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

**CRIMINAL APPEAL NO. AAU 0067 of 2017**
**In the High Court at Suva Case No. HAC 47 of 2017**

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| **BETWEEN** | : | **ULAIASI QALOMAI** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Mataitoga, JA** |
| | | **Qetaki, JA** |
| | | **Morgan, JA** |
| **Counsel** | : | **Appellant in person** |
| | | **Mr R. Kumar for the Respondent** |
| **Date of Hearing** | : | **6 September, 2023** |
| **Date of Judgment** | : | **28 September, 2023** |

## JUDGMENT

**Mataitoga, JA**

[1] The appellant [Ulaiasi QALOMAI] was jointly indicted with 3 others in the High Court on two counts of Act with Intent to Cause Grievous Harm [section 255(a)], one count of Aggravated Robbery [section 311(1)(a)] and Damage to property [section 369(1)] of the Crimes Act, 2009 committed with 04 others [three of whom are the appellants in AAU0092/2016, AAU 099/2016 and AAU 100/2016] on 06 April 2014 at Nadi in the Western Division.

[2] The information read as follows.

***FIRST COUNT***

***Statement of Offence***

***ACT WITH INTENT TO CAUSE GRIEVOUS HARM:*** *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

***Particulars of Offence***

***PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI*** *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to* ***MANI RAM,*** *unlawfully wounded the said* ***MANI RAM*** *by kicking, hitting and striking him in the head with a liquor bottle.*

***SECOND COUNT***

***Statement of Offence***

***ACT WITH INTENT TO CAUSE GRIEVOUS HARM:*** *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

***Particulars of Offence***

***PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI*** *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to* ***NAUSAD MOHAMMED,*** *unlawfully wounded the said* ***NAUSAD MOHAMMED*** *by kicking, hitting and striking him in the head with a liquor bottle.*

***THIRD COUNT***

***Statement of Offence***

***AGGRAVATED ROBBERY:*** *Contrary to Section 311 (1) (a) of the Crimes Decree 2009.*

***Particulars of Offence***

***PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI*** *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, robbed* ***MANI RAM*** *of assorted liquor valued at $3,400.00, assorted cigarettes valued at $1,300.00 and $5,300.00 cash all to the total value of $10,000.00 and immediately before the robbery, force was used on the said* ***MANI RAM.***

***FORTH COUNT***

***Statement of Offence***

***DAMAGING PROPERTY:*** *Contrary to Section 369 (1) of the Crimes Decree 2009.*

***Particulars of Offence***

***PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, wilfully and unlawfully damaged assorted liquor valued at $3,200.00, assorted juice valued $580.00, 1 x computer valued at $650.00, dried Kava valued at $220.00 and 1 x cash register valued at $499.00 all to the total value of $6,609.00 the property of* ***MANI RAM.***

[3] After sentencing each of the appellant's pursued their respective appeals against conviction individually not as group. I will now consider each appellant's appeal separately and individually.

**High Court**

[4] After the trial the assessors returned a verdict of guilty against the appellant for all the charges. The trial judge agreed with the assessors and convicted the appellant. He was sentenced on 11 July 2016 to 10 years for all offences with a non-parole period of 7 years.

[5] The appellant was tried in absentia. He was present for the Voire Dire hearing to determine the admissibility of his caution interview statement. He was in court when the date of the hearing of his case in the High Court was advised. He did not appear for his trial. He has not given any believable reason to explain his absence.

[6] On 2 August 2016 the appellant submitted a untimely application for Leave to Appeal on 11 April 2017. He filed written submission on 21 October 2019. Legal Aid Commission [LAC] filed an application for enlargement of time with amended grounds of appeal. Appellant informed the Court 10 June 2020, that LAC is no longer representing him. The State submitted their submission in response on 17 August 2020.

**Court of Appeal**

**Single Judge**

[7] Before the single judge the appellant submitted 5 grounds of appeal, to support his application for enlargement of time to appeal. It is trite law that if the enlargement of time is not granted, the appellant's appeal terminates forthwith.

[8] As regards the determination of an application for time extension to allow for an appellant to file an application for leave to appeal, the principles set out in **Kumar v State** [2012] FJSC 17 held that:

> *"[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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?"*

[9] According to Supreme Court in **Rasaku v State** [2013] FJSC 4, the above are not exhaustive but useful yardstick to assess the merit of an application for enlargement of time.

