IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No: HAA 031 of 2011

BETWEEN:

MUSKAN BALAGGAN
Appellant

AND:

THE STATE
Respondent

Date of Hearing: 16 April 2012
Date of Judgment: 24 April 2012

Counsel: Ms S. Vaniqi for Appellant
Ms T. Leweni for State

JUDGMENT

[1] The appellant was sentenced to 2 years' imprisonment by the Magistrates' Court, after pleading guilty to giving false information to a public servant, contrary to section 201(a) of the Crimes Decree. She appeals against her sentence only.

[2] The appellant is a foreign national. She is 21 years old. In January 2011, she arrived in Fiji from Australia on an Indian passport. When she was returning to Australia, after staying in Fiji for a few days, she was arrested at the Nadi International Airport and was charged with an offence under the Illicit Drugs Act. She engaged Rajendra Chaudhry to represent her and to act as her surety. She stayed at Mr. Chaudhry's residence in Suva while on bail. On 13 June 2011, the appellant filed a formal complaint with the police that Mr. Chaudhry raped her on numerous occasions at his residence. She gave a signed statement to D/IP Vakatuturagani, in which she described each episode of rape in detail.

[3] A month later, the appellant swore an affidavit, in which she stated:

> 1. I came to Fiji from Melbourne, Australia in January 2011. When returning to Australia, I was arrested at the airport and questioned and charged for possession drug. I was presented in Court. I was then remanded at Suva Women's Prison. I engaged Rajendra Pal Chaudhry of Gordon & Chaudhry. He bailed me and as I didn't have anyone offered to be my surety. I have no family or relations or friends in Fiji with whom I can stay whilst my case is pending. I have no further monies to afford to rent. Mr. Chaudhry and his wife took me into their care and I stayed with them.

2. The DPP informed the Court on 8th March 2011 that they were awaiting weight and analysis results from Australia of the substance I was charged with allegedly being in possession of and it could take between 6 weeks to 6 months. I also made application, through Mr. Chaudhry to vary bail so that I could travel to Australia to continue my studies and I had to be in Australia before 11th April 2011 or I would lose my enrolment and visa. This application was unsuccessful.

3. As I couldn't travel to Australia for my studies whilst awaiting trial, I lost my place at the tertiary institute at which I was studying as well as lost my employment at Cadbury Schweppes. I was also missing my fiancé. Since I have been in Fiji I have not been able to see him and our relationship is extremely strained and under pressure. I was scared we will break up as he does not understand how I could have been caught up in such events leading to my arrest and detainment in Fiji. All of these events in my case made me very frustrated. Mr. Chaudhry spoke sternly to me when I asked him about my case. I thought that he was not focused on my case. As the days went by I became very stressed out and dejected. The news of my mother being very ill made me depressed and homesick.

4. When Mr. Chaudhry left for Australia on 10th June 2011 for holiday with his family, I became very angry that Mr. Chaudhry could go to Australia and take a holiday whilst my case was pending. In my anger and desperation, and upon talking to certain people, I made certain allegations against Mr. Chaudhry in my statement to Police on 14th June 2011. Each and every allegation I made against Mr. Chaudhry on that day is untrue and was made in a state of anger and now with the benefit of hindsight and a settled mental state, I now withdraw all those allegations and my complaint in totality.

5. I have not been influenced by anyone, pressured and offered no promises to withdraw my complaint against Mr. Chaudhry and I have consulted Mr. Kini Marawai and spoke to him and had this affidavit prepared on my instructions.

6. I further give an undertaking that the allegations as made on 14th June 2011 will not be the bases of any future complaint/s against Mr. Chaudhry by me.

[4] Upon receipt of the appellant's affidavit, the police interviewed her under caution in the presence of her new counsel, Mr. Kini Marawai, on an allegation of giving false information. The appellant elected not to offer any comment on the allegation. She was charged and presented in Court on 12 July 2011. On 4 August 2011, she pleaded guilty to the charge. Her subsequent attempt to withdraw her guilty plea was refused by the learned Magistrate. She was convicted and sentenced.

[5] The first ground of appeal is that the learned Magistrate erred in law and fact when she failed to take into account the period that the appellant was in remand before sentence and failed to award an appropriate discount or deduction for such time already spent in remand.

[6] It has been a long standing practice of the sentencing court, to make an appropriate reduction in sentence for time spent in custody pending trial by an offender ***(Basa v The State*** *[2006] FJCA 23; AAU0024.2005 (24March 2006)*. This practice has now been codified in section 24 of the Sentencing and Penalties Decree.

[7] The sentencing remarks of the learned Magistrate contain no reference to time spent in custody. Counsel for the State concedes this ground. However, during the hearing, both counsel accepted that the appellant was remanded in custody after the High Court revoked her bail in the drug case.

