IN THE MAGISTRATES' COURT OF FIJI
AT NADI
EXTENDED CRIMINAL JURISDICTION

High Court Criminal Case No. 227 of 2012
Magistrates' Court Criminal Case No. 893 of 2012

STATE

v.

YAVALA BARAVILALA

For the State: **Inspector of Police Jiten Singh**

For the Defendant: **In Person**

TRIAL IN ABSENTIA RULING

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1. You are charged with one count of *"aggravated robbery"* contrary to section 311 (1) (a) of ***Crimes Act 2009*** in that you "with another, on the 1st day of July 2012, at the MH Superfresh carpark area, Tamavua in the Central Division, stole 1 x LG mobile valued at $89.00 and $5.00 cash, all to the total value of $94.00, the property of **Dinesh Kumar**."

2. The Charge, which unfortunately, needs amendment was read out to you on 7 September 2012. You indicated you understood the Charge and you entered a plea of "Not Guilty" to it. You were granted bail pending trial by this Court, *albeit differently constituted*, on 7 September 2012. You indicated that you continued to maintain your plea of "Not Guilty" when the matter was mentioned for trial on 11 October 2012 and again on 26 November 2012.

3. You failed to appeal on 24 January 2013 and again on 11 March 2013. On 11 March 2013, the Police Prosecutor indicated that you were not in prison. A bench warrant was issued against you on that day. You appeared in Police custody on 17 September 2013. You filed a bail application on 25 September 2013. On 9 October 2017, you were

released on bail. On this day, in your presence, the Court adjourned these proceedings for trial to 29 November 2013. You appeared in Court on 29 November 2013, but the State was not ready for trial. The trial date was vacated and the matter adjourned to 1 & 2 April 2014 for trial. The matter was fixed to 17 February 2014 for mention but on that day, you did not appear. A bench warrant, your second, was issued against you.

4. On 1 April 2014, the Police Prosecutor informed the Court that Police Officers had told him that you were at your residence. The hearing was vacated because you were not present still and the matter was adjourned to 14 May 2014 for mention to fix a trial date. You appeared with your counsel on 23 May 2014 and the matter was fixed for mention to 6 June 2014. You were remanded in custody. The matter then began to progress. It transpired that you had admissions and that voir dire grounds were needed. These were filed and then the matter adjourned several times for voir dire disclosures.

5. You were granted bail on 24 October 2014. On 28 January 2015 you failed to appear. Voir dire disclosures were served on your counsel on 17 August 2015. On 27 March 2015, the prosecutor indicated that you were not in Suva Prison. The State was directed to confirm your whereabouts. On 20 May 2015, the Prosecutor indicated that you had been released from Suva Prison on 9 December 2014. A bench warrant was issued, your third.

6. You appeared on 14 July 2015. Your case was adjourned to 6 January 2016 for voir dire. On 6 January 2016, you were not present. Your voir dire had to be vacated. It was said that you were at the Remand Centre. Production Orders were issued to both the Remand and Correctional Centres in Suva. You were finally produced on 4 April 2016. There were struggles to have you produced in Court thereafter. On 29 August 2016, your voir dire hearing was fixed to 23 November 2016. You were not present and the Magistrate issued a Bench Warrant. Your voir dire hearing was refixed to 9 February 2017. On that day, the voir dire was refixed to 6 April 2017 because the Police had not summonsed their witnesses. On 6 April 2017, the voir dire was refixed to 5 June 2017 and then the matter was adjourned to 3 July 2017.

7. You were produced in custody after being arrested for another matter on 3 July 2017. The matter was fixed for voir dire hearing on 10 July 2017. On 10 July 2017, your voir dire hearing was refixed to 26 October 2017. On 26 October 2017, you were not produced. The matter was called several times and despite the Court's production orders, you were not produced until 13 March 2018. The matter was called several times

thereafter but the State did not have their file. Time was spent focused on alibi witnesses and so the voir dire to determine admissibility fell by the wayside a little.

8. On 8 October 2018, you did not appear. You had been released on bail in CF 1971 of 2018 and despite the Court's order of remand in respect of this matter, you were released from prison. A bench warrant was issued against you on 20 November 2018. Legal Aid applied to withdraw as your counsel and they were permitted to do so. You appeared later that day and your bench warrant was cancelled. You were warned to appear in Court on 4 December 2018 and you failed to appear on that day. Another bench warrant was issued against you. In a subsequent appearance, you were given the opportunity to re-apply to the Legal Aid Commission if you wished.

9. You appeared on 18 March 2019 and you were warned for Court on 25 April 2019. On 25 April 2019, the prosecutor appeared without the file. Your case was adjourned to 28 May 2019. You failed to appear. A bench warrant was issued. You appeared on 25 July 2019. You were remanded in custody. You failed to appear on 6 August 2019. A bench warrant was issued.

