IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0173 of 2019
[High Court Criminal Case No. HAC 84 of 2018]

BETWEEN : **EMINONI BULUBULUTURAGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **18 March 2021**

Date of Ruling : **19 March 2021**

RULING

[1] The appellant had been charged in the High Court of Suva for having committed aggravated burglary contrary to section 313(1)(a) of the Crimes Act and theft contrary to section 291(1) of the Crimes Act at Nadera in the Central Division between 18 November 2017 and 19 November 2017. The charges were as follows:

COUNT 1

Statement of Offence

Aggravated Burglary: *contrary to section 313(1)(a) of the Crimes Act 2009.*

Particulars of Offence

Eminoni Bulubuluturaga *with others, between the 18th day of November 2017 and the 19th day of November 2017 at Nadera in the Central Division, in the* *company of each other, entered into the property of Ratu Orisi Bolenaivalu, as trespassers, with intent to commit theft.*

COUNT 2

Statement of Offence

Theft: *contrary to section 291 (1) of the Crimes Act 2009.*

Particulars of Offence

Eminoni Bulubuluturaga *with others, between the 18th day of November 2017 and the 19th day of November 2017 at Nadera in the Central Division, dishonestly appropriated 6 x Tabua's (Whales-tooth), 1 x Straw bag and 1 x 40 inch TCL brand television, the properties of Ratu Orisi Bolenaivalu, with intention of permanently depriving Ratu Orisi Bolenaivalu of the said properties.*

[2] After full trial where the appellant had been tried in absentia, the assessors had expressed a unanimous opinion on 14 November 2019 that the accused was guilty of both counts. The learned High Court judge had agreed with the unanimous opinion of the assessors and convicted the appellant of both counts on 15 November 2019 and sentenced him on 09 December 2019 to 04 years and 06 months of imprisonment with a non-parole period of 03 years and 06 months.

[3] The appellant had filed a timely appeal on 09 December 2019 against conviction supplemented by written submissions on 29 September 2020. Though not formally appealing against sentence, he had abandoned sentence appeal in his application in Form 3 on 24 December 2020. The State had tendered its written submissions on 16 December 2020. The appellant had filed a reply too to the state's submissions on 29 December 2020 along with an affidavit dated 29 December 2020.

[4] The facts as narrated by the trial judge are briefly as follows:

> *'[5] The main witness presented by the prosecution in this case is the PW2, Nikhil Satish Lal. The accused Eminoni was well known to him. He has met the accused on the same day some time before the alleged incident. At the time of the incident, he has observed the accused from a distance of 10-12 meters away, without any obstruction and under the street lights for about 2 minutes.*

> *[6] Though I have considered and also directed the assessors to consider the possibility of mistaken identity, having observed the demeanor of the PW2, I am convinced without a reasonable doubt that the witness has seen the accused and properly identified him at the time of the incident. I am certain that the assessors too were convinced enough on the identity of the accused.*
>
> *[7] Furthermore, when considered the place of the incident, the PW1 states that it was a green coloured cement house on Yasiyasi Road, with a fence right round. The PW2 and rest of the witnesses too confirms the same. The description of the stolen items matches with the description of the items seen by the PW2. Assessors as the representatives of the society, with their knowledge and experiences of life seem to have satisfied that all the witnesses and the evidence relate to the same incident.*
>
> *[8] The court having explained all the relevant legal principles and the applicable law to the assessors, they unanimously held the accused to be guilty of the alleged offences. Each one of the assessors has obviously has had no doubt of the involvement and the guilt of the accused. Therefore, the Court sees no reason to deviate from the opinion of the assessors.*
>
> *[9] From my point of view, the assessor's opinion was not perverse. It was open for them to reach such conclusion on the available evidence. Therefore, I concur with the opinion of the assessors.*

[5] Grounds of appeal urged on behalf of the appellant are as follows:

> ***Conviction***
>
> *'1. **THAT** the High Court Judge erred in law when his Lordship failed to ascertain that the charge is defective in nature before proceedings to the trial in absentia causing a fundamental error of law.*
>
> *2. **THAT** the High Court Judge erred in law when his Lordship insisted to proceed to trial in absentia despite the appellant not being aware of the trial date without any third party being present to defend on his behalf throughout the trial to constitute a fair trial in absentia.'*

01st ground of appeal

[6] The appellant complains that the charges were defective in that both charges had alleged that the appellant had committed the offences '*with others'* and *'in the company of each other'* indicating that there were others involved. However, according to him, the police had charged only him with these offences. He argues that therefore, it was wrong to have charged him under section 313(1) (a) of the Crimes Act, 2009.