[8] As far as this case was concerned, the appellant was granted bail by the Magistrates' Court and that the learned Magistrate had not revoked bail. If that is the case, then the remand period did not apply to this case but to her drug case. In the event, if she is convicted in the drug case, the remand period will have to be taken into account in the sentence. If the remand period is taken into account in this case, then there is a risk that she will end up having double reduction in sentence based on the same fact, depending on the outcome of her drug case. The appellant is not entitled to benefit twice for the same fact. This ground of appeal fails.

[9] The second ground of appeal is that the learned Magistrate erred in law and fact when she failed to give a one-third discount to the appellant as a first offender.

[10] This ground is misconceived. I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In ***Naikelekelevesi v State*** *[2008] FJCA 11; AAU0061.2007 (27 June 2008),* the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.

[11] The weight that is given to a guilty plea depends on a number of factors. In ***Daunabuna v State*** *Criminal Appeal No. AAU0120/07 (4 December 2009),* the Court of Appeal adopted a passage from ***R v Winchester*** *(1992) 58 A Crim R 345* at 350 by Hunt CJ:

> "A plea of guilty is always a matter which must be taken into account when imposing sentence. The degree of leniency to be afforded will depend upon many different factors. The plea may in some cases be an indication of contrition, or of some other quality or attribute, which is regarded as relevant for sentencing purposes independently of the mere fact that the prrisoner has pleaded guilty. The extent to which leniency will be afforded upon this ground will depend to a large degree upon whether or not the plea resulted from the recognition of the inevitable: *Shannon (1979) 21 SASR 442 at 452*; *Ellis (1986 6 NSWLR 603 at 604*. The plea of guilty may also be taken into account as a factor in its own right independently of such contrition, as mitigation for the co-operation in saving the time and cost involved in a trial. Obviously enough, the extent to which leniency will be afforded upon this ground will depend to a large degree upon just when the plea of guilty was entered or indicated (and thus the savings effected): *Beaven (unreported, Court of Criminal Appeal, NSW,* Hunt, Badgery-Parker and Abadee JJ, 22 August 1991),

> at p.12.
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> The important point to be made is that leniency is afforded upon the second ground as a result of purely utilitarian considerations, as with the 'discount' allowed for assistance given to the authorities: *Cartwright (1989) 17 NSWLR 243; Gallagher (1991) 23 NSWLR 220; 53 A Crim R 248.* The leniency is afforded in order to encourage early pleas of guilty so that the criminal list is more expeditiously disposed of and so that other cases, in which there is a genuine issue to be determined, will be brought on for hearing without delay.
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> Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed. That does not mean that the sentencing judge should show a precisely quantified or quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown; that was the point of this Court's decision in *Beavan* at pp14-15. As was said in that case – discounts for assistance given to the authorities to one side – it is both unnecessary and often unwise for the judge to identify the sentence which he or she regards as appropriate to the particular case without reference to one factor and then to identify the allowance made which is thought to be appropriate to that particular factor."

[12] The appellant's guilty plea was clearly taken into account as a mitigating factor. The complaint relates to the weight that was given to the guilty plea by the learned Magistrate. After adjusting the sentence to reflect the aggravating factors, the learned Magistrate reduced the sentence by 9 months to reflect the mitigating factors that included the appellant's guilty plea. The appellant received approximately 27% reduction in sentence for her mitigating factors. Given her other mitigating factors, the percentage reduction for guilty plea would be around 13%.

[13] The learned Magistrate showed leniency to the appellant for not wasting court time and resources by pleading guilty. The sentencing remarks make no reference that the appellant was contrite. Therefore, the discount given for guilty plea was based on saving the court time and resources, and not for contrition.

[14] The appellant pleaded guilty on the third appearance in the Magistrates' Court. She then used the opportunity that was given to mitigate, to withdraw her guilty plea. Her application for withdrawal of guilty plea was refused. She maintained her appeal against conviction until her present counsel, Ms Vaniqi, appeared for her appeal. Given the appellant's stance, there is no evidence of contrition by her. The discount that was given for the guilty plea was in exercise of discretion by the learned Magistrate. No error has been shown in the exercise of that discretion. This ground of appeal fails.

[15] The third ground of appeal is that the learned Magistrate erred in law when she failed to refer to any legal authorities in her sentence to justify the sentence imposed on the appellant.

[16] I accept that the learned Magistrate did not refer to any earlier cases for guidance before

imposing the sentence on the appellant. In ***State v Miller & Ors*** *Criminal Appeal No. CAV0008/2009 (15 April 2011),* the Supreme Court observed at p 9:

> "Clearly too with the onerous demands placed on judicial officers by the Sentencing and Penalties Decree 2009 the judgment including discussion of similar cases within the range for the offence, and aspects of aggravating circumstances and mitigating circumstances, should be committed to writing also."

