

**IN THE MAGISTRATES' COURT**  
**AT BA**  
**CRIMINAL JURISDICTION**

*Criminal Case No. 44/2024*

**BETWEEN:**     **STATE**

**PROSECUTION**

**AND:**           **VILIKESA VAIYATAYATA**

**ACCUSED**

**Counsel:**                 Ms. N. Kumar for the State  
                                  Mr. A. Barinisavu for the Accused.

**Date of Sentence:**     15 August 2025.

**SENTENCE**

Introduction

1. Mr. Vilikesa Vaiyatayata, on 3 December 2024, you pleaded Guilty to 1 Count of Assault Causing Actual Bodily Harm. The particulars of the offence are:

Statement of Offence

**Assault Causing Actual Bodily Harm:** *Contrary to Section 275(1) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***Vilikesa Vaiyatayata*** on the 3<sup>rd</sup> day of February 2024 at Ba Police Compound, Ba in the Western Division assaulted ***Elizabeth Tuisawau*** thereby occasioning her actual bodily harm.

2. 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 this offence.

Circumstances of the Offending

3. According to the Summary of Facts you admitted in Court, the Complainant is your wife and on 3 February 2024 at about 2:30am, you entered the room where the Complainant had been sleeping. Your clothes were wet and you smelt heavily of liquor.
4. The Complainant was preventing you from entering the room to change your clothes as she could not tolerate the smell of the liquor as she was pregnant. You kept trying to force yourself in. The Complainant yelled at you to leave the room but you then wrapped your hand around her neck to stop her from yelling.
5. The Complainant pleaded with you to leave her as her stomach was hurting. You then released her and told her not to go anywhere. The Complainant reported the matter at Ba Police Station and she was medically examined and the Doctor noted abrasions on her right cheek and a bruise on the left interior neck.
6. You were arrested and interviewed under caution where you admitted to the offence. You were then charged for this matter.

### Objective Seriousness

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

### Sentencing Regime

8. The maximum penalty for this offence of Assault causing Actual Bodily Harm is 5 years imprisonment.
9. 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.*

10. 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.

### Mitigating and Aggravating Factors

11. The Court notes that mitigation offered by your counsel on your behalf, however, personal circumstances and family background holds very low mitigatory value in this offending.
12. The Court is aware that you took an early guilty plea which highlights your genuine remorse for your actions and this is also reflected by your cooperation with the Police at the time of your interview.
13. Further, the Court was informed that you are a first offender.
14. The aggravating factor in this matter is that you breached the trust of the Complainant, your wife, there was no provocation on the part of the Complainant when you committed this offence and at the time of committing this offence, the Complainant was pregnant.

### Application for Non-Conviction

15. In written submissions provided, your counsel urged this Court to exercise its discretion under section 16(1) of the Sentencing and Penalties Act in not recording a conviction and pursuant to section 45 of the Sentencing and Penalties Act, discharge or release you without a conviction.
16. In ***Chandra v State*** *Criminal Appeal No. HAA 028 of 2022* (16 December 2022) His Lordship Justice Sharma differentiated a non-conviction under section 16 of the Sentencing and Penalties Act with a discharge without conviction under section 45 of the Sentencing and Penalties Act. It was stated

***15. The courts in this country 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.

16. 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."**

17. 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.

18. 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."**

**19. 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..."**

**20. 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.**

21. 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 accused 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)".*

....

**26. In this case, the appellant by his mitigation was specifically asking for a non-conviction order under section 16 of the Sentencing and Penalties Act which is different to a discharge without conviction order. An application for a discharge without conviction falls under section 45 of the Sentencing and Penalties Act. This was not what the appellant was asking for because section 174(2) of the Criminal Procedure Act makes it mandatory for a Magistrate to convict an accused upon a guilty plea or finding of guilt.**

**27. The Magistrate's Court upon finding an accused guilty must convict before proceeding to sentence under the Sentencing and Penalties Act. The effect of sections 15(1) (e), (f), (i) or (j) of the Sentencing and Penalties Act is to give a discretion to the sentencer not to record a conviction or dismiss a charge as a sentencing option based on the mitigating factors and the nature of the offence committed.**