10. On 16 December 2019 after a series of appearances, the State called Detective Constable 4579 Josaia Soro to the stand. He testified that after a series of checks with the Fiji Corrections Service, he was able to confirm that you were not remanded anywhere in the country and that you were not incarcerated anywhere in the country. Moreover, he testified that Police informers had sighted you in town as recently as a week from the time of his testimony.

LAW

11. Section 14 (2) (h) of the **Constitution** guarantees the following:

"14. – (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;

(ii) the conduct of the person is such that the continuation of 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."

12. Pursuant to section 7 (1) (b) of the **Constitution,** a Court may, if relevant, consider international law applicable to the rights and protection of the rights and freedoms contained in our Bill of Rights.

13. In **The Prosecutor v. Ayyash et al., Appeals Chamber, Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial in Absentia Decision, Case No.: STL-11-01/PT/AC/AR126.1** [2012] STLB 11; 1 November 2012 (In Absentia Reconsideration AC) [2012] STLB 11 (1 November 2012), the Appeals Chamber for the Special Tribunal for Lebanon upheld the Tribunal's decision to hold a trial in absentia.

14. The Appeals Court held that there must be reasonable steps taken to notify the Accused of the proceedings; the evidence of notification must be such so as to satisfy the Court that the Accused actually knew of the proceedings against them; and the evidence must satisfy the Court with a reasonable degree of specificity that the Accused's absence means they must have elected not to attend the hearing and have therefore waived their right to be present.

15. In **Stoyanov v. Bulgaria – 39206/07** [2012] ECHR 184 (31 January 2012), the European Court of Human Rights held that trial courts had the discretion to order trials in absentia in circumstances where a Defendant has received notification of his or her trial and does not wish to take part in it. The following is a useful articulation of the due process considerations involved:

> "31. The Court has not ruled out the possibility that, in the absence of official notification, certain established facts might provide an unequivocal indication that the accused is aware of the existence of criminal proceedings against him and of the nature and the cause of the accusation and that he does not intend to take part in the trial or wishes to avoid prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, *Iavarazzo v. Italy* (dec.), no. 50489/99, 4 December 2001), or when

materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces (see *Sejdovic*, cited above, § 99). Such circumstances are to be distinguished from the outright fact of fleeing from the crime scene in fear of prosecution or a general expectation that criminal proceedings might be instituted, which are not sufficient to justify the assumption that the accused was aware of the proceedings for the determination of the charges against him and has waived his right to appear in court. An assumption of that kind would risk undermining the very concept of the right to a public hearing within the meaning of Article 6 § 1 of the Convention as well as the notion of an effective defence guaranteed under Article 6 § 3 of the Convention, which includes the right of the accused to be informed promptly of the nature and cause of the charges against him, to have adequate time and facilities for the preparation of the defence and to examine or have examined witnesses against him.

The Court has not ruled out the possibility that, in the absence of official notification, certain established facts might provide an unequivocal indication that the accused is aware of the existence of criminal proceedings against him and of the nature and the cause of the accusation and that he does not intend to take part in the trial or wishes to avoid prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, *Iavarazzo v. Italy* (dec.), no. 50489/99, 4 December 2001), or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces (see *Sejdovic*, cited above, § 99). Such circumstances are to be distinguished from the outright fact of fleeing from the crime scene in fear of prosecution or a general expectation that criminal proceedings might be instituted, which are not sufficient to justify the assumption that the accused was aware of the proceedings for the determination of the charges against him and has waived his right to appear in court. An assumption of that kind would risk undermining the very concept of the right to a public hearing within the meaning of Article 6 § 1 of the Convention as well as the notion of an effective defence guaranteed under Article 6 § 3 of the Convention, which includes the right of the accused to be informed promptly of the nature and cause of the charges against him, to have adequate time and facilities

for the preparation of the defence and to examine or have examined witnesses against him.

32. For a trial in absentia to be justified, what is decisive is whether the facts of the case show unequivocally that the applicant was sufficiently aware of the opportunity to exercise these rights in the context of the specific proceedings instituted against him and whether he might be considered to have waived his right to appear in court. In the absence of any notification this right can neither be seen to have been clearly waived nor exercised effectively.

33. In the Court's view, no such circumstances have been established in the instant case. In this respect the present case discloses no material difference from the case of *Sejdovic*, cited above. The mere absence of the applicant from his home is insufficient to consider that he was aware of the proceedings and, consequently, had absconded (see *Shkalla v. Albania*, no. 26866/05, § 73, 10 May 2011, *Hu v. Italy*, no. 5941/04, § 55, 28 September 2006, and *Sejdovic*, cited above, § 100). The Government's argument is not based on any objective factors viewed in the light of the evidence against the applicant; it assumes that the applicant was responsible for the killing of his girlfriend. As in *Sejdovic*, the Court is unable to accept this argument, which also runs counter to the presumption of innocence.

