IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: 22 OF 2014

BETWEEN : **SIRELI LILO**

Appellant

AND : **STATE**

Respondent

Counsels : **The Appellant in person**
Mr. Aman Datt for the Respondent

Date of Hearing : **24 November 2014**
Date of Judgment : **11 December 2014**

JUDGMENT

1. The appellant was charged before the Lautoka Magistrate under following count:

FIRST COUNT
Statement of Offence
Assaulting Police officer in the due execution of his duty:- Contrary to section 247(b) of the Penal Code, Cap.17.

Particulars of the Offence
Sireli Lilo and Paula Namua on the 19th day of May 2009 at Lautoka in the Western Division, assaulted Police Constable Number 3830 Apenisa Ratukabu, in due execution of his duty.

2. The appellant pleaded not guilty and after trial he was convicted on 10.7.2014.

3. This appeal against the conviction was filed on 21.7.2014 within time.

4. The ground of appeal against the conviction are :

   (i) That the Guilty verdict is unreasonable and cannot be supported on the evidence adduced at Trial.
   (ii) That the charge was defective and could not support the evidence on trial and thus could not convict the appellant at all.

(iii) That appellant did not receive a fair trial by reason of the prosecution's failure in not amending the charge to throwing objects. Failure to do so resulted in a serious miscarriage of justice.
(iv) That appellant was denied a fair trial when his worship failed to have this matter determined within reasonable time.

5. Both parties have filed written submissions.

6. The appellant in his written submissions had taken up the position that he is appealing against the sentence as well. The points appellant had raised are:

   (i) that the sentence is harsh and excessive.
   (ii) that the time period spent in remand was not deducted.
   (iii) learned Magistrate should have suspended his sentence.

<u>Grounds against the conviction</u>

7. The prosecution has led the evidence of two police officers in the trail. PC 3830 Apenisa had stated that the appellant picked up a stone from in front of the prosecution office and he threw it to him and it landed on his both hands. A medical report was tendered marked EX.1. There are some scratch wounds on lower and upper limbs. PC 2902 Anaiasa had stated that he was told by Apenisa that prisoners escaped. He saw some injuries on Apenisa on his elbow. He was told prisoners threw stone at Apenisa.

8. The appellant had given evidence. He had denied throwing a stone while admitting that he escaped.

9. The learned Magistrate had correctly analyzed the evidence and decided that the prosecution had proved the charge. There is no error in the judgment of the learned Magistrate.

10. The main grounds of appeal in that the appellant should have been charged for throwing objects. The term assault is not defined in the Penal Code.

11. In **<u>Fagan v Metropolitan Police Commissioner</u>** [1968] 3 All ER 442 at 445 it was held by Justice James:

    'An assault is any act which intentionally –or possibly recklessly- causes another person to apprehend immediate and unlawful personal violence. Although "assault" is an independent crime and is to be treated as such, for practical purposes today "assault" is generally synonymous with the term "battery", and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case, the "assault" alleged involved a "battery". Where an assault involved a battery, it matters not, in our judgment, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand on another, and the action does nor cease

to be an assault if it is a stick held in the hand and not the hand itself which is laid on the person of the victim.'

12. Considering the facts of this case it was correct to charge the appellant for assaulting a police officer in the due execution of his duty. There is no merit in the grounds against the conviction and those fails.

Grounds against the sentence

13. The learned magistrate had correctly identified the maximum penalty as 5 years. Then learned Magistrate had followed the judgment of Hon. Mr. Justice Paul Madigan in **Lalagavesi v State** [2010] FJHC 386; HAA 17.2010 (8 September 2010) where a tariff of nine to twelve months was set for this offence.

14. The learned Magistrate picked 9 months as a starting point and added 3 months for the aggravating factors. No mitigation was submitted by the appellant and he was not a first offender. The learned Magistrate had given reasons why the sentence should not be suspended. There is no error in the sentence.

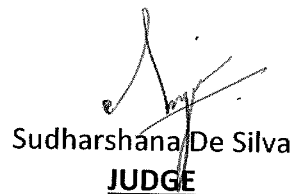
15. In ***Bae v State*** [1999] FJCA 21; AAU 0015u.98s (26 February 1999) the Court of Appeal held that:

    *"It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence. This error may be apparent form the reasons for sentence or it may be inferred from the length of the sentence itself. (**House v The King** [1936] HCA 40; (1936) 55 CLR 499)"*

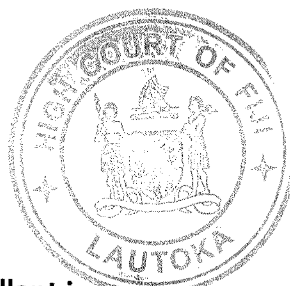
16. This Court called for a report from the Fiji Corrections Services to ascertain whether the appellant was in remand custody only for this case. According to the report dated 5.12.2014, the appellant was in remand custody prior to conviction for other cases.

17. There is no merit in the grounds against the sentence and those fails.

18. Appeal against the conviction and sentence is dismissed.



Sudharshana De Silva
JUDGE



At Lautoka
11th December 2014

Solicitors : Appellant in person
Office of the Director of Public Prosecutions for Respondent