

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 76 of 2023
CRIMINAL MISC. CASE NO. 277 of 2023

BETWEEN : **NEEL AVIKASH NAICKER**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. I. Khan for the Appellant.
: Mr. S. Seruvatu for the Respondent.

Date of Submissions : 17 November, 2023

Date of Judgment : 14 December, 2023

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Lautoka for one amended count of assault causing actual bodily harm contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

Neel Avikash Naicker on the 27th day of April, 2020 at Lautoka in the Western Division assaulted Anjini Lata Prasad thereby occasioning her actual bodily harm.

2. The appellant pleaded not guilty and he was released on strict bail conditions. On 4th November, 2022 the accused was not present and a bench warrant was issued.
3. On 27th March, 2023 the court was informed that the accused had left the country on 5th November, 2022 and a copy of the travel history from the Immigration Department was tendered in court. A trial in absentia was granted by the court and the matter was adjourned to 26th September, 2023.
4. On this date the matter proceeded to trial in absentia the prosecution called the complainant as a witness and closed its case.
5. By judgment dated 27th October, 2023 the learned Magistrate found the appellant guilty and convicted him as charged. On 31st October, 2023 the appellant was sentenced to 6 months imprisonment with a permanent DVRO in respect of non-molestation and non-contact were issued to protect the victim.
6. The brief summary of facts is as follows:
 - a) The victim and the appellant were living in a defacto relationship. On 27th April, 2020 at about 8.50am the victim and the appellant had an argument. The appellant punched the victim's right arm and after she fell on the floor he kicked her on her left side.
 - b) The appellant swore at the victim and he uttered the words "*you are a prostitute and a bitch*". The victim reported the matter to the police and she was seen by a doctor at the Kamikamica Health Centre. According to the medical report tendered in court the victim suffered a swelling and bruising on the right arm and red linear laceration on the right upper back and bluish discoloration on the left knee.

- c) In court the victim was also able to identify the appellant through a photograph which was tendered in court.
7. The appellant being aggrieved by the conviction of the Magistrate's Court filed a timely petition of appeal in this court together with a miscellaneous application seeking the following orders:
- a) *That this Honourable Court grants a stay of sentence pending the determination of the Petitioner's appeal before this Honourable Court;*
 - b) *That the Petitioner be granted bail pending determination of Petitioner's appeal to this Honourable Court;*
 - c) *That this Honourable Court set aside the conviction that was made in the absence of the Petitioner contrary to section 172 of the Criminal Procedure Act 2009;*
 - d) *Any other order/orders this Honourable Court seems just and expedient;*
 - e) *That the time of service of this Motion be abridged.*

APPEAL AGAINST CONVICTION

The following ground of appeal was filed in court:

- i. *That the learned Magistrate acted without jurisdiction when he heard the case of the Petitioner in his absence contrary to section 167 (1) of*

the Criminal Procedure Act 2009 and as such there was a substantial miscarriage of justice.

8. The appellant's counsel filed written submissions but the state counsel despite an order made by this court for the filing of written submissions and further time given on two occasions failed to oblige. However, both counsel agreed that the court deliver its judgment on the written submissions filed. The court cannot be waiting for the state counsel, orders were made and the court has to attend to its duty of pronouncing its judgment in a timely manner.
9. The appellant's counsel stated that no inquiries were made by the learned Magistrate in respect of the following:
 - a) The non-appearance of the appellant;
 - b) Whether the non-appearance by the appellant was deliberate;
 - c) Whether a fair trial could be held without the appellant's participation.
10. Finally, counsel submitted that in the absence of an effective waiver the trial held in absentia was contrary to the Constitution of Fiji. In the written submissions counsel relied on the following cases in support namely:
 - i. *Ariana's Used Car and Spare Parts vs. FCCC, HAA 005 of 2021 (4 February, 2022);*
 - ii. *Lekima Rokolisoa vs. The State, HAA 024 of 2017 (28 July, 2017);*
 - iii. *Rashid Bulldozing Works vs. LTA, HAA 14 of 2017 (21 September, 2017);*
 - iv. *Waiqele Sawmills Ltd vs. LTA, HAA 15 of 2017 (21 September, 2017);*
 - v. *Shameem Mohammed vs. State, HAA 02 of 2019 (20 September, 2019);*