[17] The problem faced by the learned Magistrate was that the appellant was charged under the new Crimes Decree. The earlier cases related to an offence under the repealed Penal Code. The maximum penalty for the offence under the Penal Code was imprisonment for 12 months. Ms Vaniqi has brought to the attention of this Court cases that were considered under the Penal Code. The cases show that under the Penal Code the sentences ranged from suspended sentence to 12 months' imprisonment *(**Reaza v State** Crim. Appeal No. HAA 042/09; **Fazir v State** Crim. Appeal No. HAA 025 of 2008; **DPP v Hussein** Crim. Appeal No. 19 of 1978; **DPP v Prasad** Crim. Appeal No. 5 of 1978).*

[18] The learned Magistrate in her sentencing remarks highlighted the maximum penalty for the offence under the Crimes Decree. The learned Magistrate was not referred to any cases under the Crimes Decree for guidance by counsel appearing in the Magistrates' Court. Nor has there been any relevant cases referred to this Court. It appears that there has been no guideline case decided under the new Crimes Decree. In these circumstances, no error can be attributed to the learned Magistrate for not referring to any case authorities for guidance. This ground fails.

[19] The fourth ground of appeal is that the learned Magistrate erred in law and fact when she imposed a custodial sentence contrary to the objects of the Sentencing and Penalties Decree and where a suspended sentence and fine would have been more appropriate given the circumstances of the case.

[20] Neither under the common law, nor under the Sentencing and Penalties Decree, 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?

[21] Despite her youth and previous good character, the learned Magistrate considered general deterrence as the primary purpose of sentence that applied to the appellant. The appellant lied about being raped by her counsel and surety. It is this kind of conduct that perpetuates the myths about women being incredible when they complain of sexual assaults on them by men. For centuries, women have been discriminated against by rules and principles that were based on rape myths. Fortunately, the Crimes Decree has now effectively abolished all those rules and provides the victims of sexual assaults safeguards to report and seek justice.

[22] Clearly, the appellant's conduct of reporting false rape against her counsel required denunciation and deterrence. Her rehabilitation is a secondary purpose. A suspended sentence would not have achieved the primary purpose of sentence in this case. No error has been shown for not suspending the sentence. This ground fails.

[23] The fifth ground of appeal is that the learned Magistrate erred in law and fact when she took a starting point of 2 years for sentence as she should have started at the lower end of the scale given the circumstances of the case and where the maximum penalty under the Penal Code was 12 months' imprisonment. This ground is misconceived. The appellant was not charged under the Penal Code but under the Crimes Decree. The maximum penalty for the offence under the Crimes Decree is 5 years' imprisonment. The 2 years starting point fell in the lower end of the maximum sentence of 5 years' imprisonment that was available for this offence. This ground fails.

[24] The final ground of appeal is that the learned Magistrate erred in law and fact when she failed to properly take into account the mitigating factors provided by the appellant. This ground has merits.

[25] The appellant no doubt is a young offender. She has previous good character. She pleaded guilty to the charge. The combination of these factors makes her plea of mitigation compelling. Her sentence was reduced by 9 months for all her mitigating factors. The 9 months was offset with the aggravating factors identified by the learned Magistrate as follows:

> i) You have given false information to a police officer;
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> ii) The State has wasted considerable resources on the investigation that you instigated. Added to this was that you knowingly committed this action and you knew what it would result in.

[26] None of these aggravated the offence. Giving false information to a police officer were elements of the offence. The police are obliged by the law to investigate all crimes. The legal duty of the police to investigate crimes cannot aggravate an offence of giving false information. In any event, no evidence was led of the extent of investigation carried out by the police.

[28] The aggravating factors in this case were that the false information was directed towards her lawyer and that she committed an offence while on bail. The lawyer client relationship is of trust. She violated that trust when she falsely accused him of rape. In her affidavit, the appellant said she was upset about her lawyer going on holidays in Australia, while her case was pending. So she made out a false allegation of rape against her lawyer.

[29] On an objective seriousness of the offence, a starting point of 2 years is appropriate. I would add 12 months to reflect the aggravating factors and reduce 18 months to reflect the compelling mitigating factors. The final sentence is 18 months' imprisonment.

[30] For the reasons given, the appellant's sentence is reduced from 2 years to 18 months' imprisonment. The appeal against sentence succeeds to this extent.

Daniel Goundar
JUDGE

At Suva
24 April 2012

Solicitors:
Vaniqi Law for Appellant
Office of Director of Public Prosecutions for State