HERBERT WISE v STATE (HAA0117 of 2005)

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

4 November 2005

Criminal law — sentencing — Appellant convicted of resisting arrest, assaulting police officer, damaging property, throwing an object and possession of dangerous drugs — appeal against conviction and sentence — whether court erred in revoking bail — whether judicial mishandling of case — no reason to quash conviction — sentence not harsh or excessive — appeal dismissed — Dangerous Drugs Act 114 s 8(b) — Penal Code ss 105, 247(b), 247(e), 385.

The Appellant appealed his conviction and sentence of one count each of resisting arrest, assaulting a police officer, damaging property and throwing an object. He claimed that the police officers acted in excess of their lawful powers, that the learned magistrate erred in accepting the evidence and in revoking bail, that he was disqualified from hearing the trial on the ground of prejudgment, and that the case was wrongfully transferred from the Chief Magistrate to the presiding magistrate.

The Appellant was accused of unlawfully throwing stones at police officers. He pleaded not guilty and was granted bail. He was remanded in custody when the learned magistrate revoked his bail for interfering with the police. The Chief Magistrate heard him on the issue and found his explanation unsatisfactory. He was released on bail but was later charged and pleaded guilty of drug possession. The Appellant asked to be dealt with after trial on the remaining charges. However, the Chief Magistrate sentenced him to 3 months' imprisonment and ordered the destruction of the drugs.

Trial proceeded with another magistrate. Evidence showed that the police officers checked and searched the Appellant for being in possession of marijuana. During the arrest, he resisted, ran away and threw stones at the police officers. In the cross-examination, he disputed the police version. He denied the assault but admitted the drug possession. He agreed that there was scuffle, but denied knowledge of how the police officer's belt got damaged. The Appellant also agreed that the officer's shirt got damaged during the scuffle. The Appellant's medical report was not tendered nor did he inform the interviewing officer that he received injuries.

Held — (1) The Appellant's interview was inconsistent with his sworn evidence and the prosecution's version of the facts was preferred. The High Court was satisfied of the accuracy of the magistrate's analysis of the facts and the law on reasonable force which the police officers used to effect arrest.

(2) There was no evidence of prejudgment on the learned magistrate's part. It was desirable that one magistrate hear all issues in relation to one file but when a magistrate was away or was ill, and an urgent issue arises, such as revocation of bail, the presiding magistrate can consent to another magistrate hearing the matter. The Chief Magistrate heard the Appellant's guilty plea and it appeared that he transferred trial to another magistrate.

(3) There was a question about the way in which the revocation of bail was handled. The Appellant was never asked for his point of view before he was remanded in custody. This is undesirable.

(4) The charges justified a short custodial term of imprisonment. The sentence passed was not harsh or excessive. The injury of the police officer was minimal, but the act of the Appellant of assaulting a police officer was a serious one. It strikes at the authority of the law enforcers. The court found no reason to quash the conviction.

Appeal dismissed.

No cases referred to.

Appellant in person

S. Puamau for the State

Shameem J. The Appellant appeals against conviction and sentence in respect of one count of resisting arrest, one count of assaulting a police officer in the due execution of his duty, one count of damaging property and one count of throwing an object. He was also convicted of being found in possession of dangerous drugs in a separate matter but he has no complaint in relation to that matter.

The charges, which are the subject of appeal are as follows:

FIRST COUNT

Statement of Offence

Found in Possession of Dangerous Drugs: Contrary to s 8(b) of the Dangerous Drugs Act 114 as amended by Dangerous Drug Act (amendment) Decree No 4 of 1990 and Dangerous Drug Act (amendment) Decree No 1 of 1991.

Particulars of Offence

HERBERT WISE on the 19th day of October 2004, at Navua in the Central Division, was found in possession of 13.7 grammes of Dangerous Drug namely Indian Hemp.

SECOND COUNT

Statement of Offence

Resisting Arrest: Contrary to s 247(b) of the Penal Code Act 17.

Particulars of Offence

HERBERT WISE on the 19th day of October 2004 at Navua in the Central Division resisted a lawful arrest on him conducted by Police Constable No 2283 LINO TUIMAISALA, in the due execution of his duty.

THIRD COUNT

Statement of Offence

Assaulting Police Officer in the Due Execution of his Duty: Contrary to s 247(e) of the Penal Code Act 17.

