

AT NADI WESTERN DIVISION
CRIMINAL JURISDICTION
RESIDENT MAGISTRATE'S COURT

Criminal Case No. 54 of 2018

BETWEEN : **DPP**
AND
DESHWAR DUTT

Before : **NILMINI FERDINANDEZ**
RESIDENT MAGISTRATE

Date of Trial : **18th October, 2018, 26th November, 2018,**
12th March, 2020 & 28th July, 2020

Date of Judgment : **16th December, 2022**

Sergeant 2658 Ana Mataniwai for Prosecution

Accused Present in person

JUDGEMENT

1. The accused was initially charged on the 6th of February 2018 for one count of Escape from Lawful Custody contrary to section 196 of the Crimes Act 2009 and one count of Serious Assault contrary to section 277 (a) of the Crimes Act 2009.

Particulars of the Offence

Count 1

Deshwar Dutt on the 15th day of December, 2017 at Nadi in the Western Division whilst in the lawful custody of COC 71953, Paulo Ratumaikoro escape from the custody of COC 71953 Paulo Ratumaikoro.

Count 2

Deshwar Dutt, on the 3rd day of January, 2018 at Nadi in the Western Division resisted arrest from police officer namely Pauliasi Boseiwaqa in due execution of his duty.2020

Brief Background

2. Accused has pleaded not guilty for both the charges. Therefore, trial has commenced on the 12th March 2020.
3. However, on the 20th of July 2020 State amended the charge bringing the charges only down to one count of **Serious Assault contrary to section 277 (a)** of the Crimes Act 2009. When the amended charge was read out the accused pleaded not guilty and therefore, trial has recommenced on the same day after disregarding the evidence that was previously recorded.
4. Hearing has continued on the 21st of July 2020, 28th of July 2020, 5th of October 2020 and 16th of June 2022 when the accused closed his case.
5. At the trial the prosecution has called the following witnesses and tendered to court documents marked from **Pr. Ex 1** to **Pr. Ex. 4** as evidence.
 - i.) **PC5243 Lemeki Racule**
 - ii.) **SC 6816 Pauliasi Boseiwaqa**
6. The accused has chosen only to give evidence under oath and has not called any witnesses on his behalf. He has also tendered to court documents as evidence marked as **Def. Ex 1** to **Def. Ex. 3** before closing his case.
7. After the trial was concluded only the accused opted to tender written submissions while the prosecution opted only to rely open the evidence.

The Law

8. The accused in this case is charged on one count of **Serious Assault** contrary to section 277 (a) of the Crimes Act 2009.
9. Section 277 (a) of Crimes Act 2009 reads as follows;
*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.*
10. Therefore according to the Statement of Offence, to prove the offence of **Serious Assault**, against the accused in this case the prosecution must prove the following elements beyond reasonable doubt; that
 - a) On the 3rd day of January 2018,
 - b) The accused has resisted arrest from police officer namely Pauliasi Boseiwaqa in due execution of his duty.

Analysing of the evidence

- 11 It is important to keep in mind at this point that there is no dispute among the parties that the accused has been arrested at Vuda Mangroves.
- 12 However, the accused has taken a stand that he never resisted arrest.

13 Prosecution's evidence

- 13.1** Pw1 **PC5243 Lemeki Racule** has stated to court in his evidence that Deshwar Dutt (the accused) has escaped from prison in December 2017 and that the witness was a member in the police team created to recapture him.
- 13.2** They have been searching the entire areas of Namaka and Nadi, when they received the information that the car taken by the accused has been located near Vuda mangroves.
- 13.3** By the time this witness has reached the place where the vehicle was parked with his team, some other officers have been already waiting there in case the accused might return to the car.
- 13.4** The witness and his team, Sgt. Sailesi, PC Pauliasi and PC Semisi have reached there when it was dark and have parked themselves on the top of the hill looking down while some other officers have been searching in the mangroves area. Since it was dark, all what he could see was the lights of the police officers that were moving around in the mangroves.
- 13.5** After sitting down on the hilltop the entire night, upon day break the witness and his team has moved down about 25 meters to the mangrove area and have joined in the search. In about 10 minutes this witness has heard PC Pauliasi shouting *“Au-ko-yaqo”* meaning “He’s here”, when all the other police officers started to run towards where the calling was coming from.
- 13.6** When the witness was about 30m away he has seen the accused and PC Pauliasi struggling and Sgt Silio and PC Jone has managed to jump and help to handcuff the accused.
- 13.7** He has stated to court that the struggle between the accused and PC Pauliasi lasted about one minute, and after handcuffing the accused was taken to Namaka police.
- 13.8** While being cross examined, this witness stated that the police team was waiting at Vuda swamps for about 8 hours since the previous night and that the police arrested the accused in the morning.

