IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: 23 OF 2014

BETWEEN: **HORACE PENJUELI**

Appellant

AND: **STATE**

Respondent

Counsels: **Mr. R. Kumar for the Appellant**
Ms. Juleen JM Fatiaki for the Respondent

Date of Hearing: **11th December, 2014**
Date of Judgment: **12th December, 2014**

JUDGMENT

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

FIRST COUNT
Statement of Offence

Criminal Intimidation:- Contrary to section 375 (1) (a) (i) (ii) (iv) of the Crimes Decree No.44 of 2009.

Particulars of the Offence

Horace Penjueli on the 20th day of February, 2009 at Lautoka in the Western Division without lawful excuse, threatened Margarat Eyre with physical injury to her person with a garden fork with intent to cause alarm to the said Margarat Eyre.

2. The appellant pleaded not guilty and after trial he was convicted on 2nd July 2014. He was sentenced on 3rd July 2014 for 19 months and 11 days imprisonment.

3. This appeal against the conviction and sentence was filed on 7.7.2014 within time.

4. The grounds of appeal against the conviction are :

(i) That bail was not granted, thus appellant's interest as an accused person was not greatly and fairly served as this would have allowed the appellant to assemble defence witnesses;

(ii) That the Appellant was not allowed a fair and just trial, in contravention to his constitutional rights.

5. The grounds against the sentence are:

(i) The sentence is harsh and excessive in all circumstances of the case;

(ii) The sentence should be invalid and unlawful as the prosecution easily proved beyond reasonable doubt without being faced with a stiff challenge to establish the appellant's innocence.

6. Both parties have filed written submissions. I have carefully considered those.

Grounds against the conviction

7. The appellant was represented in the trial by the Legal Aid Commission. The appellant's bail application was refused by the learned Magistrate on 14.3.2014. There was no appeal from that order or subsequent bail application. The appellant pleaded not guilty to the charge on 14.4.2014. The trial started on 28.5.2014. Prosecution had led evidence of the complainant. She is the appellant's aunt. The sister of the appellant also gave evidence for the prosecution. Both witnesses were cross examined by the counsel for the appellant. After prosecution case was closed, defence was called.

8. The appellant gave evidence on 2.6.2014. As his witness was not present that day, he was granted next day. The witness was absent on the following day. The defence counsel closed the case for the defence. There was no application from the defence for adjournment of the case to call that witness. Both parties have field written submissions. The judgment was delivered on 2.7.2014.

9. The appellant had failed to satisfy this Court that he was denied his rights during the trail. The appellant was represented by the Legal Aid Commission. There is no merit in the two grounds against the conviction and those fails.

Grounds against the sentence

10. The learned Magistrate had correctly identified the maximum penalty as 5 years. The learned Magistrate had followed the judgment of Hon. Mr. Justice S. Temo in **State v Baleinabodua** [2012] FJHC 981; HAC145.2010 (21 March 2012) where a tariff of 12 months to 4 years imprisonment was set for this offence.

> *'[7] "Criminal Intimidation" is a serious offence, and it carries a maximum sentence of 10 years imprisonment, if the threat was intended to cause grievous hurt. The parties submitted no authorities on the tariff for this*

offence, but in my view, an acceptable tariff would be a sentence between 12 months and 4 years imprisonment. Serious cases should be given the sentence in the upper range, while less serious cases should be given sentences at the lower end of the scale'.

11. The learned Magistrate picked 24 months as a starting point and added 6 months for the aggravating factors. Six months were deducted or the mitigation. The time period in remand (4 months and 19 days) was deducted and the final sentence was 19 months and 11 days. The appellant 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.

12. 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 from 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)".*

13. This sentence is within the tariff and there is no error in the sentence. The sentence is not harsh and excessive in the given circumstances of the case. The appellant failed to satisfy this Court that there is any error in the sentence which warrants this Court's intervention.

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

15. Appeal against the conviction and sentence is dismissed.

HIGH COURT OF FIJI

Sudharshana De Silva
JUDGE

At Lautoka
12th December 2014

Solicitors: **Legal Aid Commission for the Appellant**
Office of the Director of Public Prosecutions for Respondent