Particulars of Offence

HERBERT WISE on the 19th day of October 2004 at Navua in the Central Division, assaulted Special Constable No 657 METUISELA AQILA in the due execution of his duty.

FOURTH COUNT

Statement of Offence

Damaging Property: Contrary to s 385 of the Penal Code Act 17.

Particulars of Offence

HERBERT WISE on the 19th day of October 2004 at Navua in the Central Division, willfully and unlawfully damaged a Police grey shirt (Uniform) valued at $20.80 of Special Constable No 657 METUISELA AQILA the property of the Government of Fiji.

FIFTH COUNT

Statement of Offence

Throwing Object: Contrary to s 105 of the Penal Code Act 17.

Particulars of Offence

HERBERT WISE on the 19th day of October 2004 at Navua in the Central Division, wilfully and unlawfully threw stones at Police Constable No 2883 LINO TUIMAISALA and Special Constable No 657 METUISELA AQILA.

The case was first called on 21 October 2004. He pleaded not guilty. He was granted bail on condition that he reported to the Navua Police Station, did not reoffend and did not interfere with the complainant.

On 5 November 2004 the case was called again, apparently at the instance of the prosecution. Bail had been granted by the Chief Magistrate, but the question of revocation of bail was called before another magistrate. The prosecution told the court that the Appellant had gone to a police officer and had threatened him. The court remanded him to appear before the Chief Magistrate on 10 November 2004.

On 10 November, the case was again called before the same magistrate. The prosecution again told him that the Appellant had threatened the police. No explanation was sought from the Appellant, but he was remanded again. The matter was then called before the Chief Magistrate on 15 November 2004. There the Appellant admitted approaching the complainant, who was a police officer, but denied threatening him. The learned Chief Magistrate said he was not satisfied with the Appellant's explanation and found that he had interfered with the complainant. He was remanded in custody. On 25 November however, with the consent of the prosecution, he was again released on bail on the same conditions.

On 9 February 2005 the prosecution asked for time to add a charge of being found in possession of drugs. A fresh charge sheet was filed on 23 February. The trial proceeded on the same day. The Appellant pleaded guilty to the drug possession charge, but not guilty on the remaining counts.

The facts in relation to count 1 were that on 19 October 2004, the Navua Police received information that the Appellant was selling Indian hemp in Navua town. Constable Lino went to investigate. At the Supreme Shop, he saw the Appellant standing in front of another shop. He requested the Appellant to hand over his bag for search. The Appellant refused Constable Lino and another police officer then took the bag after using reasonable force. The bag contained 37 rolls of Indian hemp. The government analyst confirms that the rolls contained 13.7 g of Indian hemp or Cannabis Safira.

These facts were admitted, as were 13 previous convictions. The Appellant asked to be dealt with after trial on the remaining charges. The Chief Magistrate however proceeded to sentence. He sentenced the Appellant to 3 months' imprisonment and ordered the destruction of the drugs.

The trial proceeded before another magistrate on 22 June 2005. Constable Lino gave evidence that he and one Metuisela were instructed to check on the suspected possession of marijuana by the Appellant. They asked the Appellant if they could search his bag. He refused to cooperate. Constable Lino tried to arrest him. The Appellant resisted arrest. He ran away and *"he got wild"*. They used reasonable force and with the help of the public and other officers, he was arrested. In the course of the incident, he ran away into the bush about 300 m from the main road. He also threw stones at the police. None hit them.

There was vigorous cross-examination by the Appellant. He clearly disputed the police version of the incident. Under cross-examination, the witness said that the Appellant had snatched the belt from the waist of Constable Metuisela, damaging the belt and the constable's shirt. The officer denied throwing stones at the Appellant.

PW2, Constable Metuisela Aqila gave evidence that the Appellant was warned three times before reasonable force was used to arrest him. He said that the Appellant pulled his shirt and punched him. One button fell out. Constable Metuisela received injuries from the assault. The medical report shows tenderness on the right chest and a bruise on the left knee. He said that he was punched when he was trying to arrest the Appellant. When he fell the Appellant pulled his shirt and belt causing the belt to snap.

PW1 and PW2's version of the facts was corroborated by the evidence of Acting Sergeant Umesh Raj. He further said that when the Appellant was arrested in the compound of the Seventh day Adventist Church, he had a stone in each of his hands. He denied that anyone swore at or abused the Appellant.

