IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

ISAIA BOBO

Appellant

CASE NO: HAA. 012 of 2017
[MC Suva, Crim. Case No. 0037 of 2015]

Vs.

STATE

Respondent

Counsel	:	Ms. L. David for Appellant
		Mr. E. Samisoni for Respondent
Date of Hearing	:	25th July, 2017
Date of Judgment	:	29th September, 2017

JUDGMENT

1. The appellant was convicted of the following offences by the magistrate court after trial on 30/11/2016;

FIRST COUNT

Statement of Offence

ESCAPE FROM LAWFUL CUSTODY: contrary to section 196 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ISAIA BOBO, on the 18th day of December, 2014 at Suva in the Central Division, being in the lawful custody of Special Police Corporal Number 1157 Lepani Toga, escaped from such custody.

SECOND COUNT

Statement of Offence

RESISTING ARREST: contrary to section 277 (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ISAIA BOBO, on the 6th day of January, 2015 at Nukulau Village in the Western Division, after being lawfully arrested by Detective Constable Number 3821 Silio, in due execution of his duty, resisted the said arrest.

2. On 05/12/16, the Learned Magistrate sentenced the appellant for a term of 8 months imprisonment on each count. It appears that the Learned Magistrate had ordered the two sentences to be served consecutively.

3. Being aggrieved by the judgment and the sentence, the appellant assails the conviction and the sentence based on the following grounds;

    1. *The learned trial magistrate erred in fact in his judgment holding that the offence of Escaping from Lawful Custody occurred on the 18th of December 2014 when in evidence adduced by PW1 and PW2 states otherwise.*
    2. *The learned trial magistrate in the second count, erred in law when he failed to consider that the element of arrest had not been met. Thus, it was not safe to entre a conviction on the second count.*
    3. *The learned trial magistrate failed to properly consider section 22 of the Sentencing and Penalties Act 2009 when passing sentence with respect to the second count.*
    4. *The starting point of 8 months for both the first and the second count was harsh and excessive.*

4. According to the prosecution, on 18/12/14 when the appellant was being taken back to the cell block in the government buildings after he was produced for a case in the Suva High Court the appellant had requested for him to be allowed to use the washroom and the escorting officer had allowed this. While the escorting officer was waiting for the appellant outside the toilets, the appellant had run away. Then on 06/01/15, a police team had surrounded the house where the appellant was staying and the appellant had jumped out of a window at the back of the house and had run away. The police team managed to arrest the appellant

after giving chase to him.

Appeal against the conviction

5. The first ground against the conviction is that the Learned Magistrate erred by convicting the appellant for the first count where the time of offence in the first count is 18/12/14, when the evidence of the first two prosecution witnesses was that the incident took place on 18/12/16.

6. I do note that the date 18/12/16 in the evidence of PW1 and PW2 in the certified copies of the court record. However, according to the original court record, the two witnesses have mentioned the date 18/12/14. Moreover, as pointed out by the counsel for the respondent, the evidence of the first and second prosecution witnesses were recorded on 15/09/16. Therefore it is obvious that the appellant has raised this ground of appeal based on a mere typographical error.

7. The first ground of appeal is therefore frivolous.

8. On the second ground of appeal against conviction, the appellant submits that the conviction on the second count is not safe due to the fact that the Learned Magistrate failed to consider that 'the element of 'arrest' had not been met'.

9. The particulars of the second count states that *"after being lawfully arrested by Detective Constable Number 3821 Silio, in due execution of his duty, resisted the said arrest"*. The evidence adduced before the Learned Magistrate only reveals that the appellant had run away when the police surrounded the house he was in and he was arrested after a police chase. I cannot find any evidence that the appellant resisted after he was arrested. Therefore, there is a significant variance between the evidence adduced on the second count and the relevant particulars of offence.

