IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0019 OF 1994S
(High Court Criminal Case No. 6 of 1993)

BETWEEN

ALIVERETI NIMACERE — APPELLANT

and

THE STATE — RESPONDENT

Appellant in Person
Mr. Wilkinson for the Respondent

Date and Place of Hearing : 12th May, 1995, Suva
Date of Delivery of Judgment : 18th May, 1995

JUDGMENT OF THE COURT

On 11th August, 1994 the appellant was convicted on two counts of Act Intended to Prevent Arrest - contrary to Section 224(a) & (b) of the Penal Code,Cap. 17.

Count 1

> *"On the 28th day of August, 1992, at Suva in the Central Division, with intent to resist or prevent lawful arrest, struck Police Constable Number 986 Samuela Naitala with a knife, unlawfully causing the said Police Constable Number 986 Samuela Naitala grievous harm."*

Count 2

> *"On the 28th day of August, 1992, at Suva in the Central Division, with intent to resist or prevent lawful arrest, struck Police Constable Number 49 Albert King with a knife, unlawfully causing the said Police Constable Number 49 Albert King grievous harm."*

He was sentenced to five years imprisonment on each count, the terms to be served concurrently. He appeals against conviction

and sentence. Both constables gave evidence that in the early morning of the 28th of August, 1992 at approximately 5.30am they went to a house in Nairai Road looking for a suspect. At the back of the house there was a shed where three men and two women were talking. They were asked to come out of the shed. The last man out of the shed was the appellant.

The constables gave evidence that they recognised the appellant as being a person in respect of whom a bench warrant was out. Constable Samuela told the appellant that he was a police officer and that he was arresting him. He took hold of the appellant by the appellant's trousers. As he did so he said that the appellant stabbed him with a knife. He suffered a serious wound in the lower left arm pit and fell down. He was bleeding profusely. Constable King came to his assistance but Constable King was also stabbed he said by the accused with a knife. The accused then ran away. The police constables went to hospital for treatment and a Doctor gave evidence of their injuries which were consistent with being stabbed with a knife. He said that Constable Samuela's injuries were quite serious and Constable King had a cut on the back of his head from which blood had come on to Constable King's shirt. Constable Samuela's shirt was produced but Constable King's T. shirt was not. We see no significance in that.

Appellant was interviewed at the Raiwaqa Police Station on the 2nd of September 1992 and made a statement which was taken down in writing.

In that statement he admitted the offences and further admitted the offences when he was charged. Both of those statements were challenged by the appellant who said that he admitted the offences because he had been assaulted by the police and forced to admit them.

As a result a voir dire was held by the learned trial Judge who ruled that both statements were admissible. After a full

summing up by the learned trial Judge the assessors found the accused guilty on both counts. The Judge agreed with them. He convicted the appellant on each count. At the time appellant was serving a term of 8 years' imprisonment for robbery with violence. This sentence had been imposed on the 27th of May 1994.

Appellant was sentenced to five years imprisonment on each of the two counts, terms to be served concurrently but cumulative on the term of imprisonment he was currently serving.

Grounds of Appeal

The appellant put forward five grounds of appeal in writing and he elaborated on them at the invitation of the President when he came before us.

Ground 1

The appellant submitted that although both officers said that they were endeavouring to arrest him pursuant to a bench warrant, no bench warrant was produced at the trial.

A fundamental ingredient of the charge was that the arrest was or would have been lawful. If there was a bench warrant it would have been. It was not necessary for the officers to have the warrant in their possession when they tried to arrest the accused. They were not expecting to see him. It could however and should have been produced at the trial. On behalf of the Crown Mr Wilkinson said that he did not know why the bench warrant was not produced and accepted that it should have been if there was one. In its absence we can only hold that the proof of the existence of the warrant was not satisfactory. There must be a doubt about it. There was not even any evidence as to what the warrant was for

It may be that it could have been proved that an arrest was

justified (or lawful) by proof of matter justifying an arrest without warrant. If for example the officers suspected (on reasonable grounds) that appellant had committed a cognizable offence (S.21 of the Criminal Procedure Code). No such evidence however was given.

We are forced to the conclusion that although the arrest may have been lawful there was no proper proof that it was.

Grounds 2 and 3

These grounds referred to the question whether the officers were police officers and did identify themselves as such. They gave evidence that they did identify themselves. The court was justified in holding that that was the case.