[7] It is correct to argue that for an accused to be made liable for aggravated burglary under section 313(1)(a) of the Crimes Act, 2009 and for simple burglary under section 312(1) of the Crimes Act, 2009 to become aggravated burglary the accused must commit burglary in company with one or more other persons. However, it is not necessary at all that the other person or persons should be charged, named or identified along with the accused.

[8] According to paragraphs 23(d) and (f) of the summing-up, eye witness Nikhil Satish Lal had seen the appellant jumping from inside the complainant's burgled premises to outside and two others passing some items. Thereafter, all of them had been seen going down the footpath towards Nadera. Therefore, there had been unequivocal evidence of the presence of three persons at the crime scene including the appellant. Therefore, the requirement of section 311(1)(a) is fully satisfied.

[9] **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) affirmed by the Supreme Court in **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) is an authority for the proposition that an information is not rendered defective by the inclusion of the words *'in the company of others'* or similar phrase where those other are not identified or charged. ***Saukelea*** was dealing with the similar phrase found in the offence of aggravated robbery under section 311(1)(a).

[10] Therefore, this ground of appeal is frivolous and accordingly dismissed pursuant to section 35(2) of the Court of Appeal Act.

02nd ground of appeal

[11] The gist of the appellant's complaint against conviction relates to the trial against him in absentia.

[12] The ruling into the appellant's bail pending trial application in HAC 84 of 2018 reported as **Bulubuluturaga v State** [2018] FJHC 579; HAM66.2018 (9 July 2018) reveals the following:

> *[3] On 21 February 2018, the Accused was produced in the Magistrates' Court at Nasinu on charges of aggravated burglary, theft and escaping from lawful custody. He was remanded in custody and the case was transferred to the High Court for trial.*
>
> *[4] <u>On 26 March 2018, the Accused waived his right to counsel and pleaded not guilty to the three charges</u> contained in the Information by the Director of Public Prosecutions. <u>He submitted a written application for bail on the same date. The case was adjourned to 3 April 2018 for bail hearing</u>.*
>
> *[5] <u>On 3 April 2018, the Accused did not appear for his bail hearing</u>. When an enquiry was made with the remand centre, <u>it was revealed that the Accused had not returned to the remand centre after his court appearance on 26 March 2018.</u>*
>
> *[6] <u>On 11 April 2018, the Accused was arrested at Nadera on a bench warrant issued by this Court</u>. He was further charged with absconding bail and resisting arrest. He was remanded in custody.*
>
> *[7] The Accused has offered an explanation for his disappearance after his court appearance on 26 March 2018. According to the Accused, he was let off from the cell by a police officer. The officer in-charge of the cell denies releasing the Accused. According to the police officer, the Accused never returned to the cell after his appearance before the High Court on 26 March 2018.*
>
> *[8] Counsel for the State strongly opposes the application for bail on the ground that the Accused's conduct of absconding and not appearing in court makes him a flight risk. I accept this submission. <u>When the Accused appeared before this Court on 26 March 2018, he was well aware that he had not been granted bail. Instead of returning to the cell, he absconded</u>. He knew his bail hearing was on 3 April 2018. He failed to appear for his bail hearing. He only returned into custody after he was arrested on a bench warrant at a location away from his residence. He is now facing an additional charge of resisting arrest.*

[13] The High Court had in the said ruling refused bail pending trial on 09 July 2018. According to the appellant, he was produced at Valelevu Magistrates court, Nasinu on 31 July 2018 regarding another unrelated case, which is still pending, and granted bail, inadvertently though by the Magistrate because the prosecution had for some reason failed to inform the Magistrate of the pending trail in the High Court and the fact that he was being kept in remand custody as ordered by the High Court.

[14] The High Court had issued a bench warrant for the appellant's arrest on 08 August 2018 and he had failed to appear on six subsequent occasions. On 29 August 2018, the efforts by the police to locate him proving unsuccessful, the state had applied for trial in absentia which had been granted by the High Court.

[15] Whilst at large on 'bail' the appellant had been then arrested for assault occasioning actual bodily harm (to his wife) under section 275 of the Crimes Act, and giving false information (false name) to a police officer under section 24 of the Police Ordinance on 15 March 2019 and produced at Tavua Magistrates court under Criminal case No.78 of 2019. He had pleaded guilty and sentenced on 02 April 2019 to 05 months of imprisonment of which 03 months were suspended for 02 years but 02 months were to be served immediately [vide **State v Bulubuluturaga** No. 5 - Sentence [2019] FJMC 49; Criminal Case 78 of 2019 (2 April 2019)].