10. The section the appellant was charged on the second count is section 277(b) of the Crimes Decree (now Crimes Act). Section 277 of the Crimes Act is as follows;

Serious assaults

277. A person commits a summary offence if he or she –

(a) assaults any person with intent to commit an indictable offence, or to resist or prevent the lawful apprehension or detention of himself, herself or of any other person for any offence; or

(b) assaults, resists or wilfully obstructs any police officer in the due execution of his or her duty, or any person acting in aid of such an officer; or

(c) assaults any person in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or respecting any trade, business or manufacture or respecting any person concerned or employed by it; or

(d) assaults, resists or obstructs any person –

(i) engaged in lawful execution of court process; or in

(ii) making a lawful distress, with intent to rescue any property lawfully taken under such distress; or

(e) assaults any person on account of any act done by him or her in the execution of any duty imposed by law.

Penalty - Imprisonment for 5 years.

11. It is pertinent to note that the short title of section 277 of the Crimes Act is "serious assault". Subsection (b) of the said section under which the appellant was charged with reads *"assaults, resists or willfully obstructs . . . "*.

12. In my view, given the construction of section 277(b) of the Crimes Act, the mere act of running away from the police where no force is used against a police officer cannot be construed as 'resisting' under that section. The situation would be different if there was any form of force used against a police officer before running away (e.g. using force to free oneself after a police officer had made physical contact) or during the chase (e.g. throwing items at a police officer who is giving chase).

13. All in all, I find that the evidence adduced on the second count does not establish the offence under section 277(b) of the Crimes Act.

14. Though the second ground of appeal is misconceived as it identifies 'arrest' as an element of the offence under section 277(b) of the Crimes Act where it is not an element of that offence, the conviction on the second count is bad in law for the reason that the relevant evidence does not support the elements of the offence under section 277(b) of the Crimes Act. Therefore, the conviction and the ensuing sentence on the second count should be quashed.

Appeal against the sentence

15. The issue raised on the first ground of appeal against the sentence is based on the sentence for the second count. As I have decided to quash the conviction and the sentence on the second count, it is no longer necessary to consider this ground.

16. On the second ground of appeal against the sentence the appellant submits that the starting point of the sentence selected by the Learned Magistrate for both counts is harsh and excessive. For the same reason given above, I will not deal with the sentence on the second count.

17. In determining the appropriate sentence for the first count, the Learned Magistrate had referred to the case of ***Tuibua v State*** [2008] FJCA 77; AAU0116.2007S (7 November 2008) and had applied the tariff of 6 to 12 months imprisonment. Then he selected an imprisonment term of 8 months as the starting point.

18. As the appellant points out, no reason can be deduced upon reading the sentence as to the reason the Learned Magistrate decided to select 8 months as the starting point of the sentence where the tariff is 6 to 12 months imprisonment.

19. However, in the case of ***Koroivuki v State*** [AAU 0018 of 2010] it was held thus;

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff".

20. Therefore, the Learned Magistrate has not acted upon a wrong principle when he selected 8 months as the starting point because the said starting point was picked from the middle range of the applicable tariff.

21. On the other hand, as the Supreme Court held in the case of ***Koroicakau v The State*** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) an appeal court cannot be expected to review each step in the reasoning process. The main focus of the appellate court should be on the final sentence. In the said case, the court said;

> *"Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence."*

22. The Learned Magistrate, after selecting the 8 months starting point had stated that there are no aggravating factors; and also that there are no mitigating factors which deserves granting any discount. Accordingly, the 8 months he selected as the starting point became the final sentence.

23. I find that the imprisonment term of 8 months is proportional to the offending in relation to the first count where, the appellant escaped from the custody of the escorting officer on his way to the cell block from the court house and the manner in which he deceived the said escorting officer in order for him to escape. Therefore, though I am inclined to agree with the appellant that 8 months on the face of it, is a relatively harsh starting point, the final sentence the Learned Magistrate arrived at is neither harsh nor excessive.

24. In the light of the above, I would dismiss the appeal against the sentence.

Orders of the court;

a) The conviction and the sentence on the second count is quashed; and

b) The conviction and the sentence on the first count affirmed.

Vinsent S. Perera
JUDGE

Solicitor for the Appellant : Legal Aid Commission, Suva.
Solicitors for the State : Office of the Director of Public Prosecutions, Suva.