

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 36 OF 2025

IN THE MATTER of an Appeal from the Decision
of the Resident Magistrate, Magistrate's Court
of Lautoka, in Criminal Case No. 751 of 2022.

BETWEEN : **APIMELEKI TOLA**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Mr. Mosese Naivalu for the Appellant.
Mr. John Rabuku for the Respondent

Date of Hearing : 11 December 2025

Judgment : 16 December 2025

JUDGMENT

- [1]** This is an Appeal made by the Appellant against his conviction imposed by the Learned Resident Magistrate, Magistrate's Court of Lautoka, in Criminal Case No. 751 of 2022, on 22 September 2025.
- [2]** The Appellant is a former High School Teacher and currently the Chairman of the Native Lands Commission.

- [3] On 4 October 2022, the Appellant was first produced in the Magistrate's Court of Lautoka, charged with the following offences [Vide page 5 of the Magistrate's Court Record]:

FIRST COUNT

Statement of Offence (a)

SERIOUS ASSAULT: Contrary to Section 277 (b) of the Crimes Act 2009.

Particulars of Offence (b)

APIMELEKI TOLA, on the 2nd day of October 2022, at Lautoka, in the Western Division, assaulted **POLICE CONSTABLE 5891 ZOHEB ALI**, thereby causing him bodily harm, in due execution of his duty.

SECOND COUNT

Statement of Offence (a)

SERIOUS ASSAULT: Contrary to Section 277 (b) of the Crimes Act 2009.

Particulars of Offence (b)

APIMELEKI TOLA, on the 2nd day of October 2022, at Lautoka, in the Western Division, resisted his arrest by **CORPORAL 2709 SANJAY PRASAD**, in due execution of his duty.

THIRD COUNT

Statement of Offence (a)

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

Particulars of Offence (b)

APIMELEKI TOLA, on the 2nd day of October 2022, at Lautoka, in the Western Division, wilfully and unlawfully damaged Vehicle Registration Number GR 117, valued at \$5,091.60, the property of the **FIJI POLICE FORCE**.

- [4] On the same day, the Appellant was explained his right to Counsel. However, he had waived his right to Counsel and wanted to represent himself. Thereafter, the Appellant's plea was taken and he pleaded not guilty to the charges. Since the Police Prosecution

- had no objection to bail, the Appellant was granted bail the same day and the matter was fixed for mention on 13 February 2023 [Vide page 39 of the Magistrate's Court Record].
- [5] However, on the 13 February 2023, the Appellant was not present in Court and a Bench Warrant had been issued. On the subsequent two Court dates, namely 12 May 2023 and 18 September 2023, the Appellant was again not present and the Bench Warrant was extended.
- [6] On 21 September 2023, the Appellant had appeared in Court and the Bench Warrant had been cancelled. The Learned Resident Magistrate had warned the Appellant that if he is not present in Court in the future without any valid reason, the case will be fixed against him for Trial in Absentia. The matter was adjourned to 15 December 2023 for Mention to fix a date for Hearing.
- [7] However, on 15 December 2023, the Appellant was again not present. As per the order made on the previous day, the Learned Resident Magistrate had fixed the matter for Trial in Absentia.
- [8] After several adjournments, on 30 June 2025, the Trial in Absentia was held before another Learned Resident Magistrate (since the previous Learned Resident Magistrate had left the jurisdiction and was no longer in service). During the Trial in Absentia, the Prosecution had called two witnesses, namely Police Constable 5891 Zoheb Alfaaz Ali and Corporal 2709 Sanjay Prasad. The Prosecution had then closed its case.
- [9] At the end of the case for the Prosecution, the Learned Resident Magistrate held that there was a case for the Appellant to answer and called for his defence. However, since the Appellant was not present in Court the Learned Resident Magistrate has recorded that the Appellant was exercising his right to remain silent. The matter had then been adjourned for Judgment.
- [10] On 22 September 2025, the Judgment was pronounced in absentia. The Appellant was found guilty and convicted of the three charges against him [Vide pages 10-15 of the Magistrate's Court Record for copy of the Judgment].

- [11] On 29 September 2025, the Sentence was pronounced in absentia. The Appellant had been imposed an aggregate sentence of 9 months imprisonment, to be served as soon as he was apprehended. A Stop-Departure Order had also been issued against the Appellant and the Director Immigration notified of same [Vide pages 6-9 of the Magistrate's Court Record for copy of the Sentence].
- [12] Aggrieved by this decision, on 9 October 2025, the Appellant filed a Notice of Appeal against his Conviction in the High Court. The Appeal has been filed within the prescribed time of 28 days from the date of Sentence.
- [13] On 27 October 2025, Amended Grounds of Appeal against Conviction were filed. However, on 25 November 2025, the Counsel for the Appellant was granted leave to file a Further Amended Grounds of Appeal against Conviction. On 4 December 2025, the said Further Amended Grounds of Appeal were filed.
- [14] This matter was taken up for hearing before me on 11 December 2025. The Learned Counsel for the Appellant and the Deputy Director of Public Prosecutions for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [15] As per the Further Amended Grounds of Appeal filed by the Appellant the Grounds of Appeal against Conviction are as follows:

