

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

Crim. Misc. Case No: HAM 068/2013

**BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST
CORRUPTION
APPLICANT**

**AND : MAHENDRA MOTIBHAI PATEL
RESPONDENT**

**COUNSEL : Mr V Perera and Ms R Drau for the Applicant
: Mr H Nagin for the Respondent**

DATE OF HEARING : 18/11/2013

DATE OF RULING : 28/02/2014

RULING

- [1] The Respondent is charged with one count of Abuse of Office contrary to Section 111 of the old Penal Code Cap.17. He has been charged along with Tevita Peni Mau and Dhirendra Pratap.
- [2] The matter was first called in the Suva Magistrates Court on 06/02/2008. Thereafter it was called before Suva High Court on 29/01/2010. Amended Information was filed in the High Court on 23/07/2010 and the Respondent entered a plea of Not Guilty.
- [3] The Respondent last appeared in Court on 25/10/2011. By letter dated 30/01/2012, the Respondent informed the Applicant about his intended visit abroad for medical treatment. As the Respondent was absent from proceedings and had violated one of the bail conditions, a Bench Warrant was issued on 15/03/2012 which is yet to be executed upon his return.

- [4] The Respondent without appearing before this court sent instructions via his counsel with no certainty of his arrival date. Therefore, the Applicant filing this application moves that the Respondent be tried in absentia.
- [5] The Applicant submits that the consequence of the absence of the Respondent is the inevitable delay of the trial and stagnation of the case thereof and the general public will lose the confidence in the justice system. The Respondent voluntarily has violated the bail conditions imposed on him.

Trial In absentia in Fiji

- [6] Up to year 2013, in Fiji, the only provision that allows trial in absentia is Section 171 of the Criminal Procedure Decree 2009. That Section under the Part XIII of the Criminal Procedure Decree is only applicable to Magistrate Court proceedings. There is no provision enabling a trial in absentia in the High Court under the Criminal Procedure Decree.
- [7] In the absence of explicit provisions, the Fiji High Court in the first and recent case of **FICAC v NEMANI** HAC 37(A) of 2010, considering the provisions in the Common Law and relevant authority of **R v JONES (Anthony)** [2003]1 AC 1, ruled that the defendant be tried in absentia. In that case, the defendant was charged with Extortion and Abuse of Office, respectively. She went to New Zealand without leave of the court and remained absent for over 30 months. The court noted that the defendant had deliberately and voluntarily absconded from court and chose not to be present nor gave instructions to a lawyer to represent her.
- [8] After promulgation of the Constitution of The Republic of Fiji 2013 there is a specific provision to deal with trial in absentia. Article 14(2) (h) under the heading of "Rights of Accused Persons" states:

(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;

[9] After violating one of the bail conditions, the Respondent sent instructions via his counsel with no certainty as to the arrival date. Finally, the Respondent by letter dated 18th day of January, 2013 purported to be issued by the Dr. Harrisberg merely restating the contents of the previous letters with the continued need for constant monitoring of the Respondent, was forwarded to this court by counsel of the Respondent.

[10] The Respondent was aware of this case pending against him at the time he travelled out of the country. He never appeared in court since 21st February 2012.

[11] The court and the prosecution have waited indefinitely for the return of the respondent and the delay has been more than 24 months. The Respondent is charged with two others who have also waited indefinitely for the return of the same to face trial.

[12] The Respondent, upon violating his bail conditions for about 24 months, did not take measures to inform this court his intend date of return to Fiji. This long delay would cause irreparable damage to the prosecution, to the justice system and the general public will lose confidence in the system.

[13] It is apparent that the Respondent has absconded from court more than 24 months. But he excised his rights by giving necessary instructions to his counsel.

[14] However, Respondent's rights have to be safeguarded at the trial in absentia by the presiding Judge. Assessors shall be clearly warned not to hold the absence of the Respondent against him. Further the prosecution should disclose and present

evidence all relevant material facts that would be advantageous to the Respondent, to the assessors. The Judge must also warn the assessors in his summing up that the absence of the accused is not an admission of guilt and adds nothing to the prosecution case. The Judge must also take steps to expose weaknesses of the prosecution case in his summing up.

[15] 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.

P Kumararatnam
JUDGE

At Suva
28/02/2014