IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 393 of 2018

STATE

vs.

1. **TEVITA LESIVOU**
2. **TEVITA BOLA**

Counsel: Ms. S. Tivao for the State
1st Accused In Person
2nd Accused In Person

Date of Ruling: 31st July 2019

RULING

(On Joinder of Charges)

Introduction

1. The first and the second accused have been charged with one count of Attempted Aggravated Robbery, contrary to Sections 44 and 311 (1) (a) of the Crimes Act. Apart from that, the first accused has also been charged with one count of Serious Assault, contrary to Section 277 (b) of the Crimes Act. The particulars of the offences are that:

COUNT ONE

Statement of Offence

ATTEMPTED AGGRAVATED ROBBERY: *Contrary to Sections 44 and 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

TEVITA LESIVOU *and* ***TEVITA BOLA*** *on the 13th day of October 2018, at Suva in the Central Division, in the company of each other, attempted to rob* ***HITESH LAL*** *of his wallet and mobile phone, the properties of* ***HITESH LAL.***

COUNT TWO

Statement of Offence

SERIOUS ASSAULT: *Contrary to Section 277 (b) of the Crimes Act 2009.*

Particulars of Offence

TEVITA LESIVOU *on the 13th day of October 2018, at Suva in the Central Division, assaulted* ***POLICE CONSTABLE 3646 SHIRIDATH PRASAD*** *by punching* ***POLICE CONSTABLE 3646 SHIRIDATH PRASAD*** *in due execution of his duty.*

2. The hearing commenced on the 29th of July 2019. The prosecution called the complainant to give evidence. Subsequent to the evidence of the complainant, the court directed to the prosecution to address the issue on whether the joinder of these two offences against the first accused is correct in law pursuant to Section 59 (1) (a) and (b) of the Criminal Procedure Act. The learned counsel for the prosecution then made an oral submission and also tendered a written submissions stating the position of the prosecution. The first accused is appearing in person, hence, he did not make any submissions on this issue. Having carefully taken into consideration the oral and written submissions of the prosecution, I now proceed to pronounce my ruling as follows.

Background

3. The prosecution alleges in the information that the first and second accused have attempted to rob the complainant on the 13th of October 2018. When they were trying to rob the complainant, the police vehicle came and arrested the first and second accused. They were

then escorted to the police station. While at the police station, the first accused had assaulted one of the police officers when the police officer tried to escort the first accused to the cell block.

The Law

4. Section 59 of the Criminal Procedure Act states that:

i) Any Person may be charged together in the same charge or information if the offences charges are:

a) Founded on the same facts or form; or
b) are part of a series of offences of the same or a similar nature,

ii) Where more than one offence is charge in a charge or information, a description of each offence shall be set out in a separate paragraph of the charge or information, and each paragraph shall be called a count.

iii) Where, before trial or ay any state of a trial, the court is of opinion that-

a) an accused person may be prejudiced in his or her defence by reason of being charged with more than one offence in the same charge or information; or
b) for any other reason it is desirable to direct that the person be tried separately for any one or more offence charged in a charge or information-
the court may order a separate trial of any count or counts in the charge or information.

5. Section 59 (1) generally provides an authorization for the joinder of charges. Section 59 (1) (a) and (b) provide the grounds on which the offences are allowed to be joined. In order to

join offences in one information, they must be either founded on same facts or form, or part of a series of offences of the same or a similar nature. Moreover, Section 59 (3) has stipulated the safeguard for the accused person. Even though the charges are properly joined pursuant to Section 59 (1) (a) and (b), the court has a discretionary power to order a separate trial if the court finds that the joint trial might either prejudice or embarrass the accused in his defence, or any other desirable reasons for doing such.

Same Facts or Form

6. The learned counsel for the prosecution submitted during the course of the hearing, that the two offences have been joined pursuant to Section 59 (1) (a) of the Criminal Procedure Act, that is on the ground that the two offences are founded on the same facts or form.

7. Having carefully taken into consideration the section 40 of the Criminal Justice Act of UK, Rule 9 of the Indictment Rules 1971 of UK and Rule 10.2 of the Criminal Procedure Rules 2015 of UK, I find the laws pertaining to joinder of offences in England is also based upon the similar principles that the Section 59 of the Criminal Procedure Act is founded on. Hence, I find the interpretations and judicial precedents in England in relation to joinder of charges have a persuasive relevancy in determining the propriety of the joinder of charges under Section 59 of the Criminal Procedure Act.