FURTHER AMENDED GROUNDS OF APPEAL AGAINST CONVICTION

- (1) That the First Learned Resident Magistrate erred in law when he failed to warn himself on the principles regarding trial in absentia and thereby breached Section 14(2) (h) (i) of the Constitution whereby the requirements of the same were not satisfied, whereas the Honourable Court had failed to ascertain beyond reasonable doubt that the Appellant was aware of the date of the trial but had voluntarily chosen not to attend.
- (2) That the Second Learned Resident Magistrate erred in law when she adopted and endorsed the First Resident Magistrate's order, dated 15 December 2023, to proceed with the trial in absentia when as the Second Learned Resident

Magistrate she is constitutionally charged to ensure that the Appellant's rights pursuant to Section 15(1) of the Constitution are properly discharged.

- (3) That the Second Learned Resident Magistrate erred in law and in fact when she failed to satisfy the second limb of Section 14(2)(h)(i) of the Constitution even though a Bench Warrant report was tendered by the Prosecution showing only a check with Correction Centres nation-wide and an unsatisfactory effort at attempts to locating the Appellant elsewhere proving that she did not satisfy herself of the Prosecution adequately exhausting their avenues as to the possible location of the Appellant who was just travelling to and from his home at Imthurn Place, Domain to work on a daily basis in full view of the public and was never in hiding.
- (4) That the First Learned Resident Magistrate erred in law and in fact when the additional condition following cancellation of his bench warrant on 21 September 2023, that *"if he (Appellant) is not present in Court thereafter without any valid reason this case will be fixed for trial in absentia"* was ignored when the Honourable Court fixed the matter for trial in absentia in his absence on 15 December 2023, without first and foremost having him produced in the Honourable Court by way of a bench warrant or otherwise and first assessing whether the reason for his absence was valid or not before proceeding further.
- (5) That the Second Learned Resident Magistrate erred in law and in fact when no proper foundation was laid as to the proper identification of the Appellant throughout the trial in absentia in particular as to the maker of the identification document.

THE LAW

[16] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.”

- [17] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

“(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.”

- [18] With regard to Trials-in-Absentia in the Magistrates Courts, Section 167 Criminal Procedure Act and Section 171 (1) (a) of the Criminal Procedure Act, would be applicable.

Section 167 of the Criminal Procedure Act provides that the Court may proceed with the hearing of the case in the absence of the accused in certain cases. For ease of reference the Section is re-produced below:

167. — (1) 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.

(2) Notwithstanding section 165, where the matters specified in sub-section (1) apply in any case, the court may —

(a) proceed to hear and determine the case in the absence of the accused; or

(b) adjourn the case and issue a warrant for the arrest of the accused in accordance with the provisions of section 84.

(3) A court shall only proceed in accordance sub-section (2) upon production of the bond entered into by the accused, or upon —

(a) it being proved that there has been proper service of the summons a reasonable time before the date fixed for the case, or on production of the relevant bond; and

(b) the court being satisfied that the accused was informed verbally or by the documents served upon the accused, that the case might be proceeded with if the accused did not attend the court as notified.

As could be observed the above provision is only limited or applicable to minor offences. With regard to other offences or offences in general, Section 171 would be the applicable provision. The Section which is titled '*non-appearance of parties after adjournment*', is re-produced below:

171. — (1) If at the time or 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 person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present; and

(b) if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the accused person who has not appeared is charged with an indictable offence, or if the court refrains from convicting the accused person in his or her absence, the court shall issue a warrant for the apprehension of the accused person and cause him or her to be brought before the court.

[19] Furthermore, Section 14 (2) (h) of the Constitution reads 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.

