IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Labasa Criminal Appeal No.5 of 1978

000127

LEPOLO MACANAWAI — Appellant

v.

REGINAM — Respondent

Appellant in Person
Mr. Jennings for Respondent

JUDGMENT

The appellant was on his own plea of guilt convicted in the Savusavu Magistrate's Court on a charge of burglary contrary to Section 332(a) of the Penal Code and was sentenced to 3 years' imprisonment.

The appellant who appeared in person appeals against his sentence on the ground that it is harsh and excessive.

At the hearing of the appeal counsel for the respondent expressed concern about the charge and subsequent conviction of the appellant on the said charge. Counsel conceded that on the facts of the case the more appropriate charge would appear to be one of assault occasioning actual bodily harm.

The basic facts on which the conviction was entered appear to be these. The appellant is the brother of complainant's husband. Complainant and husband live together in a dwelling-house in the village of Tacilevu at Nasavusavu. In the early morning of 12th November, 1977 the appellant went and entered his brother's house which at the time was unlocked and there forreasons best known to him assaulted the complainant causing her injuries. The injuries were however not serious.

An essential ingredient of the crime of burglary is that there should be a breaking, whether constructive or actual. Such ingredient was obviously lacking in

this case. The dwelling-house in question was not only unlocked which rendered a breaking therein legally impossible but also according to the appellant he had gone to his brother's house to find a place to sleep. This is a common enough occurrence in a Fijian village where everybody appears to be related in one degree of kinship or another.

In these circumstances I am satisfied that the charge of burglary which was preferred against the appellant was misconceived and the conviction thereon cannot be sustained.

The question then arises whether on the facts disclosed a conviction for assault occasioning actual bodily harm might not be substituted. The Court has power to substitute a conviction for a lesser or minor offence to that originally charged. The test however is whether the designated lesser offence is similar in character as the original charge, that is to say, whether the basic ingredients of the two offences are more or less the same. Clearly burglary and assault are inherently quite different offences in that the ingredients which constitute each offence are independent of each other. In my opinion therefore and in this counsel for the respondent is in agreement assault occasioning actual bodily harm cannot properly be treated as a lesser offence to burglary. Accordingly, I am satisfied that this Court has no jurisdiction to substitute a conviction for assault against the appellant in the particular circumstances of this case.

It seems therefore I have no alternative but to set aside and quash the appellant's conviction and sentence which I hereby order.

(Sgd.) T.U. Tuivaga
JUDGE

Labasa
16th March, 1978