

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA003/2018
(Magistrates' Court Case No. 1760/ 2017)

BETWEEN: ILAITIA TUWERE

APPELLANT

AND: THE STATE

RESPONDENT

Counsel: Appellant in Person
Mr E. Samisoni for the Respondent

Date of Hearing: 13 February 2018

Date of Judgment: 16 February 2018

JUDGMENT

- [1] This is a timely appeal against both conviction and sentence.
- [2] On 8 December 2017, the appellant was charged with one count each of drunk and disorderly (count 1), resisting arrest (count 2) and disorderly conduct in the police station (count 3). On 13 December 2017, the appellant waived his right to counsel and pleaded guilty to the charges in the Magistrates' Court.
- [3] On 14 December 2017, the appellant was convicted and sentenced to 1 month imprisonment for drunk and disorderly, 4 months' imprisonment for resisting arrest and 1 month imprisonment for disorderly conduct in the police station, to be served concurrently. The total effective sentence was 4 months' imprisonment.
- [4] The facts were that on 6 December 2017, the police received a report of unruly behavior by some men at Rodwell Road, Suva. When the police arrived at the scene, they saw the appellant and two other men staggering and swearing along the road. The men were drunk. When a police officer approached the appellant, he challenged the officer for a fight. The appellant pushed the officer away when he tried to arrest him. The appellant was arrested and brought to the Market Police Post. He continued

with his unruly behavior at the station and swore at the police officers using vulgar language.

- [5] The appeal is against the conviction and sentence for resisting arrest only. The appellant contends that his conviction for resisting arrest is unlawful because he was not cautioned and charged with that offence by police. This argument is wholly misconceived. The appellant may not have been cautioned and charged with resisting arrest at the police station, but when the charge sheet was filed in the Magistrates' Court, it contained the offence of resisting arrest contrary to section 277(b) of the Crime Act 2009.
- [6] The appellant voluntarily and freely pleaded guilty to the resisting arrest charge. The admitted facts supported the charge of resisting arrest. The guilty plea was unambiguous and the appellant was properly convicted of resisting arrest. Conviction for resisting arrest is affirmed.
- [7] The appellant's complaint against sentence is that the learned magistrate sentenced him for resisting arrest on the basis that he had assaulted the arresting police officer in due execution of his lawful duties. In sentencing the appellant for resisting arrest, the learned magistrate referred to the case of *State v Batiratu* [2012] FJHC 864; HAR001.2012 and adopted the following passage from that judgment:

Assault on a police officer is listed under section 277 – headed “Serious Assaults”. Serious assaults under this section attract a maximum sentence of 5 years imprisonment. These offences under section 277 are to provide protection for those persons with specific duties to perform, such as to arrest a suspect, or for a police officer to carry out his or her duty, or for anyone aiding a police officer in that regard, and they cover assaults committed during unlawful combinations to raise wages or respecting trade, business or manufacturing matters, or assaults against court process servers, those executing lawful distress, or assaults on persons carrying out duties imposed on them by law.

- [8] After imposing a term of 4 months' imprisonment for resisting arrest, the learned magistrate said at [19]:

- [9] In *Batirani*, the offender punched a police officer in the face, causing tenderness and slight swelling below the eye. The offender was charged and convicted of assault on a police officer in due execution of his duties. On a review, the High Court sentenced the offender to 4 months' imprisonment for assaulting the officer in due execution of his lawful duties.
- [10] In the present case, the appellant was not charged or convicted of assault on a police officer in due execution of his lawful duties. The appellant was charged and convicted of resisting arrest. But the learned magistrate sentenced the appellant for assaulting a police officer in due execution of his lawful duties. It is an error of principle to punish a person for an offence that he was not charged or convicted. As the High Court of Australia said in *Queen v De Simoni* (1981) 147 CLR 383, 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, which he has not been convicted...

- [11] The error made by the learned magistrate vitiated the sentencing discretion. The appellant should have been punished for the offence of resisting arrest. Resisting arrest is a serious offence but in sentencing the offender the courts are obliged strike a balance between the seriousness of the offence and the seriousness of the actual conduct of the offender (*O'Keefe v State* [2007] FJCA 34; AAU0029,2007 (25 June 2007)).
- [12] The appellant offered minimum resistance during his arrest. He pushed the officer during arrest. A term of 3 months' imprisonment for resisting arrest reflects both the seriousness of the offence and the seriousness of the appellant's actual conduct. For these reasons, the appeal against sentence succeeds.

Orders of the Court:

1. Appeal against conviction dismissed.
2. Appeal against sentence for resisting arrest allowed.

2. Appeal against sentence for resisting arrest allowed.
3. The sentence imposed in the Magistrates' Court for resisting arrest is set aside and substituted with a sentence of 3 months' imprisonment, to be served concurrently effective from 14 December 2017.



A handwritten signature in black ink, appearing to read "Daniel Goundar".

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Hon. Mr. Justice Daniel Goundar

Solicitors

Appellant in Person

Director of Public Prosecutions for the Respondent