THE GROUNDS OF APPEAL AGAINST CONVICTION

Grounds 1 to 4

- [20] These Grounds of Appeal against Conviction all relate to the orders made by the two Learned Resident Magistrates in relation to the Trial in Absentia. The 1st and 4th Grounds of Appeal against Conviction are in respect of the orders made by the First Learned Resident Magistrate; while the 2nd and 3rd Grounds of Appeal against Conviction are in respect of the orders made by the Second Learned Resident Magistrate. In my opinion, the said four Grounds of Appeal against Conviction are inter-connected and will be addressed together.
- [21] It is evident from the Magistrate's Court Record that this matter was taken up before the First Learned Resident Magistrate from the 4 October 2022 (the First Call Date) up to 15 December 2023, the day on which the First Learned Resident Magistrate had fixed the matter for Trial in Absentia. Thereafter, all proceedings in the matter were taken up before the Second Learned Resident Magistrate.
- [22] After the First Call Date the matter was fixed for mention on 13 February 2023. However, on the 13 February 2023, the Appellant was not present in Court and a Bench Warrant had been issued. The matter had been adjourned for Mention to 12 May 2023.
- [23] However, even on the 12 May 2023, the Appellant was not present in Court and the Bench Warrant was extended. The matter had been adjourned for Mention to 18 September 2023.
- [24] However, even on the 18 September 2023, the Appellant was not present in Court and the Bench Warrant was further extended. The matter had been adjourned for Mention to 8 December 2023.
- [25] Three days later, on 21 September 2023, the Appellant had appeared in Court and the Bench Warrant had been cancelled. It is not ascertainable from the Magistrate's Court

Record as to what explanation the Appellant had offered (if any) for not being present in Court on 13 February 2023, 12 May 2023 and 18 September 2023. Nevertheless the First Learned Resident Magistrate had cancelled the Bench Warrant.

[26] The said Learned Resident Magistrate had clearly warned the Appellant that if he is not present in Court in the future without any valid reason, the case will be fixed against him for Trial in Absentia and the matter was adjourned to 15 December 2023 for Mention to fix a date for Hearing.

[27] However, on 15 December 2023, the Appellant was again not present and no valid reason had been provided for his absence. It must be emphasised that it was the Appellant himself who had opted to represent himself. On the First Call date the Appellant was explained his right to Counsel. However, he had waived his right to Counsel and wanted to represent himself.

[28] Accordingly, on 15 December 2023, as per the order made by him on the previous day that if the Appellant is not present in Court in the future without any valid reason, the case will be fixed against him for Trial in Absentia, the First Learned Resident Magistrate had proceeded to fix the matter for Trial in Absentia.

[29] Section 171 (1) (a) of the Criminal Procedure Act stipulates that:

If at the time or 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 person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present.

[30] Therefore, the First Learned Resident Magistrate had every right to fix this matter for Trial in Absentia, since the Appellant was not present in Court after the previous adjournment of the matter.

[31] In any event, in this case, the First Learned Resident Magistrate had given a specific warning to the Appellant that if he is not present in Court in the future without any valid reason, the case will be fixed against him for Trial in Absentia. This warning was given to the Appellant on 21 September 2023, the day on which he appeared to secure the cancellation of his Bench Warrant. As highlighted by the Deputy Director of Public

Prosecutions; on behalf of the State, this was the only date on which the Appellant appeared in Court for this matter during the entire duration of these proceedings (which lasted nearly 3 years). It must be mentioned that on the First Call date, 4 October 2022, the Appellant was brought to Court under arrest.

- [32] The Learned Counsel for the Appellant contended that the First Learned Resident Magistrate had not satisfied the provisions of Section 14(2) (h) (i) of the Constitution prior to fixing the matter for Trial in Absentia. Section 14(2) (h) (i) of the Constitution provides that:

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.

- [33] In this case, there was no necessity for the Court to be satisfied that a summons or similar process requiring his attendance in Court was issued, since the First Learned Resident Magistrate had specifically informed the Appellant on 21 September 2023, that his presence was required in Court on the next day, which was 15 December 2023. Since the Appellant was not present in Court on 15 December 2023 and no valid reason or explanation had been provided for his absence, the First Learned Resident Magistrate had proceeded to fix the matter for Trial in Absentia.
- [34] It must be emphasized that the First Learned Resident Magistrate had not taken the matter for Trial in Absentia immediately. He had fixed the matter for Trial in Absentia on 28 June 2024, which was over 6 months later. The Appellant, if he so wished, could have appeared in Court at any time during this period and sought a vacation of the order made by the First Learned Resident Magistrate. But he failed to do so.
- [35] In fact, the Appellant had the opportunity of appearing in Court at any time up until 30 June 2025, the date on which the matter was actually taken up for Trial in Absentia, before the Second Learned Resident Magistrate and seeking a vacation of the order made by the First Learned Resident Magistrate. This was over one and a half years after the order was made for Trial in Absentia. However, he failed to do so.