8. The Court of Appeal of England in **Victor Sidney Barrel and Allen Henry Wilson (1979) 69 Cr App R 250,** has discussed the scope of the "same facts or form". In Barrel (supra) the appellant and two others were charged with one count of affray and one count of assault causing actual bodily harm. The appellant was charged alone with another count of attempting pervert the course of justice. The factual background of the case are that; the Appellant and two others had gone to a discotheque. The manager of the discotheque had refused their entry. The appellant and two other then become aggressive and assaulted the manager and one of the attendants at the discotheque. For this incident, the three of them were charged for affray and assault causing actual bodily harm. Two months later, the appellant had visited the manager of the discotheque and tried to induce the manager to

modify his evidence in favour of the appellant by offering money. For this subsequent incident, the appellant was charged with the offence of attempted to pervert the course of justice. Three of them were subsequently convicted and sentenced. The appellant argued that the third count was not founded on the same facts or form, hence, the joinder of the third count with first two counts was wrong. The Court of Appeal of England found it otherwise and held that the third count was founded on the same facts and form. Shaw LJ, in his judgment outlined the scope of the "same facts and form" where his Lordship held that:

> *"The phrase "founded on the same facts" does not mean that for charges to be properly joined in the same indictment, the facts in relation to the respective charges must be identical in substance or virtually contemporaneous. The test is whether the charges have a common factual origin. If the charges described by counsel as the subsidiary charge is one that could not have been alleged but for the facts which give raise to what he called the primary charge, then it is true to say for the purposes of rule 9 that those charges are founded, that is to say have their origin, in the same facts and can legitimately be joined in the same indictment."*

9. Accordingly, the Court needs to determine whether the offences that the prosecution intends to join have a common factual origin. The common or the same fact has to be the facts of the offences and not any other facts. In **Barrel (supra)** the appellant approached the manager of the discotheque because of the other two charges. Therefore, the existence of the first two offences was a precondition to the subsequent action of the appellant in approaching the manager. The appellant approached the manager because of the existence of first two offences.

10. Accordingly, the Court needs to determine whether the first accused allegedly assaulted the police officer because of the alleged incident of attempted aggravated robbery. The learned counsel for the prosecution submitted that the first accused allegedly committed this crime following his arrest in relation to the attempted aggravated robbery.

11. It is clear that the first accused has allegedly assaulted the police officer after he was arrested. The arrest of the first accused is not a fact of the offence of attempted aggravated robbery. It is a consequential result of the alleged incident of attempted aggravated robbery. The first accused could have assaulted the police officer even he was arrested for another incident. The assault of the police officer is a resultant consequence of the arrest and not the alleged incident of attempted aggravated robbery. In **Barrel (supra)** the appellant approached the manager because manager was one of the victims in the first and second counts. The evidence of the manager was materially important. The appellant would not have approached the manager if the first two counts were not existed. Therefore, I find the facts in this matter, with which this court is dealing with now, is distinguished from the facts of **Barrel (supra)**.

12. The Court of Appeal of England in **R v Lewis (95) Cr App R 131, CA** found that the offence of common assault, which was founded on the allegation that the appellant had assaulted the police officer while he was in the custody of the police, was not founded on the same facts with other offences of threat to kill of his former girlfriend and her partner, threat to destroy property, damaging property, and found in possession of offensive weapons. In **Lewis (supra)** the appellant was arrested upon the allegation that he had threatened his former girlfriend and her partner that he would kill them and destroy and damage their house and property. He was then escorted to the police station. When he was taken to the cell in the police station, he had demanded the presence of a certain police officer, who was not available at that time. The appellant had then spat at the police officer who was escorting the appellant to the cell and also attempted to punch him. There was a struggle between the appellant and the police officer. Two other officers also got involved into the struggle and received minor injuries.

13. Farquharson LJ in his judgment in **Lewis (supra)** found that the common assault was not founded on the same facts of the other counts. Farquharson LJ held that:

> *"It will be recalled that the other indictable offences all related to the besetting of Miss James's house with the accompanying threats made by the appellant.*

Further, the criminal damage offences related to what had taken place in the immediately outside her house and finally, the possession of the offensive weapon was again in the street at the time of his arrest. The common assault, as we have described, only occurred, and it was of a somewhat unusual nature, after arrest and the appellant had been taken to the police station.

Accordingly, in considering those facts, can it be said that the charge of common assault is founded on the same facts or evidence as count charging an indictable offence? Quite mainly it could not, because the facts or evidence relating to the common assault all derives from what had occurred in the police station."

14. Accordingly, it is my considered opinion that the offence of attempted aggravated robbery and the offence of serious assault are not founded on the same facts or form. Hence, these two offences cannot be joined in one information pursuant to Section 59 (1) (a) of the Criminal Procedure Act.

Offences of Same or Similar Nature

15. I now take my attention to determine whether these two offences are part of a series of offences of the same or a similar nature.

