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

CRIMINAL APPEAL NO. AAU 0084/2018
[Criminal Action No: HAC 172/2015]

BETWEEN : **VERETI WAQA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Kumarage, JA

Counsel : **Ms N Mishra for the Appellant**
Mr R Kumar for the Respondent

Date of Hearing : **9th May and 17th May, 2023**

Date of Judgement : **6th June, 2023**

JUDGEMENT

Mataitoga, JA

[1] I have read in final draft the Judgment of Qetaki JA and I agree with his reasons and conclusions.

Qetaki, JA

[2] The appellant was charged with two others by the Director of Public Prosecutions for aggravated robbery contrary to section 311 (1) of the Crimes Act. The following information was filed against them:

[3] **FIRST COURT**

Statement of Offence

***AGGRAVATED ROBBERY**: Contrary to section 311 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

KELEPI SALAUCA, VERETI WAQA & TUI LESI BULA in the company of another** on the 11th October, 2015 at Sigatoka in the Western Division robbed **KAVITESH KIRIT PRASAD** of the following items: Nissan Navara (Registration HA 448) valued at $60,000.00, $300.00 cash, Assorted cards namely Westpac, Westpac Debit Card, Australian Master Card, Australian Drivers Licence, Joint FNPF/FIRCA, Black SFIDA pair of canvas, Gym Gloves, White iPod, Nokia Lumia Phone, Euphoria Calvin Klein Perfume, Encounter Fresh Calvin Klein perfume, Mangal Sutra valued at $10, 000.00, Bangles valued at $6,000.00, Hair set valued at $9,000.00, Bracelet valued at $2,000.00, Ear ring valued at $3,000.00, Bedstone Necklace valued at $900.00, Wedding Ring (Female) valued at $2,000.00, Wedding Ring (Male) valued at $1,200.00, Gold Chain (22 carat) valued at $1,200.00, Wrist Watch (Fossil-Citizen) valued at $800.00, Ladies Watch (Pulsar) valued at $300.00, Black Label (x 15 bottles) valued at $1,350.00, Bombay Sapphire (x 5 bottles) valued at $400.00, Galaxy Samsung S5(x2) valued at $2,400.00, ITB Hardware (x2) valued at $1,000.00, 1 Flash Drive valued at $500.00, 1 Toshiba laptop valued at $1,800.00 and assorted branded BLK Clothing valued at $80.00 all to the **Total Value of Approximately $93, 930.00.

[4] **THE FACTS**

In brief the facts in this case are:

On 11 October, 2015 the complainant and his wife (husband and wife) were asleep in their house at Malaqereqere, Sigatoka. At about 2.00 a.m. they were awoken by the sound of someone breaking into their bedroom. Three persons of itaukei origin in the company of each other and another had broken into the house of the victims. The victims were asked to cooperate so that no one was harmed, blankets were thrown over them, curtains drawn and the lights in the house turned on.

[5] The victims were questioned regarding the whereabouts of their valuables in the house. The pregnant wife of the complainant was grabbed by her hair and dragged from one room to the other so that she could show them where the valuables were. The house was searched for about an hour and the intruders fled from the scene having stolen the following properties belonging to the victims namely Nissan Navara vehicle (registration no. HA 448), mobile phone, assorted jewellery, assorted liquor, wallet with cash of $300.00, credit cards, perfumes, laptops, BLK clothes, shoes, black and white SFIDA canvas, watches etc. all to the value of about $93,000.00. Upon police investigation the accused were found to be in possession of most of the items stolen from the complainants. They were arrested and charged.

[6] The appellant was tried in absentia although he had attended part of pre-trial proceedings, while the other two accused were present at their trial. After the full trial the assessors had expressed unanimous opinion that all the accused were guilty of the single count of aggravated robbery. The Learned High Court Judge had agreed with the unanimous opinion of the assessors and convicted all the accused persons on the same count on 15 June 2018 and the accused were sentenced on 10 July 2018. For his part the appellant was sentenced to 13 years 9 months and 27 days imprisonment with a non-parole period of 12 years, his sentence to commence from the day of his arrest.