- 13.9** He also stated that it was considered that the accused resisted arrest because of the struggle and that the leader of the whole team Inspector Simioni Qasi was also present within vicinity.
- 13.10** Drawing to the word “Scuffling” used by this witness in his police statement, the accused has questioned the witness as to what he has meant by it. When the witness explained that both Scuffling and struggling mean the same, the accused challenged the same stating that it means ‘a person making a low noise by moving around’.
- 13.11** The accused also suggested that the witness and his team thereafter brutally assaulted him and broke his leg, which the witness has denied.
- 14.1** **PW2 SC 6816 Pauliasi Boseiwaqa** was the police officer who has actually arrested the accused. He too confirmed in his evidence that he was a member in the police team that was created to recapture the escaped prisoner Deshwar Dutt.
- 14.2** He explained to court that this police team comprised with police officers from Lautoka, Nadi and Namaka police stations, was led by Inspector Simoni Qasi. There have been officers from Prison Authority too in this recap team.
- 14.3** On the 2nd of January upon receiving information about sighting the escaped prisoner in the Vuda area, the police team has proceeded to the place. This witness has reached Vuda around 8pm and since then the police have been conducting searches from time to time in the mangroves.
- 14.4** On the 3rd January, at about 6.45am when this witness was searching the edge of the mangrove, he has seen the figure of a man lying motionless in the mud near the edge and then the man has stood up when the witness could identify him as the escaped prisoner, Deshwar Dutt.

- 14.5** Then the witness has shouted out **“Ko-yaqo”** meaning ‘He’s here’ when the accused has turned and started running towards the bush. The witness too has started running after him calling his name. According to him the accused and the witness have run through full grown mangrove trees, jumping over the roots. The accused has fallen down 2-3 times, when the witness has managed to catch up and tackle him, which made the accused fall down on the roots again. According to this witness, while fallen on the ground too the accused has struggled for about 2-3 minutes not allowing the witness to arrest him. When the witness tried to catch the hand of the accused, the accused has tried to hit him with a rock he had in his hand.
- 14.6** At this point PC Temo and Silio have arrived there with the other police officers and have helped the witness to overpower the accused and arrest him. The witness identified the accused in court.
- 14.7** At cross-examination the witness has stated that he had to chase the accused for about 50m jumping over the mangrove roots before he managed to tackle him and that he and the accused have been struggling for about one minute before arrest.
- 14.8** The accused has then suggested to the witness that him, SC Temo, SC Selio, DC Jone and PC Lemiki have brutalised the accused while arresting and in the process they broke his bone in the right ankle, which the witness denied.
- 14.9** When it was questioned whether there was plenty officers present at the area of arrest, the witness has stated that although there were many officers in the searched area, there were only a few officers in the arrest area.
- 15.1** While giving evidence the accused acknowledged that at 6.45am on the 3rd of January 2018 he had been lying down motionlessly in the swamp. Although he had no watch with him to know the exact time, from the

- lights at the daybreak and with the amount of sunshine he could agree with the prosecution about the time.
- 15.2** However, he chose to vary from the prosecution and took up the position that he has surrendered himself to the police but has never resisted arrest.
- 15.3** Explaining the background of the arrest, the accused has stated to court that he has dug a hole in the swamp and hidden himself in the cavity with mud all over him to cover him. He has been lying sideways with only one eye not covered so that he could look around. He has been hiding in the cold swamp without food and water and all the other necessities that needed to keep him warm for about 8 hrs since previous night. He could not move as he has been lying motionlessly in the cold swamp for more than 8 hours and by 6.45am with the visibility very clear, he could see plenty individuals with batons.
- 15.4** He has recognized Sc Pauliasi, DC Temo, DCpl Silio, Sc Lemiki and and PC Jone Sauqaqa among the police officers that were roaming around, and when he saw PC Pauliasi with whom he was in good terms and who had treated him well whenever he went to the police station, he has decided to surrender himself. He explained to court that he knew the consequences of serious assault and that evading the police would put him in deep problem.
- 15.5** Therefore, the accused has called out ***“Paul”*** as that was the name, he knew of Pauliasi at that time. When his voice did not reach the police officer, the accused has tried to move so that the officer could see him.
- 15.6** However, when *Paul* and the other police officers saw the accused, they all have come running to him and have started assaulting him.
- 15.7** The accused stated to court that he has been escorted to Namaka Medical centre on the same day of arrest due to the injuries he sustained that day, and the doctor has issued a Medical report after examining

him. He has tendered to court the said Medical Report as evidence marked as **De. Ex.1.**