**Grounds of Appeal**

[10] The grounds of appeal submitted are as follows:

(i) *Trial in Absentia was an injustice proceeding giving rise to a full denial of the Appellants right to a fair trial pursuant to Section 15 (1) of the 2013 Fiji Constitution;*

(ii) *Gross miscarriage of Justice has occurred when the Learned Judge has overlooked and /or has failed to carefully scrutinize with utmost caution the risk and inherent danger of the Dock Identification;*

(iii) *That the Appellant's conviction is unsafe and unsatisfactory due to the acceptance of the Dock Identification evidence without any prior identification parade conducted by the Police;*

(iv) *The trial judge's failure to direct his mind on the Police Statement of Jona Toga which was not credible and cannot be used against me because of the omission in identifying me as those alleged robbers gives rise to the doubt of the question whether the credibility of Jona Tonga must be accepted or not. The evidence in chief provided by Jona Toga contradicts the statement given to the Police by him. And the failure to accept the discrepancy has directly prejudice me; and denied me the chance of being acquitted; and*

(v) *A Substantial Question of law is involved when the Learned Judge upheld to allow the trial proper proceeding to continue even though the charge statements has already being dealt during the voire dire ruling as being inadmissible."*

[11] The prosecution evidence of the case as summarised by the learned High Court judge in the sentencing order is as follows.

> *"[3] The Complainant, Mr. Mani Ram, had been running a shop in Matintar, Nadi, for the past 40 years. To cater to customers who enjoy the night life in the Airport City of Nadi, he kept his shop open till late night in the company of his security guard, Mr. Naushad. Five accused came in a mini-van, got off near the shop and started drinking alcohol. Around 3 a.m., they came to the counter of the complainant's shop in the guise of customers and tried to forcibly enter the shop through the opening at the counter. Failing of which they broke off the rear door and entered the shop forcibly. They went on rampage in the shop completely disregarding personal and property rights of the shop keepers. They wounded the complainant and his security guard kicking, hitting and striking brutally with bottles, and destroyed the property. They robbed valuable goods and cash. 1st accused was apprehended hand handed by members of the public while others fled with the loot. The entire 'horrific drama' lasted nearly eight minutes was being secretly recorded by six surveillance cameras installed in the shop. The CCTV footages obtained from cameras helped the police to identify the culprits who were later apprehended 1st and made a confession to police. Other accused were positively identified by the prosecution witnesses. The CCTV footage displayed during trial showed a systematic and coordinated brutal attack on the victims and their property."*

[12] The single judge approached the determination of the application by firstly reviewing the grounds of appeal submitted, to find out if it had any merits, before dealing with the reasons if any, for the delay and the length of the delay.

[13] Each of 5 grounds set out in paragraph 9 above, were carefully reviewed and individually assessed, taking into consideration, the submissions made by the appellant.

in light of the evidence and relevant law. The learned Judge alone in his ruling was detailed in his coverage of the legal and evidential basis to support the conclusion he reached.

[14] The learned Judge Alone concluded that none of the appeal grounds submitted, have a reasonable prospect of success on appeal and refused application for enlargement of time to allow an application for leave to appeal against conviction.

[15] In addition the single judge found that the reasons for the delay are unconvincing.

[16] The application for extension of time to seek leave to appeal against conviction was refused in a ruling dated 25 August 2020.

**Renewal Application**

[17] On 17 September 2020 this appellant submitted a renewal application on his application for enlargement of time to seek leave to appeal against conviction to the full court. He submitted to the court that pursuant to section 35(3) of the Court of Appeal Act and Rule 41(2) of the Court of Appeal Rules as the basis of this renewal application. However, there were no new grounds submitted; despite his earlier notice to the court that he reserves the right to submit new grounds. It should be pointed out, that at this stage of the appeal process, there is no right to submit new grounds i.e. that those grounds not canvassed before the single judge may not be introduced at the full court hearing without following relevant procedure.

[18] The Court Registry received another Notice from the appellant on 18 February 2021 which set out some claims which are confusing and does not amount new grounds and they do not relate to evidence and directions of the trial judge.

**Full Court**

[19] In assessing the renewal application submitted by the appellant the principles that this court will observe are the same as those set out by the Supreme Court in **Kumar v State** (supra) which the single judge carefully reviewed when examining and applying to the

evidence and directions of the trial judge. The 5 factors to be considered are set out at paragraph 7 above.

[20] Under the 3rd and 4th factors of **Kumar**, the test for enlargement of time is real prospect of success. This require this court to review the grounds of appeal submitted, to determine whether the enlargement of time application be granted.