Constable Epeli Rika interviewed the Appellant under caution. In that interview, he admitted being in possession of marijuana or Indian hemp but denied resisting arrest or assaulting any of the officers. He agreed that there was a *"scuffle"* caused by his suggestion that the search of his bag be carried out in a place away from the public. He said he did not know how PW2's belt got damaged but agreed that the shirt might have got damaged in the scuffle.

Under cross-examination, Constable Epeli Rika said that the Appellant had been taken to a doctor on the same day and that his shirt was also torn. The medical report was taken to the Human Rights Commission.

The learned magistrate found a case to answer. The Appellant gave sworn evidence. He denied resisting arrest, said that the police had acted unlawfully, said that the public had also acted harshly towards him, disputed damaging the belt and denied throwing any stones. He said that the police had thrown stones. He said that as a result of the incident, his clothes were shredded and blood stained. He said he could not recall if he was under the influence of marijuana that day.

Judgment was delivered on 27 July 2005.

After reviewing the evidence the learned magistrate accepted the evidence of the prosecution witnesses and said that the police had acted lawfully, in effecting the Appellant's arrest. He convicted the Appellant on all remaining counts accordingly. He was sentenced to 6 months' imprisonment on each count to be served concurrently with each other.

The Appellant, in a lengthy letter to the court, appeals against conviction and sentence. His complaints can be summarised as follows:

1) *The police officers at Navua Police Station acted in excess of their lawful powers;*
2) *The learned magistrate erred in accepting their evidence;*
3) *The learned trial magistrate erred in revoking the Appellant's bailed and was disqualified from hearing the trial on the ground of prejudgment;*
4) *The case was wrongly transferred from the Chief Magistrate to the presiding magistrate.*

The State opposes the appeal, saying that it was the prerogative of the presiding magistrate to accept the police version of the facts, that the arrest of the Appellant was lawful, that he was given a fair trial and that the revocation of bail had nothing to do with the findings on the trial.

The Appeal

In his interview with the police the Appellant denied resisting arrest and assaulting a police officer. He did not tell the interviewing officer that he had been assaulted by the police. He said he did not know how the belt was damaged and

assumed that PW2's shirt was torn in what he called a "scuffle". This was quite inconsistent to his sworn evidence in court. There he said that he was assaulted by belts and that he was kicked and belted for 15 minutes. In the circumstances, it is unsurprising that the learned magistrate preferred the prosecution version of the facts.

Further, although his medical report was not tendered, he did not tell the interviewing officer that he had *"shredded and bloodstained clothes"* or that he had received injuries as a result of the scuffle. Indeed, the presence or absence of injuries would not necessarily have confirmed the truth of his evidence. The prosecution evidence was that he resisted arrest, that he struggled and threw stones and that he needed to be overpowered by civilians and police officers. The presence of injuries on the Appellant would not be inconsistent with the prosecution case.

In relation to his objection to the judicial handling of the case, I consider that there is nothing unusual or sinister in the way the magistrate handled it. Although it is desirable that one magistrate hear all issues in relation to one file, when a magistrate is away or is ill and an urgent issue arises, such as the revocation of bail, the presiding magistrate can consent to another magistrate hearing the matter. Further, because the Chief Magistrate heard the Appellant's guilty plea, it appears that he transferred the trial to another magistrate. This is not unusual. I see no evidence of prejudgment of the learned magistrate's part.

I do however question the way in which the revocation of bail was handled. The Appellant was never asked for his point of view, before he was remanded in custody. The learned magistrate simply accepted the prosecution's position that the Appellant had interfered with the police. This is undesirable. The Appellant might have had a good explanation for the breach of his bail conditions. As it happens, when he was finally heard by the Chief Magistrate on the issue, his explanation was unsatisfactory. Nevertheless, he should have been heard before his bail was revoked on 5 November and 10 November 2004.

As State counsel says however, the bail revocation was later overtaken by the trial. The Appellant was on bail for the duration of the trial and the trial was conducted fairly. The learned magistrate's analysis of the facts and the law on the reasonable force which can be used to effect arrest, was accurate.

There are no reasons to quash conviction. The sentence passed in total was not harsh or excessive. Although the injury received by PW2 is minimal, the act of assaulting a police officer is a serious one because it strikes at the authority of law enforcers. The charges justified a short custodial term of imprisonment.

This appeal is dismissed.

Appeal dismissed.