

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

Criminal Case. No. HAM 24 of 2023

BETWEEN : **THE STATE**

APPLICANT

A N D : **TUBALE LATINARA**

RESPONDENT

Counsel : Mr. S. Seruvatu for the Applicant.
Ms. S. Ali for the Respondent.

Date of Hearing : 31 January, 2023
Date of Ruling : 01 February, 2023

RULING

[Trial in Absentia]

BACKGROUND INFORMATION

1. The applicant by Notice of Motion dated 30th January, 2023 supported by the affidavit of WDC 3183 Melaia Silaira sworn on 30th January, 2023 seeks the following orders:

“That a trial in absentia be granted to the State in relation to Tubale Latinara.”

2. The application filed is opposed, an affidavit in response has been filed by the Senior Legal Officer, Ms. Keli Vulimainadave on behalf of the respondent.
3. The respondent is charged with one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act. The substantive matter is pending in this court being criminal case no. HAC 11 of 2017.
4. The matter was first called in the Magistrate’s Court at Nadi on 13th December, 2016. Thereafter it was called before the High Court on 18th January, 2017. The information filed was put to the respondent on 3rd March, 2017 whereby the respondent pleaded not guilty. The respondent was granted conditional bail on 30th August, 2017.
5. On 16th June, 2020 the respondent did not appear in this court hence a bench warrant was issued. By his absence the respondent breached his bail conditions as well.
6. State counsel submits that the investigating officer in this matter had made several attempts to locate the respondent but has not been successful. The attempts included visiting all the known addresses of the respondent, questioning the respondent’s cousin namely Miliana Divua who lives at Bila, Back Road, Nadi where the respondent used to reside, checked with residents living around Bila, Back Road, spoke with Mr. Yogen Reddy the respondent’s last known employer about the whereabouts of the respondent. The respondent had worked for Mr. Reddy for about 2 to 3 weeks in early 2022.

7. Furthermore, the investigating officer had also checked at the respondent's village at Koro Island and had spoken to one Ragolelei who has confirmed that the respondent has not returned to his village since 2016. A check was also made with the Fiji Corrections Services and the respondent is neither in any remand centre or serving in any of the Corrections facilities throughout Fiji.
8. It is also submitted that the absence of the respondent is causing delay to the trial. Furthermore, the respondent is aware of the proceedings and has also violated his bail conditions voluntarily. By his conduct the respondent has waived his right to be present in court at trial.
9. A search was also conducted by the investigating officer at Shardar Medical Services (part of Minsitry of Health) for any record of Covid-19 vaccination by the respondent including a search at the Elections Office to get the details of the respondent's voter registration and the office of Criminal Intel West. All the above searches have not produced any positive results.
10. According to the state counsel any further delay will mean a substantial delay resulting in prejudice to the State's case as it is a 2016 allegation.
11. On the other hand the respondent's counsel stated that there are no specific details and/or time or dates provided by the investigating officer in respect of the checks made by her. Furthermore, there are no correspondence attached to the affidavit of the investigating officer to confirm that inquires were made at the Elections Office and the office of the Criminal Intel West.
12. Counsel also stated that the investigating officer has not forwarded the details of the respondent in the Crime Stoppers programme. Counsel also

stated that the respondent's last known address as per his bail form is Maqalevu, Nadi and not Bila, Back Road, Nadi. Since the state has not exhausted all the avenues available to them in locating the respondent their application should be dismissed.

LAW

13. Section 14 (2) (h) of the Constitution of the Republic of Fiji specifically deals with trial in absentia situations as follows:

- (2) *Every person charged with an offence has the 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.”*

DETERMINATION

14. Upon perusal of the court file there is no doubt that the respondent was aware of the date he was supposed to have appeared in this court, he was granted conditional bail which he chose to breach by not appearing in court as required. I accept that the respondent has voluntarily chosen to absent himself.

15. The prosecution and the court including the respondent's counsel have also waited patiently for the respondent to appear in court for a long time. I do not accept that the investigating officer has not done enough to locate the respondent. In my considered judgment the investigating officer has done whatever she possibly could do within the available resources to locate the respondent.
16. In respect of the search made at Bila, Back Road, Nadi and not at the address as mentioned in the respondent's bail form is not material because a person can change his or her address without informing the court. In any event no issue has been taken on behalf of the respondent that it was the respondent's cousin Miliana Divua who had informed the investigating officer that the respondent is not residing at Bila, Back Road, Nadi.
17. It is obvious to me that the respondent has also taken advantage of the Covid-19 pandemic lockdown in 2020 to avoid appearing in court or contact his counsel. I agree with the state counsel that there should not be any further delay in the determination of this matter. The delay is inexcusable, inordinate and could cause prejudice to the prosecution due to passage of time.
18. For the proper administration of justice and to retain the confidence of the general public it is important that there be a finality to the substantive matter without any further delay. In this case the respondent's interest is represented by his counsel hence the respondent will not be prejudiced and a trial in absentia can be granted.

ORDERS

- a. The application for trial in absentia is granted.



Sunil Sharma
Judge

At Lautoka

01 February, 2023

Solicitors

Office of the Director of Public Prosecutions for the Applicant.

Office of the Legal Aid Commission for the Respondent.