**Assessments of Grounds of Appeal**

**Ground 1- Trial of Appellant in Absentia – Section 14(2)(h)(i) Fiji Constitution**

[21] The right of an accused person to be tried in a court of law and be subjected to procedures and court processes which is fair, transparent and merciful is part of the laws of Fiji and in the context of Fiji's Constitution, it is a fundamental right. The law recognizes in Section 14 that fundamental right, but there are limits and rightly so. In the context of this case the relevant limitation is Section 14(2)(h)(i) of the Constitution, which states:

> *"14 (2) Every Person has a right ... ...*
> *(h) 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."*

[22] Before the court orders trial in absentia of an accused person, the following must be satisfied based on the evidence:

(i) Court is satisfied that the person has been served with summons;

(ii) Process for attendance at court followed and

(iii) Accused person refuse to attend

[23] The above are further necessary because section 15 of the Fiji Constitution gives the accused person the right of access to the courts and that the hearing of the cases will be determined with a reasonable time.

[24] This court must state that bob-compliance or breach of the constitution protecting the rights of the accused under section 14 and 15 Fiji Constitution are not to be readily waived to meet the convenience of the prosecution or the court registry. If a court is thinking of waiving the right of an accused to be present for his trial, it must support that decision based on evidence adduced before it.

[25] Having outlined the above requirements, the court notes that the trial judge held an inquiry in court to determine the application by the prosecution for the appellant to be tried in absentia. The trial judge in allowing the State's application to try the appellant in absentia stated as follows:

> *'[10] The Constitution of the Republic of Fiji 2013 under Article 14(2) (h) specifically provides for trial in absentia which states:*
>
> *Every person has a right*
> *(h) 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) the conduct of the person is such that the continuation of the proceedings in his or her presence is impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence;*
>
> *[11] The Respondent was aware of this case and the trial date when he 'escaped' from remand custody. Remand Committal Warrant had been issued by this Court for him to be produced before this Court. He failed to appear in court on the day fixed for trial. Warrant was issued to arrest him. State has not been able to execute the warrant.*
>
> *[12] The Respondent is charged with four others who are awaiting speedy disposal of this case. There are number of eye witnesses and their memory will fade away with the passage of time. Prosecution is greatly prejudiced if the trial is further delayed. Long delay would cause irreparable damage to the Prosecution and to the justice system. The general public will lose confidence in the system.*
>
> *[13] Considering Article 14(2) (h) of the Constitution of The Republic of Fiji, I allow the application by the Prosecution for the respondent to be tried in absentia.*
>
> *[14] I am mindful that facts that Respondent's right to a fair trial have to be safeguarded at the trial in absentia even though he is not present at the trial. Assessors shall be clearly warned not to hold the absence of the*

*Respondent against him. I would advise the prosecution to disclose all the evidence against him on relevant material facts and highlight evidence advantageous to the Respondent in my summing up to the assessors. I will also warn the assessors that the absence of the accused is not an admission of guilt and adds nothing to the prosecution case. I will also take steps to expose weaknesses of the prosecution case in the summing up.*

[26] The above factual situations established by the trial judge showed clearly that the appellant's actions, after having been clearly notified of his trial date and using the bail granted by the Nadi Magistrate Court to absent himself from his trial amount to consent not to attend. His trial in absentia was justified on the evidence and facts of this case. There has been no miscarriage of justice.

[27] Therefore, this ground of appeal has no reasonable prospect of success. It is dismissed

**Grounds 2 & 3 - Weakness in Dock Identification Evidence**

[28] In reviewing the trial records, the evidence of Jona Toga's identification evidence of the appellant, the assessment undertaken by the Justice of Appeal sitting alone of the relevant evidence and the confused submission made by the appellant in support of this grounds of appeal, we conclude that these grounds have no merit and are dismissed.

[29] The appellant's legal submissions contained in his written submissions are irrelevant to the facts of his case as his was not a first time dock identification. Dock identification at the *voire dire* inquiry was only a formality.

[30] The appellant now makes another submission to the effect that Mr. Jone Toga in his police statement had said that he and the appellant had not met nor had they consumed liquor together prior to the robbery. Jone had also said to the police that he was consuming liquor with others and saw the robbery happening and identified only the person caught after the robbery who was not the appellant. However, the appellant also submits that Jone had given evidence at the *vior dire* inquiry consistent with his evidence at the trial of his identification of the appellant at the crime scene but does not say that he confronted and contradicted Jone with his alleged police statement. In fact he admits that he had not done so at the *voir dire* inquiry as his focus was on challenging his confession and due to lack of legal assistance.

