IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 37 OF 2020

BETWEEN	**:**	**KAMILO NACENO**
		APPELLANT
AND	**:**	**STATE**
		RESPONDENT
Counsel	**:**	Appellant in person
		Ms J Fatiaki for the State
Date of Hearing	**:**	**18 November 2020**
Date of Judgment	**:**	**19 November 2020**

JUDGMENT

[1] On 22 May 2018, the appellant was produced in the Magistrates' Court at Savusavu on the following charge:

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375(1) (a) (i) (iv) of the Crimes Act of 2009.

Particulars of Offence

KAMILO NACENO, on the 15th day of May 2018 at Karoko village in the Northern Division without lawful excuse and with intent to cause alarm to **MERE MARA** threatened the said **MERE MARA** by uttering the words "iko rere, qo au mission tiko mai meu mai vakamatei ira dau vakatevero tu ike" meaning" are you afraid, this is my mission to kill those who do witch craft".

[2] After numerous adjournments, the appellant pleaded guilty to the charge of his own free will. On 11 September 2020, he was sentenced to 8 months' imprisonment. This is an appeal against sentence only, but at the hearing, the appellant informed the court that he did not intend to plead guilty to the charge.

[3] The court records indicate that the appellant pleaded guilty freely and voluntarily. There is nothing in the court records to suggest that his guilty plea is ambiguous. The appellant is therefore barred from appealing his conviction by operation of section 247 of the Criminal Procedure Act, which reads:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.

[4] The appellant's right of appeal is limited to the appropriateness or legality of his sentence.

[5] The maximum penalty for criminal intimidation is 5 years imprisonment. An acceptable range is between 6 months and 2 years imprisonment. The learned magistrate took 7 months as a starting point. He increased the sentence by 8 months to reflect the aggravating factors and decreased the sentence by 7 months to reflect the mitigating factors.

[6] The aggravating factors considered by the learned magistrate were:

i) Domestic violence
ii) Armed with a chainsaw
iii) Threatened to kill.

[7] The learned magistrate considered the offence a domestic violence because the victim was the appellant's maternal aunt. However, the learned magistrate decided not to suspend the sentence for a different reason. The learned magistrate considered the

offence serious because the appellant 'threatened to kill the people of Karoko village with a chainsaw'.

[8] The appellant was charged with criminal intimidation contrary to section 375 (1) of the Crimes Act. The essential elements of this charge were that the appellant without lawful excuse threatened another person with the intention to cause alarm to that person. If the threat is to kill, then the offence is punishable by 10 years imprisonment pursuant to section 375 (2) of the Crimes Act. But the appellant was not charged with the serious offence. He was charged with a less serious form of criminal intimidation, that is, threatening a person with the intention to cause alarm to that person.

[9] In sentencing the appellant, the learned magistrate used the fact that he had intended to kill, firstly as an aggravating factor to enhance the sentence, and secondly, to justify not suspending the sentence. The appellant was virtually punished for a more serious offence, which he was not charged or convicted. There is an error of principle in the exercise of the sentencing discretion. As the High Court of Australia in the case of *De Simoni* [1981] HCA 31; (1981) 147 CLR 383 said at 389:

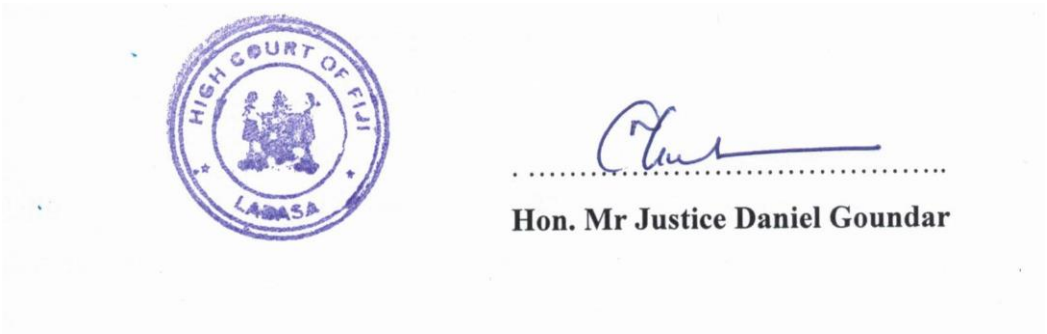
> ... the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted ... a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence. (per Gibbs CJ)

[10] The *De Simoni* principle was followed in *Vakalalabure v The State* [2006] FJSC 8; CAV0003U.2004S (15 June 2006), where the Supreme Court said at [55]:

> However it is a fundamental principle of our criminal law, inherited from England, that a person must not be punished except for offences for which he has been tried and convicted. It is a necessary corollary of this principle

that a convicted person must not be sentenced for uncharged offences or matters of aggravation.

[11] For these reasons, the appeal against sentence is allowed. The sentence imposed in the Magistrates' Court is set aside and substituted with a sentence of 6 months imprisonment. The appellant is a first time offender. He has already served two months in prison. I suspend his 6 months imprisonment for 2 years to give effect to the principle of rehabilitation.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Appellant in person

Office of the Director of Public Prosecutions for the State