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

CRIMINAL APPEAL NO.AAU 50 of 2020
[High Court at Suva Case No. HAC 299 of 2017S]

BETWEEN : **ILAITIA SARAI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **22 July 2022**

Date of Ruling : **25 July 2022**

RULING

[1] The appellant had been charged as the 02nd accused with others in the High Court of Suva for having committed two acts of AGGRAVATED ROBBERY contrary to section 311 (1) (a) of the Crimes Act 2009 on 25 September 2017 at Sports City, Suva in the Central Division.

[2] At the trial the appellant had been tried in absentia. After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty of both counts. The Learned High Court Judge had agreed with the assessors and convicted the appellant accordingly and sentenced him on 14 May 2019 to 12 years of imprisonment on the each count to run concurrently with a non-parole period of 11 years (his sentences to run from the day of his arrest).

[3] The appellant had been arrested on 02 June 2020 in Kadavu and he had filed his appeal on 29 June 2020 against conviction and sentence. Thus, the appellant's appeal is late by about 01½ years. He had subsequently tendered multiple papers supplementing his appeal. Finally, the appellant has informed this court in writing on 24 December 2021 that he would only rely on grounds of appeal and written submissions tendered on 23 November 2021. One finds additional grounds of appeal only against conviction, an affidavit explaining delay and an application for enlargement of time among the papers he had submitted on 23 November 2021. Subsequently, in December 2021 he had also filed a bail pending appeal application. He had also tendered 'review submissions' in February 2022. The State had tendered its written submissions in May 2022.

[4] The facts as narrated in the sentencing order are briefly as follows.

> *2. The brief facts were as follows. The female complainant was Ms. Roseline Mudaliar (PW1). She was on 25 September 2017 employed as a teller for Real Forex Exchange Office at Sports City, Suva in the Central Division. At 8.30 am, she opened the main door of the Real Forex Exchange Office at Sports City. She had just started work. She then went into her office, which was separated from the customer area by a counter and glass partition. Suddenly Accused No. 2 and 3 came through the main office door. Another two were on guard outside the office.*
>
> *3. Accused No. 3 climbed over the counter and glass partition, and went into PW1's office. He opened the office door, and let Accused No. 2 into the same. The two then threatened PW1 not to raise the alarm, or they will kill her. They demanded money. They punched PW1 on the head and back. They then forced PW1 to open the office's safe. The two then stole the items mentioned in count no. 1 from the office safe. They also stole PW1's properties as itemized in count no. 2. The two then fled the crime scene, with the others outside the office.*

[5] Grounds of Appeal urged on behalf of the appellant:

> ***Conviction***
>
> *'Ground 1*
>
> *The learned trial judge erred in law by allowing the prosecution to tender the cautioned interview statements of the appellant in evidence without*

conducting a trial within a trial in order to determine the admissibility of the cautioned interview statement of the appellant on evidence.

Ground 2

(i) The learned trial judge erred in law and fact when he convicted the appellant despite the prosecution failing to satisfy the elements of the offence

(ii) No evidence was admitted in evidence against the appellant by the prosecution. There was an ID Parade but the appellant was neglected to be included and the dock identification is undesirable for identification for the first time of an accused and in any case this was a trial in absentia for the appellant.

Ground 3

The learned trial judge erred in law and fact in conducting the trial in absentia.

[6] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[7] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in

terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[8] The delay of this appeal is very substantial. The appellant's explanation is that after being arrested in respect of this offending he was released by the Magistrates' court at Suva and was free to go. Thereafter, he had left for Kadavu island due to concerns of his personal safety and was doing farming there when the police arrested him upon a warrant issued by the High Court in respect of the High Court case. Only then that he got to know that he had been convicted and sentenced in his absence. However, the state has submitted that the appellant had appeared before the High Court on 23 October 2017 in this case which had been adjourned for 03 November 2017 where he was absent. Obviously, his appearance in the High Court must have been after his alleged release from the Magistrates court and therefore, he alone is responsible for his absence from the High Court. Thus, his explanation for the delay in not tenable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

01st ground of appeal

[9] The issue is whether the trial judge was bound to conduct a *voir dire* inquiry even when the appellant was being tried in absentia before his cautioned statement was admitted in evidence. Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and accordingly, a *voir dire* must only be conducted after the accused has pleaded to the information.

[10] **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

> *'[24] Whenever the court it advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing.* ***When the accused is not represented, a trial within a trial must always be held****. At the conclusion of the trial within a trial, a ruling must be given before the principal trial*

> *proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*
>
> *[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.*

[11] ***Rokonabete*** deals with two situations. When the accused is represented by counsel and when he is unrepresented *i.e.* when the accused appears in person. In either situation, when the trial court is informed that there is a challenge to the confession a *voir dire* must be held to determine its admissibility. If the accused is represented and his counsel does not wish to challenge the confession a *voir dire* hearing need not be held. If, however, the accused is unrepresented a *voir dire* must always be held which means that even if an unrepresented accused does not challenge his confession the trial court should still hold a *voir dire* inquiry to test its voluntariness and to be satisfied that there are no general grounds of unfairness that adversely affect its admissibility.

