to reach the neighbour's house, you came from behind and grabbed Zarine's hair and pulled her back towards your house.
10. Farisha then shouted at you to leave Zarine alone. You then turned towards Farisha and slapped her on her right ear. You then took out a cane knife and pointed it towards the neck of Farisha. Farisha then reported the matter to the Police.
11. You were then arrested and escorted to Ba Police Station and during the investigation, it was revealed that you had a pending matter in Ba being CF 317/20 where you were on bail with the condition not to re-offend and you had breached the said bail condition by re-offending.
12. It was also revealed that you had a previous conviction for which you were on suspended sentence and you had breached the order of suspended sentence by committing the other offence.
13. You were then interviewed under caution and then charged for this matter.

Objective Seriousness

14. Considering the prevalent nature of this crime within the domestic environment especially targeting female members, I find the objective seriousness of this crime is high.

Sentencing Purpose

15. Considering that the primary purpose of this sentence is founded on the principle of deterrence. It is the responsibility of the Court to deter others from committing such offences of the same or similar nature as well as to protect the community from those who commit such offences.
16. A deterrent sentence for such offences of this nature demonstrates the gravity of the offence and reflects the society's immediate denouncement of such crimes.

Sentencing Regime

17. The maximum penalty for the offence of Assault causing Actual Bodily Harm is 5 years imprisonment.
18. In the case of **Matai v State** [2018] FJHC 25; *Criminal Appeal 108.2017Ltk* (26 January 2018) His Lordship Justice Madigan imposed a new domestic violence tariff. He stated:

"... it must now be said that the tariff for a domestic violence assault causing actual bodily harm is a wide range of 6 to 18 months, wide enough to cater for all kinds of injuries. It would be only in exceptional circumstances that a suspended sentence would be passed for the offence, given that sending the convict back into the family home could well have perilous consequences. For a second offence on the same victim, a suspended sentence is inconceivable.

19. Thus, the tariff applicable in this matter given that there is domestic violence is 6 to 18 months and in only exceptional cases would a suspended sentence be given.
20. The maximum penalty for the offence of Criminal Intimidation where there is a threat to cause death or intended grievous harm is 10 years imprisonment.

21. The applicable tariff for such an offence is between 12 months and 4 years imprisonment with serious cases being given sentences in the upper range while less serious cases should be given sentences at the lower end of the scale (vide **State v Baleinabodua** [2012] FJHC 981; HAC 145.2010 (21 March 2012)).
22. The maximum penalty for common assault is 1 year imprisonment.
23. His Lordship Justice Madigan in **State v Pinau & Ors**; Criminal Case No: HAC012 of 2013 (18 April 2013) stated at paragraph 10 that:

"The maximum sentence for common assault is one year imprisonment; there is no set tariff and it is therefore left to the discretion of the sentencing tribunal to pass an appropriate sentence. Suspended sentences are not uncommon."
24. The maximum penalty for the offence of Breach of Order Suspending Sentence is a fine not exceeding \$10,000 and in addition the court must restore the sentence or part sentence held in suspense and order the offender to serve it which is pursuant to section 28(4) of the Sentencing and Penalties Act 2009.
25. The maximum penalty for Breaching of Conditions of Bail is a fine of \$2,000 or 12 months imprisonment or both.
26. In **Ratu v State**; Criminal Appeal No. HAA 89 of 2018 (21 February 2019) His Lordship Justice Madigan referred to the decision of **Saula Lalagavesi** HAA 83/2018LT where His Lordship had stated that the tariff for breaching conditions of bail is from a suspended sentence to 9 months imprisonment.

Level of Culpability

27. Further, it is evident that there was no provocation on the part of both the Complainants when you committed this offence against them. The assault you committed on them was impulsive/spontaneous and at the time you were intoxicated. Moreover, when the Complainants were going to the neighbour's house, you attempted to prevent them from doing so. Thus, I find the level of culpability is quite high.

Mitigating and Aggravating Factors


28. The Court notes that mitigation offered by you, however, personal circumstances and family background holds very low mitigatory value in this offending (vide **Raj v State** Appeal No. CAV 0003 of 2014 (20 August 2014)).
29. I am aware that section 154 of the Criminal Procedure Act 2009 does not apply to offences where there is a domestic relationship between an Accused and Complainant.
30. However, your wife and daughter were present in Court on 8 November 2024, and they informed that they has forgiven you and that there was no force or pressure exerted on them to reconcile with you. Your wife informed the Court that the issue had been your drinking but since this incident you have changed and she and your daughter had genuinely forgiven you for your actions. This will taken as there being genuine reconciliation in the matter.
31. Further, the Court was informed that you have 1 previous conviction for Criminal Intimidation in CF476/19 where you were sentenced on 27 November 2020 to 11 months imprisonment suspended for 3years.

32. You have not provided the Court with any evidence of any significant contributions made by you to your community. As such, considering section 5 of the Sentencing and Penalties Act 2009, the Court is unable to provide you any discount for your previous character.
33. In considering the aggravating factors in this matter, the Court finds that:
- i. you breached the trust of the Complainants – your wife and your daughter; and
 - ii. to avoid your angry outburst your wife had been removing your daughter from the home which then led to you committing the offence of common assault against her which would have had a negative impact on her considering that she was only 10 years at the time of the offending.

Sentence

34. Taking note of section 17 of the Sentencing and Penalties Act, I prefer to impose an aggregate sentence. Considering the objective seriousness, the purpose of this sentence with the level of culpability, in this case it is appropriate to have a starting point towards the higher end of the tariff. I accordingly select 24 months as the starting point.
35. I will then add 18 months for the aggravating factors mentioned ~~at paragraph 20 herein~~, making it a total of 42 months imprisonment. For your mitigating circumstances, I will consider there being genuine reconciliation between you and the Complainants and deduct 8 months. For your early guilty plea which highlights your genuine remorse for your actions, I will deduct a further 12 months leaving you with a balance of 22 months imprisonment.
36. Section 26(1) of the Sentencing and Penalties Act allows a court to make an order suspending the whole or part of the sentence if it is satisfied that it is appropriate to do so in the circumstances whilst section 26(2)(b) provides the Magistrates Court with the discretion to suspend a sentence where the sentence does not exceed 2 years.
37. Considering your chances of rehabilitation with your remorsefulness for your actions, I will partly suspend your sentence. You shall serve 11 months of your sentence with immediate effect and the remaining 11 months will be suspended for 5 years.
38. Now turning to the offence of Breach of Order Suspending Sentence, your counsel submitted that you work with Capital Construction in Nadi and you earn \$300.00 per week. Your counsel has stated that you are willing to pay a reasonable fine, however, the Court is unaware of your financial situation as such the Court will not order a fine.
39. After considering the facts and the circumstances of the case herein, the Court finds that you had committed these offences on 27 September 2023 within your operational period which you were about to complete on 27 November 2023. It is evident that you had been mindful of this but due to your drinking and lapse of judgment, you perpetrated these offences against your wife and daughter. As such I will restore part of the sentence held in suspense. Thus, you will need to serve 5 months of your 11 months Sentence as ordered in Ba CF 476/19 and pursuant to section 22(1) of the Sentencing and Penalties Act, this will be made concurrent to sentence of 11 months imprisonment herein.
40. Finally, the Court is mindful, that you have been in in custody from 26 September 2023 until 13 October 2023 which is 17 days. As this is a minimal amount of time in custody, the Court will not consider the same as time served by you.

41. Thus, your sentence in this matter is 22 months wherein you are to serve 11 months with immediate effect and the remaining 11 months will be suspended for 5 years.
42. If you commit any crime during the 5 years, you are liable to be charged and prosecuted for an offending pursuant to section 28 of the Sentencing and Penalties Act.
43. Further, as this incident involves domestic violence, there are sufficient grounds to make an order under the Domestic Violence Act. Accordingly, I grant a permanent domestic violence restraining order (DVRO) against you with standard non-molestation conditions for the protection of your wife and daughter. This DVRO will remain in force until this court or any other competent court varies or suspends it. If you breach the DVRO, you will be liable to be charged and prosecuted for an offence pursuant to section 77 of the Domestic Violence Act.
44. Any party aggrieved with this Sentence has 28 days to appeal to the High Court.


N. Mishra
Resident Magistrate