Application for Leave to Appeal

[7] The appellant through his counsel had filed an untimely appeal on 28 August 2018 against conviction and sentence supplemented by amended grounds of appeal by the appellant himself on the same day. The delay is about 18 days. The appellant had tendered written submission on 13 November 2019 where he had sought to consolidate all grounds of appeal. At the leave to appeal hearing, the appellant filed Form 3 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence. The State had tendered its written submissions on 27 January 2019 where no serious objection had been raised to the appellant's delay in filing.

[8] In timely leave to appeal applications the Court of Appeal has raised the bar by applying a test of **reasonable prospect of success** to determine whether leave to appeal should be granted (see **Caucau v State AAU** 0029 of 2016; 4 October 2018 [2018] FJCA 171,

Navuki v State AAU 0038 of 2016; 4 October 2018 [2018]FJCA 172 and **State v Vakarau** AAU 0052 of 2017; 4 October 2018 [2018]FJCA 173 and **Sadrugu v The State** Criminal Appeal No. 0057 of 2015; 6 June 2019 [2019] FJCA 87.

[9] All the three accused had sought leave to appeal their conviction and sentence in accordance with section 21 (1) of the Court of Appeal Act. Their applications for leave were taken up together in line with a Judge's directive made with respect to all the three appeal hearings as they arise from one and the same High Court trial. All the three appeals were taken together for the leave to appeal hearing as they arise from one and the same High Court trial.

[10] The appellant's consolidated grounds for appeal against conviction for leave to appeal hearing before a single judge, see Ruling of Learned Single Judge at page 4, page 35 of Record of HC of Fiji Vol,1 of Vol 11 , are as follows:

Grounds of appeal against conviction

"(1) That the learned judge erred in law when he failed to direct the assessors in the summing up on the principles regarding trial in absentia and thereby breached section 14(2)(2)(h)(i) of the Constitution.

(2) That the learned trial judge erred in law when he failed to properly warn himself in the judgement on the principles regarding trial in absentia and thereby breached section 14(2)(h)(i) of the Constitution.

(3) That the lerned trial judge erred in law and in fact when he failed to properly investigate the whereabouts of the appellant during the trial and sentencing, especially since the appellant had been in remand for certain periods in 2017 and 2018.

(4) That the learned trial judge erred in law and in fact, when he proceeded with the hearing on the matter pursuant to section 14(2)(h)(i) of the Constitution whereby the requirements of the same was not satisfied, whereas the court had failed to ascertain beyond reasonable doubt that the appellant was aware of the date of trial but had voluntarily chosen not to attend.

(5) That the learned trial erred in law and in fact that the appellant did not evade the court on purpose since the appellant was remanded by the Suva Magistrates court in August 2017, for criminal cases CF 1291/17 and 1292/17 and it was beyond the appellant's control to attend the case.

(6) That the learned trial judge erred in law and in fact when he failed to consider the second limb of section 14(2)(h)(i) of the Constitution as he failed to satisfy the requirement of a summon or similar process to be served requiring his attendance whereby the similar process would include a bench warrant port to be provided to court whereby the appellant was arrested just before the sentence was passed.

(7) that the learned trial judge erred in law and in fact when he failed to consider the provision of section 172 of the Criminal Procedure Act 2009.

[11] The gist of the appellant's complaint against conviction relates to the trial against him in absentia which the appellant alleges was conducted in breach of section 14(2)(h)(i) of the Constitution. All the grounds of appeal except ground (7) jointly support the appellant's contention that his constitutional rights to attend his trial had been violated.

[12] The appellant's position has been that he had no intention to evade the trial but attended all mention dates whilst on bail since 23 December 2015. He had pleaded not guilty to the information on 26 November 2015. According to him the trial had been fixed to take place originally from 31 July 2017 to 04 August 2017 but had finally been conducted from 31 May to 12 June 2018. He submits that he was in remand in Suva Remand Centre in respect of some other cases [Nasinu Magistrates Court (2) Case No. CF 900/17 and Suva Magistrates Court (4) Cases No.CF1291/17 and CF1292/17] during the period of the trial in the High Court. He claims to have missed appearances in the High Court from 19 September 2017 due to his remand in prison commencing from early September. He states that he was in remand in respect of case No. HAC 289 of 2018 of Suva High Court when conviction and sentence were recorded against him. He further submits that he had received no summons or any other process of court for his appearance in the High Court regarding the case.