[16] According to the appellant, he had been released on 11 May 2019 after serving the said sentence and returned to his residence in Suva where he was arrested by the police to serve the sentence in HAC 84 of 2018 on 21 November 2019.

[17] The High Court had proceeded to trial in absentia on 12 and 13 November 2019 and the appellant had been convicted and sentenced on 15 November 2019.

[18] Therefore, it is very clear that the appellant had deliberately kept away from the High Court knowing very well that he had been committed to remand custody by the High Court which had even refused his bail pending trial, from 31 July 2018 to 15 March 2019 and again since 11 May 2019 till 12 November 2019. Had the appellant been interested in defending himself, he had ample opportunity to surrender to the High Court between 31 July 2018 to 15 March 2019 and thereafter since 11 May 2019 till 12 November 2019.

[19] The appellant argues that his rights under section 14(2)(h)(i) of the Constitution had been violated as a result of the trail against him in absentia on the premise that he was not aware of the trial date. Section 14(2)(h)(i) is as follows:

> *'Every person charged with an offence has the right to be present when being tried, unless (i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or (ii)…………'*

[20] In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2)(h)(i) of the Constitution would provide guidance to court as to the conditions that should be satisfied before an accused can be tried in his absence. Those conditions are that (i) the accused should be served with summons or similar process requiring his attendance at the trial and (ii) despite summons or similar process the accused should have chosen not to attend (waiver of the right to be present). Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court.

[21] The first of these conditions is an obligation on the part of the court envisaging sufficient notice on the accused that he should appear at the trial or a direction on the authority holding him to produce the accused in court for the trail while the second condition is a conscious, deliberate or voluntary decision on the part of an accused not to present himself for the trial. However, once such notice has been given to an accused, if not detained under the authority of court, it is his responsibility to make himself available to face trial on every occasion without any further notice unless prevented from doing so for reasons beyond his control. Therefore, section 14(2)(h)(i) of the Constitution is no license for an accused to evade process of court and course of justice.

[22] The common law sheds more light on this issue. It appears that even when an accused waives his right to be present the court is not necessarily bound by law to proceed with the trial without the accused. Discretion is vested in the trial judge to decide whether the accused should be tried in his absence or not. In **R v Abrahams** 21 VLR 343 where the appellants were present at the commencement of the trial but were absent at a later stage due to illness, Williams J said, at p 346:

> *'The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present,*

> *and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence.'*

[23] **Regina v Jones** (On Appeal From The Court of Appeal (Criminal Division) [2002] UKHL 5 Lord Hutton said:

> *'23. I consider that the authorities make it clear that a court has power to proceed with a trial when the defendant has deliberately absconded before the commencement of the proceedings to avoid trial, although it is clear that the power to proceed in such circumstances should be exercised by the trial judge with great care.*
>
> *24. The authorities also show that there are two stages in the approach to be taken to the matter. The first stage is that although the defendant has a right to be present at his trial and to put forward his defence, he may waive that right. The second stage is that where the right is waived by the defendant the judge must then exercise his discretion as to whether the trial should proceed in the absence of the defendant.'*

[24] In **R v O'Hare** [2006] EWCA Crim 471, [2006] Crim LR 950 the accused had absconded even before a date had been set for his trial and made no effort to contact the court either directly or through counsel, and the court concluded that the accused had waived his right to be present at the trial.

[25] The facts that the appellant was committed to remand custody and thereafter refusal of his bail pending trial application by the High Court were the clearest communications possible to the appellant that he was required to attend trial. His initially decision not to attend court upon inadvertently being granted bail by the Magistrates court and thereafter since his release after serving the brief custodial sentence were the surest indications that he had waived the right to be present at the trial. There was a deliberate and conscious effort on the part of the appellant to avoid facing the trial despite having no barriers to do so. He made no effort to attend or contact court to at least find out the status of the case against him leave aside the trial date. It is not that he did not know of the trial date but did not want to know it. The appellant had told court on 21 November 2019 that he decided not to appear because he did not want to go back to remand custody pending trial.

[26] In the circumstances, there had been no violation of the appellant's rights under section 14(2)(h)(i) of the Constitution.

[27] Thus, this ground of appeal has no reasonable prospect of success in appeal.

<u>Order</u>

1. Leave to appeal against conviction is refused.

COURT OF APPEAL
FIJI

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Hon. Mr. Justice C. Prematilaka
<u>JUSTICE OF APPEAL</u>