- 15.8** After being produced in court the accused has been held at the Maximum Correction Centre and upon his request the High Court at Lautoka has ordered him to be taken to CWE Hospital in Suva and was examined again, The reports issued after examination there tallies with the Medical report issued by the Namaka Medical Centre on the 3rd of January 2018. The accused tendered to court the two medical reports issued by CWE Hospital marked as De. Ex.2 and De. Ex.3.
- 16.1** It is evident from all the available evidence that the police team has been in the Vuda Swamp area since 8pm on the previous night and have been conducting searches from time to time until about 6.45am on the 3rd of January 2018. However, none of the police officers have noticed the accused who has been lying in the cold swamp for approximately more than 10hrs. It is accepted by all the parties that the accused has been lying in the swamp mud right before he was seen by the police.
- 16.2** The accused's stand was that he was actually unable to move because he was lying motionlessly in the cold swamp for more than 8 hrs without any food or water, which can be believed.
- 16.3** However, the prosecution witnesses' stand was that right after having been found out, the accused has started running off to the bush through full grown mangrove trees and jumping over the mangrove roots and in fact, he has run for 50m before he was tackled by PW2.
- 16.4** This stand taken by the prosecution is unbelievable as it is hard to believe that a man lying motionlessly in the cold swam mud right throughout the night for more than 10 hrs would be capable enough to run as soon as he stand up from the mud and to run so fast in the marshy land for 50m through fully grown mangrove trees and ,jumping over mangrove roots so that a fit policeman had difficulty in catching him.

- 16.5** Further, the accused has stated that while been covered in the swamp mud, he has seen everything that has been happening in the area and that with the daybreak when he saw the amount of police officers searching for him, he has decided to surrender himself. Therefore, he has chosen PC Pauliasi who had a good rapport with him to surrender and has called his name out. And since his voice did not reach the officer, he has moved a bit so that he could be seen. He has also explained to court that he is not new to court system or police, and he knew the consequences of evading police and serious assault, and that was why he decided to surrender.
- 16.6** It can be accepted that the accused while hiding in the mud for more than 10hrs had been observing the surroundings and the amount of police officers roaming around and searching the place for him. So, it can also be believed that the accused has realised that the possibilities are high that he would be found out soon. As such, his position that he decided to surrender and chose a known police officer to call out, can be believed.
- 16.7** The accused has tendered to court marked as **De. Ex.1, 2 and 3** the medical reports that show the injuries caused to him at the time of arrest. According to which the accused has sustained a fracture in his right ankle amongst other minor injuries such as cuts and bruises. The prosecutions position is that the accused has sustained those injuries while he struggled with PW2 to escape. However, the accused was a fully grown man of 37 years at the time of arrest and not a child. Hence, although the bruises and cuts could have been resulted due to a struggle, it is unbelievable that a mere struggle with another man that has only lasted for about a minute could result a fracture in his ankle.
- 16.8** Therefore, the accused's version seems to be more believable, and it is difficult to trust that the accused has tried to resist arrest when he knew a police team with many officers was there.

- 16.9 On the other hand, there were contradictions between the evidence of the two prosecutions witnesses that have created a doubt about their credibility. PW1 has stated that he started running towards PW2 when he heard PW2 calling out “*He’s here*”, and then he has only seen PW2 and the accused struggling for about a minute before he was arrested. But according to PW2, after calling out “*He’s here*”, PW2 had to run after the accused for about 50m before a struggle between him and the accused has commenced. PW1 has spoken about PW2 running towards the accused, only when it was pointed out by the accused at cross examination that he has stated so in his police statement.
- 16.10 Also, PW1 has stated that Sgt Silio and PC Jone were the officers who have jumped in to help PW2 to arrest the accused, while PW2 himself has stated in his evidence that PC Temo and PC Silio have helped him to arrest the accused.

- 17 For the above-mentioned reasons, I find that the prosecution has failed to prove the contested element in this case, which is the **Resisting arrest**.
- 18 There is a doubt created through the evidence whether the accused has actually resisted arrest or was assaulted by the many police officers when he tried to surrender to the police custody.
- 19 Like in any criminal trial, the benefit of doubt would be given to the accused. Therefore, I **acquitt** the accused from this case.
- 20 28 days to appeal against this judgment.

On this 16th day of December 2022.

Nilmini Ferdinandez
Resident Magistrate