[13] The appellant argued that his rights under section 14 (2)(h)(i) of the Constitution had been violated as a result of the trial against him in absentia. Section 14(2)(h) (i) is as follows:

> *"Every person charged with an offence 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)…."*

[14] After consideration of the grounds of leave to appeal against conviction the learned Single Judge granted the appellant leave to appeal on the ground whether a miscarriage of justice has occurred by the decision of the learned trial judge to try the appellant in absentia. It was arrived at due to the absence of any other provision in the Criminal Procedure Code 2009 regarding an accused being tried in absentia in the High Court, and it appears that section 14 (2)) (h)(i) of the Constitution which conferred rights to accused persons (as a guide to be followed prior to holding his or her trial in absentia) was not complied with , a matter that has to be investigated by the State and the findings made available at the full court hearing. The State also did not oppose the appellants application for leave to appeal against conviction although it is concerned that if the appellant were to succeed in his appeal that the court has to consider his part and the evidence against him in the commission of the offence. The learned Single Judge granted leave to the appellant to appeal against conviction, there being reasonable prospect of success in the appeal before the full court were the appellant to sustain his position having been verified with the copy record, otherwise the appellant will have to substantiate his contention.at the full hearing.

Application for Bail Pending Appeal

[15] On 28 October 2020 the Legal Aid Commission on behalf of the appellant filed a notice of motion seeking bail pending appeal in terms of section 33(2),35(1)(d) of the Court of Appeal Act and section 17(3) of the Bail Act 2002 an affidavit and written submissions. Two supplementary affidavits of the appellant had been filed on 4 November 2020.The respondent had tendered an affidavit date 5 November 2020 in reply. The learned Judge of Appeal hearing the application on5 November 2020 and delivered his Ruling on 6 November 2020 where the single judge having considered and assessed the materials before the court ,established that there is sufficient material to be satisfied that the for the purpose of the appellant's bail pending application , , that he had been in remand during the entire duration of the trial in his absence in Lautoka High Court 172/2015.At paragraph [13] of the application for bail hearing he stated:

> *"13. Therefore, there is sufficient material to be satisfied for the purpose of the appellant's bail pending application that he had been in remand*

during the entire duration of the trial in his absence in Lautoka High Court HAC 172/2015."

[16] Whether the learned trial judge had been satisfied with the fulfilment of the conditions set out in section 14(2)(h)(i) of the Constitution and thereafter exercising his discretion in proceeding with the full trial in the absence of the appellant, cannot be ascertained without examining the full court record, and this was raised at the hearing of the application for leave to appeal, and also, for the hearing of application for bail pending appeal, both held before a Single judge. The only reference to this in the Summing Up {see paragraphs [6] and [174] deal with the trial without the appellant and nothing more can be found in the judgement either to find an answer to the above questions. The said paragraphs state:

"6. You will notice that the information has three accused persons mentioned, however, only accused one and accused three are present in court. The second accused Vereti Waqa is not present in court. The law provides for an accused to be tried in his absence known as trial in absentia. Although the second accused was not in court throughout the duration of the trial, he is entitled to all the rights of an accused who is present in court that is a fair trial…

174. The second accused was absent from the proceedings so he was taken to have exercised his right to remain silent."

[17] It is clear, the Summing Up does not accurately reflect the requirements of the Constitution in section 14(2)(h)(i). The appellant was granted bail pending trial as leave to appeal has already been granted to the appellant on the ground whether a miscarriage of justice has occurred by the decision of the learned trial judge to try the appellant in absentia and that there is a very high likelihood of success in his appeal.

[18] It is clear during the application for leave to appeal hearing and at the application for bail pending appeal hearing that the decision of the learned trial Judge in granting an application for trial in absentia need to be examined against the copy record. In particular on whether the requirements set out under section 14(2)(h)(i) of the Constitution had been complied with before he exercised his discretion to hold the trial in absentia against the appellant. The requirements are (i) the accused must be served with a summons or similar process requiring his attendance at the trial and (ii) despite

the 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) cannot be taken away and the accused cannot be tried in his absence in the High Court.