- [36] The Appellant further contends that the Second Learned Resident Magistrate erred in law when she adopted and endorsed the First Resident Magistrate's order, dated 15 December 2023, to proceed with the Trial in Absentia. The Second Learned Resident Magistrate purely continued with the case with what was recorded in the Case Record. There was absolutely no valid reason or justification for her to do otherwise.
- [37] If the Appellant had appeared in Court at any time before the Second Learned Resident Magistrate and explained the reasons for his absence, then the Second Learned Resident Magistrate could have considered his application favourably. However, in the absence of any such appearance by the Appellant in Court there was no justifiable reason for the Second Learned Resident Magistrate to reverse or vary the order made by the First Learned Resident Magistrate fixing the matter for Trial in Absentia.
- [38] The Learned Counsel for the Appellant made lengthy submissions to the effect that the Second Learned Resident Magistrate had erred in law in extending a Bench Warrant that had no source. Meaning that there is no evidence in the record to indicate that the Bench Warrant had been issued in the first place. This is at best a very technical objection. I concede that there is nothing on record to indicate that the Second Learned Resident Magistrate had issued a Bench Warrant on the Appellant. However, at the time she ordered the extending of the Bench Warrant on the Appellant, any defect would be rectified.
- [39] For the aforesaid reasons, I am of the opinion that the 1st to the 4th Grounds of Appeal against the Conviction are all without merit and should be rejected.

Ground 5

- [40] The final Ground of Appeal against Conviction is that the Second Learned Resident Magistrate erred in law and in fact when no proper foundation was laid as to the proper identification of the Appellant throughout the Trial in Absentia in particular as to the maker of the identification document.
- [41] During the hearing in the Magistrate's Court the Prosecution had called two witnesses in support of their case: Namely Police Constable 5891 Zoheb Alfaaz Ali and Corporal 2709 Sanjay Prasad, the two complainant's in the matter. The transcripts of the

evidence (proceedings) given by the Prosecution witnesses is found from pages 26 to 38 of the Magistrate's Court Record.

- [42] The Learned Resident Magistrate's Judgment is found at pages 10-15 of the Magistrate's Court Record. In her Judgment the Learned Resident Magistrate has duly summarized the evidence of the said two Prosecution witnesses. Thereafter, the Learned Resident Magistrate has duly analysed all the evidence in relation to the charges against the Appellant.
- [43] This Ground of Appeal against Conviction relates to the fact that the identification document (a photograph of the Appellant) shown to the two witnesses during the trial, was taken by one Corporal Apisai, who was not called as a witness by the Prosecution.
- [44] It must be stated that the showing of the photograph to the two Prosecution witnesses to identify the Appellant was additional evidence. The two Prosecution witnesses, who are both Police Officers, clearly identified the Appellant as the perpetrator at the time of the offending. He was the owner of vehicle bearing registration number KT 267. The identity of the Appellant was never in dispute.
- [45] With regard to the identity of the Appellant, PC 5891 Zoheb Alfaaz Ali testified as follows:

.....

Q: *Now officer what was the reason he came and grabbed you and pushed you?*

A: *He was aggressive and angry when Corporal Sanjay was issuing him a TIN.*

Q: *Who was the person that had done this to you?*

A: *Apimeleki Tola.*

Q: *Do you know him?*

A: *No.*

Q: *How long was this happening, the interaction with him on that particular day?*

A: *Almost 7 to 8 minutes.*

Q: *Can you describe how he looks like?*

A: *He was a fat man with brown face, black and white hair.*

Q: *Can you describe what was his built like?*

A: *He was fat.*

Q: *What was his race?*

A: *He was an I-taukei man.*

Q: *If you are shown his photograph will you be able to identify him?*

A: *Yes maam.*

[Photograph shown]

Q: *Now have a look at the photograph before you?*

A: *It's him.*

[46] Similarly, with regard to the identity of the Appellant, Corporal 2709 Sanjay Prasad testified as follows:

.....

Q: *This Apimeleki Tala, can you describe how he looks like?*

A: *He is medium built, dark complexion and I-taukei.*

Q: *If you are shown a photograph would you be able to identify how he looks like?*

A: *That's right.*

[Photograph shown]

Q: *Now officer have a look at the photograph before you?*

A: *Same person.*

Q: *Who had prepared that identification?*

A: *Corporal Apisai.*

Q: *Were you aware of how it is prepared?*

A: *Yes the photograph was taken at the forensic office.*

Q: *Is (was) the same person Apimeleki Tola arrested on that particular day?*

A: *Yes madam.*

[47] As depicted above, there was absolutely no doubt as to the identification of the Appellant. The two Prosecution witnesses, both of whom are Police Officers, clearly identified the Appellant as the committer of these offences. If the Appellant was present in Court during the trial, he would have been duly identified by the two witnesses.

[48] For the aforesaid reasons, I find that the said Ground of Appeal against the conviction is also without merit and should be rejected.

Conclusion

[49] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

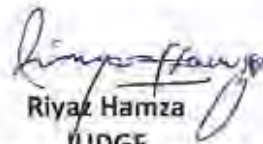
[50] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Lautoka, in Criminal Case No. 751 of 2022 is affirmed.



AT LAUTOKA

This 16th Day of December 2025


Riyaz Hamza
JUDGE

HIGH COURT OF FIJI

Solicitors for the Appellant:
Solicitors for the Respondent:

Law Naivalu, Barristers & Solicitors, Lautoka.
Office of the Director of Public Prosecutions, Lautoka.