

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAUOO82 OF 2007

BETWEEN : SAKIUSA BASA Appellant

AND : THE STATE Respondent

BEFORE THE HONOURABLE JUDGE OF APPEAL, MR JUSTICE
JOHN E. BYRNE

Counsel : Appellant - In Person
: Respondent - P. Bulamaivalu

Date of Hearing &
Ruling : 17th September 2007

R U L I N G

[1] This is an application for Leave to Appeal to the Court of Appeal from a Decision of Winter J., in the High Court on the 6th of August 2007, when he rejected an appeal by the Appellant from a decision of the Suva Magistrates' Court on the 18th of December 2006, in which the Court convicted the Appellant on a charge of **Criminal Intimidation** contrary to Section 330(a) of the Penal Code Cap. 17 and sentenced the Appellant to an 8 month consecutive term of imprisonment.

- [2] The one ground of appeal which the Appellant argued before me was based on Section 214 of the Criminal Procedure Code Cap. 21, which deals with the situation where in a trial, there is a variance between the charge and the evidence and the circumstances in which a charge may be amended. The Appellant alleges that both Winter J. and the Magistrates' Court failed to apply Section 214(a)(b) and sub-section 3 correctly.
- [3] The facts as found by the learned Magistrate were that, in the early morning of 23rd of October 2005 the Appellant was an escapee from Prison.
- [4] The Informant in the Magistrates' Court was a Police Constable Esala Matou who, with other police officers, pursued the Appellant and confronted him. It was alleged that the Appellant waved a screw driver at Constable Matou and other police officers and threatened personal injuries against them if they recaptured him.
- [5] On the 22nd of June 2006 the Appellant was interviewed in the Valelevu Police Station and was charged with the offence under Section 330 of the Penal Code.

- [6] The Charge Sheet said, as far as relevant, **“you are now charged under Section 330(a) of the Penal Code Act, that at about 3.50am on the 23rd day of October 2005 at Nadera, you with an intent to resist arrest unlawfully struck Police Constable Viliame Kuruleba with the screw driver”**. He was then given the usual caution and stated that he understood the charge and did not wish to make any other statement.
- [7] It was not until the 12th of July 2006 that the Appellant was charged with assaulting Police Constable 2526 Esala Matou. Constable Kuruleba gave evidence that the Appellant threatened himself and the other police with a screw driver and that Police Officer Matou assisted him to apprehend the Appellant.
- [8] The Appellant cross-examined Constable Kuruleba who said that the Appellant was holding the screw driver and swung it at him and tried to strike him with it.
- [9] The next prosecution witness was Constable Matou and he was also cross-examined by the Appellant. He said that the Appellant was holding and carrying a big screw driver and ran away from the Police; that the Appellant threatened him with the screw driver which he was holding and wielding. That was a threat to the Constable. He said that the Appellant was waving the screw driver around and he felt threatened by the Appellant.

[10] The learned Magistrate was satisfied that the charge had been proved and sentenced the Appellant to 8 months in prison because of the fact that at the time of the offence he was a prison escapee. Normally he said he would have sentenced him to 6 months.

[11] On his appeal, the Appellant submitted that he had always believed he had been charged with assaulting Constable Kuruleba and not Constable Matou and so was prejudiced when he was charged with assaulting Constable Matou. In that regard, said Mr Justice Winter, the Appellant had unfortunately overlooked his own cross-examination of Constable Matou parts of which I have just quoted. The Judge said that in his view that was clear evidence from Constable Matou that he was confronted by the Appellant in an intimidating manner and consequently rejected that ground of appeal. As to the sentence of 8 months, Winter J. said that a separate sentence of 18 months imprisonment for criminal intimidation in circumstances of this case was unremarkable and certainly could not be characterized as being manifestly excessive.

[12] In this Court the Appellant claimed that the Charge Sheet showed Constable Kuruleba as the victim and not Constable Matou. He said that because the Charge varied from the Charge Sheet the learned Magistrate should have amended the charge so as to allege the victim as being Constable Kuruleba.

The Appellant said that this prejudiced him because all along his attention had been focused on Constable Kuruleba and he was taken by surprise when the name of the victim was changed.

[13] At the beginning of the hearing in the Magistrates' Court the prosecution applied to amend the Charge by adding the letter "a" after the figure 330 (the section of the Penal Code). The Appellant did not object to this amendment, nor is there any record of him objecting to the change of the name of the victim.

[14] The Appellant claimed a misunderstanding as to the difference between the Charge Sheet and an actual Charge and I tried to impress on him that the Charge Sheet was not before the Magistrates' Court but, quite properly, only the Charge. I also pointed out to the Appellant that if the prosecution had wished, the Appellant could have been charged with assaulting both Constable Kuruleba and Constable Matou but it elected to name only Matou as the victim.

[15] Like Winter J., I am satisfied that the learned Magistrate committed no error under Section 214 of the Criminal Procedure Code. The only amendment made by consent at the hearing was the addition of the letter "a" to Section 330 of the Penal Code. I can see no flaw in the reasoning of Winter J., nor that of the learned Magistrate. I am satisfied the Appellant

was properly convicted and the sentence is appropriate in the circumstances.

[16] The application for Leave to Appeal is therefore refused.



A handwritten signature in cursive script, which appears to read "John E. Byrne". The signature is written over a horizontal dotted line.

[John E. Byrne]

JUDGE OF APPEAL

At Suva

17th September 2007