vi. *Ravin Chand vs. The State, HAA 13 of 2017 (17 November, 2017).*

LAW

11. It is trite law that a court having the jurisdiction to hear a matter has the discretion to proceed in the absence of the accused if the court is satisfied that the accused has been served with the summons or similar process requiring his or her attendance in court and has chosen not to attend see *Lekima Rokolisoa vs. The State* (supra).
12. Section 14 (2) (h) of the Constitution of the Republic of Fiji states:
“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) *the conduct of the person is such that the continuation of the proceedings in his or her presence is impractical and the court has ordered him or her to be removed and the trial to proceed in his or her absence”*
13. Before an application for trial in absentia is granted the court must be satisfied of the following:
 - a) The accused had notice of the proceedings;
 - b) The accused deliberately chose not to attend trial; and
 - c) A fair trial can be held in the absence of the accused.

14. A perusal of the copy record shows that the appellant had notice of the proceedings since he was present in court until 4th November, 2022. Furthermore, the copy record shows that the appellant was represented by counsel but when the bench warrant was issued no reason or explanation was given in court for the absence. Limb (a) and (b) above was satisfied.

15. In respect of limb (c) a perusal of the judgment delivered will show that the learned Magistrate was mindful of the appellant's absence and also the fact that the absence of the appellant did not mean he was guilty. At paragraph 21 of his judgment the learned Magistrate stated as follows:

I remind myself that the accused is still innocent until proven guilty. The burden of proving the guilt of the accused rests with the prosecutor and it never shifts to the accused at any time of the criminal trial. The accused not being present during the hearing doesn't mean that he is guilty of the offence charged.

16. Appellant's counsel in his submissions did not draw the court's attention to any unfairness caused to the appellant as a result of the trial in absentia. Merely saying it was an unfair trial is not good enough. The appellant has to point to the unfairness with reference to the evidence in the copy record. The appellant has not been able to do this.

17. In this regard I reiterate the observations made in *Lekima Rokolisoa* (supra) at paragraphs 15, 16 and 17 as follows:

[15] ...When conducting trial in absentia the court must exercise caution reason being such a trial will have to be fair to the absent accused as the circumstances permit resulting in a just outcome. The rights of the absent accused had to be safeguarded so that the principles of fair trial are not compromised.

[16] *The trial court should remind itself not to hold the absence of the accused against him or her and it is incumbent upon the prosecution to disclose and present evidence of all relevant facts that would be favourable to the accused. The above safeguards are, however, not exhaustive (see Fiji Independent Commission against Corruption vs. Fiona Tukana Nemani, Criminal Case no. HAC 37(A) of 2010). Furthermore trial in absentia not only includes substantive trial but trial within trial (see Krishneel Deepak Kumar vs. State, Criminal Misc. Case No. HAA 03 of 2016 (2 May, 2016).*

[17] *The House of Lords in R v Jones (2002) UKHL 5 stated that it is an overriding duty of the judge to ensure that the trial if conducted in the absence of the defendant will be as fair as circumstances permit and lead to a just outcome.*

18. Counsel also argued that the learned Magistrate did not have the jurisdiction to hear the trial in absentia which was contrary to section 167 (1) of the Criminal Procedure Act. In the Magistrate's Court for the court to grant a trial in absentia section 171(1) (a) is the enabling provision which states:

"If at the time of place to which the hearing or further hearing is adjourned

(a). the accused person does not appear before the court which has made the order of adjournment the court may (unless the accused is charged with indictable offence) proceed with a hearing or further hearing as if the accused were present..."

19. The above provision gives discretion to the Magistrate's Court to conduct a trial in absentia unless the accused is charged with an indictable offence. Here the appellant was charged with a summary offence namely assault

causing actual bodily harm. This means the Magistrate's Court had the jurisdiction to try the appellant in his absence.

20. Counsel relied on section 167 (1) of the Criminal Procedure Act which states:

This section applies to any case in which an accused person is charged with any offence punishable with imprisonment for a term not exceeding 12 months and/or a fine not exceeding 10 penalty units, and where the accused person-

(a) Does not appear at the time and place-

i) Appointed by the summons; or

ii) By any bond for his appearance that he or she may have entered into; and

(b) Personal attendance has not been dispensed with under section 83...