16. Lord Widgery LJ in **R v Kray and Others (1969) 3 All ER 941 at 944** has given a comprehensive definition for offences of similar character, where his Lordship found that:

"Offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other, but it is clear that the rule is

not restricted to such cases. Thus in R v Clayton - Wright the accused was convicted on four counts, namely, arson of a vessel; arson of the same vessel with intent to prejudice the insurers; attempting to obtain money be false pretence from those insurers in respect of a policy on the vessel; and attempting to obtain money by false pretence from insurers by falsely pretending that a mink coat had been stolen from his motor car. On appeal it was unsuccessfully contended that the fourth count was improperly joined. Lord Goddard CJ said (1948) 2 ALL ER at p 765);

"One test which the learned judge applied was to consider whether or not the evidence with regard to the mink coat could be given in evidence on the other charges. He came to the conclusion that it could, and, in the opinion of the court, he came to a right conclusion...That was one ground, but the main ground on which the court holds that there was no misjoinder is the following. The charge contained in the first three counts... in substance was the appellant fired the yacht with the idea of swindling underwriters. The charge with regard to the mink coat was a similar charge of swindling underwriters, and therefore, one gets what I may call the nexus of insurance, the nexus of fraudulent act to the prejudice of the underwriters...."

17. In view of the findings of Lord Widgery in **Kray (supra),** the existence of a sufficient nexus between the offences is the main component that need to be taken into consideration in order to determine the offences of similar character. However, the admissibility of evidence of one offence on the trial of other offence is not necessarily the only factor that determines the nexus between the offences.

18. Lord Pearson in **Ludlow v Metropolitan Police Commissioner (1970) 1 ALL ER 567** held that both law and the facts have to be taken into account in deciding whether offences are similar or dissimilar in character. His Lordship went further and defined the nexus between the offences as that:

"Nexus is a feature of similarity which in all the circumstances of the case enable the offences to be described as a series."

19. Lord Clarke in **R v Ferrell (2010) UKPC 20),** having referred to the passage of 'Archbold' 2010 edition, held that:

"The principles are now set out in the 2010 edition, which includes the following at para 1-158;

A sufficient nexus must nevertheless exist between the relevant offence, such a nexus is clearly established if evidence of one offence would be admissible on the trial of other; but the rule is not confined to such cases; all that is necessary to satisfy the rule is that the offence should exhibit such similar features as to establish a prima facie case that they could properly and conveniently be tried together in the interests of justice, which include, in addition to the interest of the defendants, those of the crown, witnesses and the public."

20. Accordingly, it appears that the applicable approach in ascertaining the existence of sufficient nexus between the offences is to determine whether the offences constitute of similar features that could establish a *prima facie* case and could properly and conveniently be tried together in the interest of justice.

21. In this matter the two offences are founded on two different legal and factual circumstances. Both counts are based upon different sets of evidence. The place and the time of first offence is remote to the place and time of the second count. First offence was allegedly took place at a public road and away from the police station.

22. Farquharson LJ in his judgment in **Lewis (supra)** further found the offence of common assault that took place in the police station was not a part of series of offences of the similar nature, where his Lordship held that:

> *"Is the charge part of a series of offences of the same or similar character as an indictable offence which is also charged? It is very difficult to see how the offence of common assault can be said to be one of a serious offences of the same or similar character when the others are of threats to kill, threats to damage property, criminal damage and the possession of an offensive weapons."*

23. In **R v Braden (87 Cr App R 289),** the Appellant had damaged two motor vehicles while he was trying to extricate his car from the position in which it was parked between two other vehicles. He was arrested and taken into the police station and put into the cell. While he was detained in the cell, he had damaged the plaster surrounding the door frame of the cell. He was charged with three counts of criminal damage. Russel LJ in his judgment found the joinder of the third count which was founded on the allegation of damaging the cell door at the police station with two other counts were wrong as the third count is not a part of a series of the same or similar character. Russel LJ held that:

> *"In this instant case, so far as time is concerned there was a laps of an hour, and so far as place is concerned, the two first offences in the highway were remote from the police station cell where the third offence was alleged to have been committed."*

24. In view of the reasons discussed above, I find the first count of attempted aggravated robbery and the second count of serious assault are not offences of the same or a similar nature. Hence, these two offences cannot be joined in one information pursuant to Section 59 (1) (b) of the Criminal Procedure Act.

25. Having found these two counts cannot be joined in one information pursuant to Section 59 (1) (a) and (b) of the Criminal Procedure Act, I now find this information is defective pursuant to Section 214 (1) of the Criminal Procedure Act. With that conclusion, I now draw my attention to determine what would be the appropriate order that this court could make in this matter.

26. The court is only allowed to make an order for a separate trial pursuant to Section 59 (3) of the Criminal Procedure Act, if the joinder of charges were done in accordance with Section 59 (1) (a) and (b) of the Criminal Procedure Act. Since the joinder of these two charges is defective pursuant to Section 59 (1) (a) and (b) of the Criminal Procedure Act, the court has no jurisdiction to make an order for separate trials pursuant to Section 59 (3) of the Criminal Procedure Act.

27. Therefore, I make an order against the prosecution pursuant to Section 214 (2) of the Criminal Procedure Act to amend the information.

R.D.R.T. Rajasinghe
Judge

At Suva
31st July 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
1st Accused In Person.
2nd Accused In Person.