Grounds 4 and 5 were based on the appellant's allegation that although he did punch one or more of the police officers he did not use a knife. He says he wanted to call a witness, a Mr Buadromo who he said was responsible for inflicting the knife wound on Constable Samuela. Mr Buadromo was said to be awaiting trial on a similar charge. In those circumstances the learned trial judge did not permit the accused to call Mr Buadromo since Mr Buadromo might thereby suffer prejudice in his own trial.

We cannot accept however, that the evidence of Mr Buadromo would have established that it was Mr Buadromo who stabbed Constable Samuela and not the appellant. The medical evidence was quite clear that the injuries suffered by Constable Samuela were such that he could not possibly had been going on another expedition to arrest someone else or even to interview somebody else, if he had already suffered the injuries that were seen by the medical officer. The injuries suffered by the appellant were such that he had a wound from which he was bleeding so freely that a tourniquet had to be applied and he lost consciousness. Furthermore if Mr Buadromo had stabbed Constable Samuela, that still would not explain the knife wound that Constable King

suffered. We can see no basis for the appellant's submission that there was evidence on which he could have been convicted of a mere assault by punching rather than stabbing with a knife as he admitted he did in the statement to the police.

The final ground of appeal was the submission that the sentence of ten years was excessive. It appears that the appellant did not understand that the terms of 5 years, on each charge would be served concurrently. He would serve only a total period of 5 years in relation to these charges. That period of 5 years however, was to be cumulative upon the term of 8 years that he was already serving.

We are of the view that the term of 5 years cumulative on the term he was already serving for armed robbery would not have been excessive for the charges in respect of which the maximum penalties were life imprisonment. Those charges however involved the prosecution establishing that the offences were committed to resist or prevent lawful arrest and we have found that there was insufficient proof that the arrest would have been lawful.

Section 169 of the Criminal Procedure Code Cap 21 however provides:-

> *"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
>
> *(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."*

Further S.24(2) of the Court of Appeal Act Cap 12 provides:

> *"(2) **Where the appellant has been convicted of an offence, and the judge could on the information have found him guilty of some other offence, and on the** findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."*

Here there is no doubt in our view that the assessors and the judge must have been satisfied that the appellant struck both constables with a knife and unlawfully caused grievous harm to each of them. He could therefore have been convicted of an offence under S.227 of the Penal Code which is as follows:-

> *"227. Any person who unlawfully and maliciously does grievous harm to another is guilty of a felony, and is liable to imprisonment for seven years, with or without corporal punishment."*

We therefore substitute for the verdicts of guilty under S.224 verdicts of guilty under S.227.

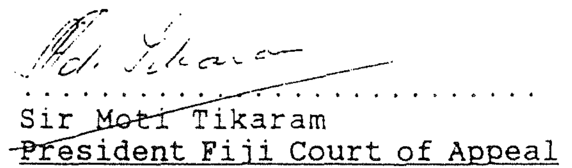
We are conscious of the fact that the maximum penalty under S.224 is life imprisonment. The term of 5 years even though it was cumulative on the term of 8 years being served was a very lenient sentence having regard to the serious nature of the offence and the accused's appalling record (approximately 50 offences going back to 1980 culminating in the term of 8 years he is serving).

The maximum penalty under S.227 however is 7 years. In recognition of this fact we reduce the term of imprisonment on each count to 4 years.

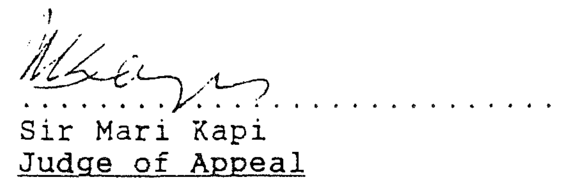
Orders

On each count :-

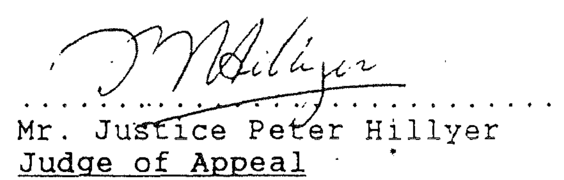
Appeal allowed, conviction under S.224 set aside, conviction under S.227 entered. Terms of imprisonment of 4 years imposed. Such terms to be concurrent but cumulative on the term of imprisonment he is already serving.



Sir Moti Tikaram
President Fiji Court of Appeal



Sir Mari Kapi
Judge of Appeal



Mr. Justice Peter Hillyer
Judge of Appeal