**28. An order not to record a conviction as per section 15(1) (e), (f), (i) or (j) read with section 16(1) of the Sentencing and Penalties Act forms part of the sentence. Accordingly, if a sentencer uses the discretion not to record a conviction in terms of the above sub sections then the conviction entered under section 174(2) of the Criminal Procedure Act is to be regarded as a conviction not recorded.**

17. Given the discussion in Chandra [supra] it is evident that a discharge without conviction pursuant to section 45 of the Sentencing and Penalties Act is only considered if there has been a technical breach of the law or if the offender is morally blameless. An imposition of a term of imprisonment will be necessary to demonstrate the seriousness of the offending especially when public interest demands imposing such a penalty.
18. Further, it is evident from Chandra [supra] that a discharge without conviction is different from a non-conviction pursuant to section 16 of the Sentencing and Penalties Act.
19. As mentioned, the Accused's counsel has submitted that the Court invokes its powers under section 45 of the Sentencing and Penalties Act in conjunction with section 16 of the Sentencing and Penalties.
20. In the case herein, the Accused assaulted his pregnant wife which led to her sustaining injuries as stated in the Medical Report. The Court is unable to find that this is a technical breach. Further, the Court is unable to find that the Accused is morally blameless especially as at the time of the offending the Accused was intoxicated. Thus, the Court is unable to invoke section 45 of the Sentencing and Penalties Act and discharge or release the Accused without a conviction.
21. The Court will now consider section 16 of the Sentencing and Penalties Act which deals with not recording a conviction. Turning to the case herein, I will consider the factors accordingly.

#### Nature of the Offence

22. Your counsel failed to submit on this factor to assist the Court. However, the Court finds that as a Police Officer you knew or ought to have known the consequences of your actions especially offences that are domestic in nature.

23. The offence that you have been charged with cannot be considered personal or private in nature especially as such an offence is prevalent in our communities and the public interest demands serious penalties for such offences.

#### Character and History of the Offender

24. The Court was informed that you are a first offender and that you have maintained this unblemished character.

#### Impact of a Conviction on the Offender's Economic or Social Well-being and on the Offender's Employment Prospects.

25. The Court was further informed that you are currently a Police Officer based at Ba Police Station. You are currently interdicted which has shown you how difficult a potential conviction can be given that you are currently on half-pay where you are receiving \$66.68 every fortnight after your deductions.
26. The Court was also informed that you have currently applied for the position of Customs Officer at Fiji Revenue and Customs Service, however, the email pertaining to this position is dated 24 November 2024. There is nothing recent to show that you are still being considered for this position.
27. Further, it was submitted that you have applied for the Master Engineer Class 6 program at FNU Maritime Campus, that you intend to begin with this program in the coming year and thereafter explore work opportunities in that relevant field. The document provided in your Mitigation does not assist the Court especially in confirming whether you have really been admitted into this program.
28. Your counsel submits that it is evident that a conviction will have an impact on your future opportunities and your employment as a Police Officer. However, your counsel has failed to provide any substantial evidence that your employment prospects will be truly affected. A mere statement that the conviction might affect you in such a manner is not sufficient (vide Qalodamu v State Criminal Appeal Case No. HAA 4 of 2024 (13 September 2024)).

#### Sentence

29. Considering the discussions in paragraphs 15-28 herein, the Court will enter and record a conviction against you pursuant to section 15(1)(d) of the Sentencing and Penalties Act.
30. In sentencing the Accused, the Court has taken into account the factors outlined in section 4(1)-(3) of the Sentencing and Penalties Act 2009.
31. Considering the objective seriousness, I pick a starting point of 14 months. I will then add 10 months for the aggravating factors making it a total of 24 months imprisonment. For your mitigating circumstances such as you having no prior convictions at the time of the offending, I will deduct 4 months. For your early guilty plea, I will deduct 8 months leaving you with a balance of 12 months imprisonment.
32. 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.

33. Thus, considering the circumstances in which this offending took place in conjunction with your previous good character, I am of the view that this is a case that can be suspended as the final sentence does not exceed 2 years. I will suspend the 12 months imprisonment term for a period of 3 years.
34. If you commit any crime during the 3 years, you are liable to be charged and prosecuted for an offending pursuant to section 28 of the Sentencing and Penalties Act.
35. 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. 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.
36. Any party aggrieved with this decision has 28 days to appeal to the High Court.



A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

N. Mishra  
Resident Magistrate