[31] It appears that the appellant had successfully challenged his confessional statement without any legal assistance and therefore, there was no reason why he could not have challenged Jone when the witness gave evidence implicating him with the robbery as an eye witness and a known person.

[32] The learned trial judge had himself considered identification evidence against the appellant in the judgment as follows.

> *"24. Trial proceeded in the absence of the 4th accused Ulaiasi Qalomai. Witness, Jona Toga said that he recognised Ulaiasi Qalomai before and during the robbery. Toga had even talked to Ulaiasi few minutes before the robbery. He had seen Ulaiasi steeling inside the Daily Shop. In this regard, Toga had given a statement to police. Togahad known Ulaiasi as a school mate at Namaka Public school.*
>
> *25. Ulaiasi was in the dock when Toga was testifying at the voir dire hearing. He was recognised in the dock by Toga. Since then Ulaiasi knew very well that Jona Toga is an adverse witness for his defence case at the trial. He could have discredited Jona Toga at the trial if Jona Toga was lying. Ulaiasi, knowing very well the trial date, absconded and waived his right to be present and right to cross examine. Only inference that Court can draw is that Toga told the truth to this court."*

[33] The appellant's legal submissions contained in his written submissions are irrelevant to the facts of his case as his was not a first-time dock identification. Dock identification at the *voir dire* inquiry was only a formality.

[34] The appellant made another submission to the effect that Mr. Jone Toga in his police statement had said that he and the appellant had not met nor had they consumed liquor together prior to the robbery. Jone had also said to the police that he was consuming liquor with others and saw the robbery happening and identified only the person caught after the robbery who was not the appellant. However, the appellant also submits that Jone had given evidence at the *vior dire* inquiry consistent with his evidence at the trial of his identification of the appellant at the crime scene but does not say that he confronted and contradicted Jone with his alleged police statement. In fact he admits that he had not done so at the *voir dire* inquiry as his focus was on challenging his confession and due to lack of legal assistance.

**Grounds 4 & 5 – Repetitive, Frivolous and Vexatious**

[35] The appellant's complaint here is on accepting Mr. Jone Toga's evidence *vis-à-vis* his alleged police statement. This matter has already been dealt with under the 2nd and 3rd grounds of appeal: See Paragraph 18 above. This ground of appeal too has no reasonable prospect of success. It is dismissed.

[36] The appellant argues that because his cautioned statement had been ruled inadmissible the subsequent trial became invalid. The cautioned statement had been ruled out by the trial judge in his ruling on 28 May 2015 due to the presence of injuries on the appellant unexplained by the prosecution.

> *'(55). According to prosecution witnesses, 4th and the 5th accused did not have any serious injuries at the time of the arrest. Police Constable Jona Toga who interviewed the 4th accused on 24th May 2014 did not notice any injury at all on the 4th accused's face during the interview. Police witness Leone Vurukami who interviewed the 5th accused also did not notice any injury on 5th accused. Then how come the injuries noted by Dr. Terry who examined both of them on 27th May 2014 came into being? Certain answer would be that they had been assaulted at the Nadi Police Station.'*

[37] However, the very purpose of the *voir dire* inquiry was to determine the voluntariness of the confessional statements. The appellant had successfully convinced the trial judge that his cautioned interview had not been voluntarily made and should not be admitted. That decision did not in any way affect the trial proper against the appellant.

[38] The appellant's argument is baseless and his ground of appeal is frivolous and vexatious. The delay is substantial and the reasons for the delay are unconvincing though an extension of time would not necessarily prejudice the respondent.

[39] In conclusion, a application for enlargement of time to seek leave to appeal have no merit. It is dismissed.

**Qetaki, JA**

[40] I agree with the judgment, the reasoning and the orders.

**Morgan, JA**

[41] I agree with the reasons and conclusion of Mataitoga JA.

***Order***

1. *Extension of time to seek leave to appeal against conviction is refused.*
2. *Conviction and Sentence in the High Court against the appellant affirmed.*

**The Hon. Mr. Justice Isikeli Mataitoga**
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

**The Hon. Mr. Justice Alipate Qetaki**
JUSTICE OF APPEAL

**The Hon. Mr. Justice Walton Morgan**
JUSTICE OF APPEAL

**SOLICITORS:**
Appellant in person
Office of the Director of Public Prosecutions, Suva, for the Respondent