34. In previous cases concerning convictions in *absentia* the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice (see *T. v. Italy*, 12 October 1992, § 28, Series A no. 245 C, and *Somogyi v. Italy*, no. 67972/01, § 75, ECHR 2004 IV). In the instant case it has not been shown by the respondent Government that the applicant had sufficient knowledge of the investigation opened on 24 September 2002 and the concrete charges brought against him on 20 November 2003."

16. Closer to home, we have the following clearly articulated principles to follow.

17. In **Chand v State** [2017] FJHC 865; HAA13.2017 (17 November 2017) his Lordship Perera J. made clear that the mere absence of a Defendant on the date fixed for trial or

hearing is not sufficient to proceed in his or her absence. The Court must first be satisfied that the Defendant has voluntarily waived his or her right to be present.

18. In **Tulava v. State** [2018] FJHC 1057; HAA37.2018 (29 October 2018) his Lordship Aluthge J at [19] made clear that Section 171 of the **Criminal Procedure Act 2009** must be read in the spirit of section 14 (2)(h) of the **Constitution.** His Lordship made clear that what this means is that before proceeding to a trial in the Defendant's absence, the Court must be satisfied that the Defendant has been served with a summons or similar process requiring his or her attendance at the trial *and* the Court must be satisfied that the Defendant has *chosen* not to be present. In respect of the latter, Aluthge J. makes clear, the Court must have some evidence before it in the form of a police report or affidavit to satisfy it that the Defendant has indeed chosen not to be present.

19. In **Kumar v. State** [2016] FJHC 397; HAA 03 of 2016 (2 May 2016) his Lordship Aluthge J. held that the word trial at section 14 (2) (h) of the **Constitution** means both trial *proper* and *trial within a trial.*

20. In **Kumar v. State**, *supra* his Lordship Aluthge J. clarified that where a Defendant absconds bail, the Court must first issue a bench warrant and then obtain evidence by way of either a police report or an affidavit to satisfy it that the Defendant has indeed chosen not to be present. However, Aluthge J. carved out this exception. Where the Court has received notice through Counsel for the Defendant and confirmation from the Fiji Corrections Service that a Defendant has escaped from remand there is no need for the issuance of a bench warrant. The Court may safely treat that as a voluntary waiver of a Defendant's right not to be present and may proceed to holding a trial within a trial and a trial in the Defendant's absence.[1]

21. In **Fiji Independent Commission against Corruption v. Nemani** [2012] FJHC 1309; HAC37A.10 (3 September 2012) the Court per Fernando J. held that Defendants' who voluntarily abscond from Courts may be tried in absentia: [20]. The Defendant in that case had fled the jurisdiction of the Court. She travelled to New Zealand without leave of the Court: [21].

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[1] See also **State v Yalibula – Ruling 1** [2016] FJHC 451; HAC47.2014 (25 May 2016) per Aluthge J. at [11] – [13].

22. In **Drova v. State** [2012] FJHC 1304; HAA23.2012 (31 August 2012) per Madigan J. at [8], the Court held that there was no reason why the appellant should not have been tried *in absentia*, especially when in the knowledge of the hearing date he deliberately absented himself by leaving the jurisdiction. By doing so he is waiving all rights to be heard at the hearing.

23. In ***R v O'Hare*** [2006] EWCA Crim 471, [2006] Crim LR 950, the Court said:

"We have taken into account that the Appellant was 18 at the time. Nonetheless we are sure that the Appellant appreciated that by absconding the trial was likely to proceed in his absence. As he made no attempt to contact his solicitor from Ireland, he plainly appreciated that his solicitor would be unable to put forward a case on his behalf at trial and arrange representation for him. In those circumstances, we consider that the Appellant waived his rights."

FINDINGS

24. You were aware that these criminal proceedings were afoot against you. You were aware that your presence was required in the lead up to your trial. You were granted bail pending trial not once but several times over the course of these rather protracted proceedings. Moreover, you have not honoured your bail undertakings. Sometimes you did not appear because you had been remanded in other matters or after having been remanded, you were not produced. But largely, the history shows that the moment you were released from remand you would make a conscious choice not to attend until such time as another spot of bother with the Police brought you back into the custody of the Court.

25. Regardless, I look now to whether or not, having had notice of your trial you are making a conscious and voluntary choice not to attend here and now. The evidence is clear. You are not remanded or incarcerated *anywhere in Fiji* at this present time. By logical extension, nothing physically prevents you from attending these proceedings if you so wish to do so. I have no hesitation in finding that you are not attending these criminal trial proceedings by choice. I find that you have constructively waived your constitutional right to be present at trial.

RESULT

26. In the result and for the reasons set out above, I order that your trial proceed in his absence.

27. In accordance with my over-arching duty to ensure you receive a fair trial, I will conduct a trial within trial first to determine the admissibility of your admissions to the Police before I move on to trial *proper*.

28. We will now fix a date for *voir dire* and for trial *proper*.

Seini K Puamau
Resident Magistrate

Dated at Suva this 14th day of January 2020.