21. Counsel submitted that on the basis of section 167 the learned Magistrate had no jurisdiction to hear the matter in the absence of the appellant. This argument is misconceived and shallow in view of section 171 (1) (a) above. If what the counsel suggests was indeed the law then a chaotic situation would have ensued and a court would not have proceeded to finalize matters which were not caught by section 167 where the accused persons had absconded.
22. Section 167 is a specific provision in respect of minor offences which is superseded by section 171. Under section 171 a Magistrate's Court has residual powers to try serious offences other than indictable offences which does not fall under section 167 requirements.
23. This is the reason why the Magistrate's Court also has powers under section 172 of the Criminal Procedure Act to set aside a conviction entered in the absence of the accused upon satisfaction of the two tests mentioned

in this section. The appellant's counsel in the petition of appeal has also pleaded as follows:

ALTERNATIVELY, under section 172 of Criminal Procedure Act 2009 this Honourable Court ought to set aside the sentence which was obtained in absence of the Petitioner.

24. As explained above section 172 is only applicable to the Magistrate's Court and not to the High Court hence this court has no jurisdiction whatsoever to act under this provision of the law.
25. The learned Magistrate had the jurisdiction to try the matter in the absence of the appellant who had chosen not to attend court and the learned Magistrate had properly exercised his discretion to do so. There is no error made by the learned Magistrate in this respect.

SUBSTANTIAL MISCARRIAGE OF JUSTICE

26. The appellant's ground of appeal mentions that since the learned Magistrate had acted without jurisdiction there was a substantial miscarriage of justice caused to the appellant. Unfortunately counsel did not to point to the test this court should take into account. The test is that the appellate court had to be satisfied on the evidence adduced and the application of law that the only conclusion reached would have been one of guilt.
27. I have once again reviewed the evidence adduced to assure myself whether the judgment in its current form had served justice bearing in mind the applicable law.

28. The Court of Appeal in *Munendra vs. The State*, criminal appeal no. AAU 0023 of 2018, 25 May, 2023 from paragraphs 40 to 42 stated the above in the following words:

[40] *The test as propounded on the proviso to section 4(1) of the Criminal Appeal Act, 1907 in UK which is identical with the proviso to section 23(1) of the Court of Appeal Act in Fiji, is that the appellate court may apply the proviso and dismiss the appeal if it is satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty [see **R. v. Haddy** [1944] K. B. 442; 29 Cr. App. R. 182; **Stirland v D. P. P.** [1944] A.C. 315; 30 Cr. App. R. 40; **R. v. Farid** 30 Cr. App. R 168)].*

[41] *The proviso to section 23(1) of the Court of Appeal Act is almost identical with section 256 (2) (f) of the Criminal Procedure Act and therefore, the same test applied to the proviso to section 23 (1) should apply to proviso in section 256 (2) (f) of the Criminal Procedure Act.*

[42] *The Court of Appeal in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) adopted the same test in the application of the proviso to section 23(1) of the Court of Appeal Act as follows:*

[55]if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.

*[56] This test has been adopted and applied by the Court of Appeal in Fiji in **R -v- Ramswani Pillai** (unreported criminal appeal No. 11 of 1952; 25 August 1952); **R -v- Labalaba** (1946 – 1955) 4 FLR 28 and **Pillay -v- R** (1981) 27 FLR 202. In **Pillay -v- R** (supra) the Court*

*considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in **R -v- Weir** [1955] NZLR 711 at page 713:*

"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."

[57]when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

*In **Vuki -v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."

29. In view of the above, I am satisfied that upon the analysis of the evidence adduced the only verdict is the guilt of the appellant. There is no evidence of any unfairness caused to the appellant the learned Magistrate was also alert to the fact that no adverse inference can be drawn from the fact that the appellant was not present in court. The evidence given by the victim was admissible and relevant to the charge and therefore no criticism can be made of the trial process and the final decision.

ORDERS

1. The appeal against conviction is dismissed due to lack of merits;
2. The conviction entered against the appellant in absentia is upheld;

3. The criminal miscellaneous application no. HAM 277 of 2023 is also dismissed due to lack of merits;
4. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

14 December, 2023

Solicitors

Messrs Iqbal Khan and Associates, Lautoka for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.