[19] The first of these conditions is the obligation of the court to conduct an inquiry to its satisfaction that a summons or a similar process has been served on the accused requiring the accused to attend the trial. The second condition is the conscious, deliberate or voluntary decision on the part of an accused not to present himself for the trial. Once a summons has been given to the accused, if not detained under authority of a court, it is his responsibility to make himself available to face trial by attending. An order or direction may be served on the authority holding him in custody to produce the accused in court to face his trial. Section 14(2)(h)(i) of the Constitution therefore is not a license for an accused to evade process of court and the course of justice.

[20] It appears from the following cases that even when the accused waives his right to be present, the court is not necessarily bound by law to proceed with the trail without the accused. The Trial Judge is vested with discretion 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, William J said, at p 346:

> *"The primary and governing principle is, I think 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 his 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 a presiding judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence."*

In **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 approaches 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 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."

Full Court Hearing

[21] At the hearing of the appeal on 17 May 2023 the appellant through his counsel submitted that the appellant's absence at the trial was for reasons beyond his control as the appellant in fact was in remand custody for other unrelated matters when the substantive matter in this case had proceeded to trial over 31 May 2018 to 12 June 2018. This position in relation to the reasons for the appellant's absence is supported by the respondent through its internal Registry checks with the Nasinu Court Registry as contained in the respondents submission dated 5 May 2023. The appellant's Bail Pending Appeal Ruling of 6 November 2020 also confirmed this.

[22] The court records have nothing to show or indicate that the leaned trial Judge had been satisfied that the conditions set out in section 14(2)(h) ((i) of the Constitution was fulfilled. Nevertheless, he decided to exercise his discretion in proceeding with the trial in the absence of the appellant in breach of section 14(2)(h)(i) and in violation of the appellant's constitutional rights.

[23] Given the learned trial judge's decision to proceed with the appellant's trial in absentia which resulted in his conviction, without complying with the requirements of section 14(2)(h)(i) of the Constitution, a miscarriage of justice has occurred. The prosecution has not opposed the possibility of the conviction being quashed, and further, it has not returned with a positive explanation on whether the learned trial judge had complied with the constitutional requirements in section 14(2)(h)(i). The appellant has also convinced this court on his position that he was in custody and was not in full control of his position at the material time.

[24] Section 23(2) of the Court of Appeal Act states:

"Subject to the provision of this Act, the Court of Appeal shall-

(a) If they allow an appeal against conviction, either quash the conviction and direct a judgement and verdict of acquittal to be entered, or if the interest of justice so require, order a new trial;"

[25] Two options are open to the court while allowing an appeal namely (i) quash the conviction and direct a judgement and verdict of acquittal to be entered, or (ii) if the interests of justice so require, order a new trial: Prematilaka RJA citing **Abourizk and Another** CAV 0012 of 2015 (25 August 2022) the Supreme Court at paragraph 12 in **Josefa Saqanavere, Tuimoala, Raogo v State**, Criminal Appeal No. AAU 035 of 2016 [In the High Court of Suva Case No. HAC 251 of 2013 S].

[26] If the conviction is quashed and a judgement and verdict of acquittal is entered, that will operate as a bar to the appellant's retrial, if retrial is ordered, given section 14(1)(b) of the Constitution which says that:

"A person shall not be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."

However, should a retrial be ordered, it should be done guided by established guidelines.

[27] In the case **Laojindamanee v State** [2016] FJCA 137; AAU0044.2023 (30 September 2016) the Court of Appeal laid down some guidance for a retrial to be ordered as follows:

"The power to order a retrial is granted by section 23(2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App. No. AAU0060 of 2006S:(14 November 2008)"

[28] The appeal against conviction is allowed and the conviction entered against the appellant quashed. In the interests of justice, a new trial is ordered, in accordance with

section 23 (2) (a) of the Court of Appeal Act. The appellant is currently on bail on conditions, the bail and its conditions are to be reviewed immediately and no later than two weeks to be consistent with the decision of this court.

Dr. Kumarage, JA

[29] I have read the final draft Judgment of Qetaki JA and, I agree with his reasons and findings.

***Orders of the Court*:**

1. Conviction of the appellant is quashed.
2. A new trial is ordered against appellant.
3. The appellant to be present before the High Court at Lautoka within two weeks from judgment day to make appropriate orders with regard to the new trial and bail review.

Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Thushara Kumarage
JUSTICE OF APPEAL