[12] ***Rokonabete*** does not appear to leave any room for the trial judge to do away with a *voir dire* inquiry when the accused is unrepresented irrespective of his desire to challenge it or not. When and if an unrepresented accused raises no challenge to his confession being admitted in evidence, he may not be fully cognizant of the consequences of the admission of his confession in evidence and even the procedure of challenging it. In my view, in order to ensure a fair trial the trial judge should explain to an unrepresented accused the consequences that will flow from his confession being used in evidence against him and his right to challenge its admissibility and how he should set about doing it.

[13] ***Rokonabete*** also has not dealt specifically with a situation where a confession of an accused is sought to be admitted in evidence in his absence. Nevertheless, if the court

is bound to hold a *voir dire* inquiry when the accused is unrepresented, one can argue that logically there is no basis for the court to circumvent it when the accused is absent from court. The High Court in **Ravouvou v State** [2018] FJHC 79; HAA130.2017 (23 January 2018) had held that:

> *'17. If the prosecution proposes to adduce the confession made by the accused in his caution interview in evidence, in a trial which is conducted in the absence of the accused pursuant to Section 14 (2) (h) (i) of the Constitution, the trial court must conduct a trial within a trial, in order to determine the admissibility of the caution interview of the accused in evidence.*

[14] This is a question of law only to be decided by the full court.

[15] ***Rokonabete*** has laid down the common law practice when the admissibility of a confession is to be challenged and seems, to some extent, to have followed **Ajodha v The State** [1982] AC 204; [1981] 3 WLR 1; [1981] 2 All ER 193, PC where the accused were present in court at the trial. Lord Bridge *inter alia* said:

> *'Particular difficulties may arise in the trial of an unrepresented defendant, when the judge must of course, be especially vigilant to ensure a fair trial. No rules can be laid down, but it may be prudent, if the judge has any reason to suppose that the voluntary character of a statement proposed to be put in evidence by the prosecution is likely to be in issue, that he should speak to the defendant before the trial begins and explain his rights I the matter.'*

[16] However, even **Ajodha v The State** (supra) does not seem to have dealt with the situation that has arisen in the present appeal *i.e.* where the accused was absent and his confession had been admitted without a *voir dire* inquiry.

[17] The trial judge does not seem to have held a *voir dire* inquiry at any stage but addressed the assessors as follows.

> *'29. In considering the above alleged admissions, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution interview statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to*

answer the second question. Are the confessions true? In answering the above questions, the prosecution must make sure that the confessions were made and they were true. You will to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he have his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you.

[18] Thus, the trial judge seems to have left it to the assessors to judge the voluntariness of the appellant's confession *vis-à-vis* only the weight and value to be attached but not the admissibility. Thus, at no stage has there been a decision by the trial judge (or at least the assessors themselves) as to the voluntariness and then, the admissibility of the confession which is the only evidence against the appellant.

[19] I think, these issue raise important issue of law and then law and fact to be decided by the full court. I allow enlargement of time on the first ground of appeal.

02(i) ground of appeal

[20] I do not think that there is any merits here. If the appellant's confession had been duly admitted according to law there seems enough evidence to satisfy the elements of the offending.

02(ii) ground of appeal

[21] The appellant complains about first time dock identification. Dock identification has no relevance here in as much the accused was tried *in absantia*. He was not identified in the dock by the witnesses at the trial. This complaint has no basis at all.

03rd ground of appeal

[22] 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. 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)……'

[23] 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.

[24] 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.

[25] 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.'

[26] **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.'

[27] Reading paragraphs 7-9 of the summing-up, I feel (though the complete record is not available at this stage) that the learned trial judge had been satisfied with the fulfillment of the conditions set out in section 14(2)(h)(i) of the Constitution and thereafter exercised his discretion in proceeding with the trial in the absence of the appellant. I do not see a real prospect of success in this appeal ground.

Bail pending appeal

[28] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to

the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004**),** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[29] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[30] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[31] The appellant was granted enlargement of time only on the issue of law raised under the first ground of appeal. Even if the full court were to hold that there had been substantial miscarriage of justice by the trial judge not holding a *voir dire* inquiry, still the result would most likely to be a new trial where the DPP would eventually decide whether to proceed with a trial *de novo* or not. If the appellant is properly convicted in any new trial, the judge will take the period of incarceration that he has undergone so

far in the matter of sentence. The Court Officer informed me during the hearing which I communicated to the parties that the appeal records in the connected appeal AAU 174 of 2019 (co-accused) are ready and the Registry is awaiting the ruling in the appellant's appeal to finalize the certification of records for the full court hearing.

[32] Though, it is now not technically required, I shall still consider the second and third limbs of section 17(3) of the Bail Act namely '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard'* together.

[33] Since his arrest upon the warrant, the appellant has so far served just over 02 years of imprisonment and a possible sentence for aggravated robbery of a commercial establishment is much longer. If the Registry acts diligently and expeditiously to have the appeal records ready for the full court hearing there is a chance that his appeal will be heard by the full court along with that of his co-accused in AAU 174 of 2019 without an undue delay. If not, the appellant is still free to apply for bail pending appeal at an appropriate time in the future.

Order:

1. Enlargement of time to appeal against conviction is allowed only on the first ground of appeal.
2. Bail pending appeal is refused.

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL