IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0067 of 2017
[In the High Court at Lautoka Case No. HAC 047 of 2014]

BETWEEN	:	**ULAIASI QALOMAI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**18 August 2020**
Date of Ruling	:	**25 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on two counts of Act with Intent to Cause Grievous Harm [section 255(a)], one count of Aggravated robbery [section 311(1)(a)] and Damage to property [section 369(1)] of the Crimes Act, 2009 committed with 04 others [three of whom are the appellants in AAU0092/2016, AAU 099/2016 and AAU0100/2016] on 06 April 2014 at Nadi in the Western Division.

[2] The information read as follows.

FIRST COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to* ***MANI RAM,*** *unlawfully wounded the said* ***MANI RAM*** *by kicking, hitting and striking him in the head with a liquor bottle.*

SECOND COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to* ***NAUSAD MOHAMMED,*** *unlawfully wounded the said* ***NAUSAD MOHAMMED*** *by kicking, hitting and striking him in the head with a liquor bottle.*

THIRD COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (1) (a) of the Crimes Decree 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, robbed****MANI RAM****of assorted liquor valued at $3,400.00, assorted cigarettes valued at $1,300.00 and $5,300.00 cash all to the total value of $10,000.00 and immediately before the robbery, force was used on the said* ***MANI RAM.***

FORTH COUNT

Statement of Offence

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

Particulars of Offence

> ***PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI*** *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, willfully and unlawfully damaged assorted liquor valued at $3,200.00, assorted juice valued $580.00, 1 x computer valued at $650.00, dried Kava valued at $220.00 and 1 x cash register valued at $499.00 all to the total value of $6,609.00 the property of* ***MANI RAM.***

[3] After trial, the assessors expressed a unanimous opinion of guilty against the appellant on all charges on 06 June 2016. The learned High Court judge in his judgment on 13 June 2016 had agreed with the assessors and convicted the appellant as charged. He had been sentenced on 11 July 2016 to 10 years of imprisonment for all offences (aggregate sentence) with a non-parole period of 07 years.

[4] The appellant being dissatisfied with the conviction had in person signed an untimely application for leave to appeal on 11 April 2017 (received by the CA registry on 10 May 2017). The Legal aid Commission had filed an application for enlargement of time with amended grounds of appeal, appellant's affidavit explaining the delay and written submissions on 19 June 2019. However, the appellant informed this court on 10 June 2020 that he would no longer require the services of the Legal Aid Commission and the LAC accordingly withdrew from the case. The appellant on the same day tendered written submission settled by him along with amended grounds of appeal. The state had filed its submissions on 17 August 2020.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[6] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
(v) If time is enlarged, will the Respondent be unfairly prejudiced?'

[7] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[8] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

[9] ***Grounds of appeal against conviction***

> *(i) Trial in Absentia was an injustice proceeding giving rise to a full denial of the Appellants right to a fair trial pursuant to Section 15 (1) of the 2013 Fiji Constitution;*
>
> *(ii) Gross miscarriage of Justice has occurred when the Learned Judge has overlooked and /or has failed to carefully scrutinize with utmost caution the risk and inherent danger of the Dock Identification;*
>
> *(iii) That the Appellant's conviction is unsafe and unsatisfactory due to the acceptance of the Dock Identification evidence without any prior identification parade conducted by the Police;*
>
> *(iv) The trial judge's failure to direct his mind on the Police Statement of Jona Toga which was not credible and cannot be used against me because of the omission in identifying me as those alleged robbers gives rise to the doubt of the question whether the credibility of Jona Tonga must be accepted or not. The evidence in chief provided by Jona Toga contradicts the statement given to the Police by him. And the failure to accept the discrepancy has directly prejudice me: and denied me the chance of being acquitted: and*
>
> *(v) A Substantial Question of law is involved when the Learned Judge upheld to allow the trial proper proceeding to continue even though the charge statements has already being dealt during the voire dire ruling as being inadmissible.*

[10] The prosecution evidence of the case as summarised by the learned High Court judge in the sentencing order is as follows.

> *'[3] The Complainant, Mr. Mani Ram, had been running a shop in Matintar, Nadi, for the past 40 years. To cater to customers who enjoy the night life in the Airport City of Nadi, he kept his shop open till late night in the company of his security guard, Mr. Naushad. Five accused came in a mini-van, got off near the shop and started drinking alcohol. Around 3 a.m., they came to the counter of the complainant's shop in the guise of customers and tried to forcibly enter the shop through the opening at the counter. Failing of which they broke off the rear door and entered the shop forcibly. They went on rampage in the shop completely disregarding personal and property rights of the shop keepers. They wounded the complainant and his security guard kicking, hitting and striking brutally with bottles, and destroyed the property. They robbed valuable goods and cash. 1st accused was apprehended red handed by members of the public while others fled with the loot. The entire 'horrific drama' lasted nearly for eight minutes was being secretly recorded by six surveillance cameras installed in the shop. The CCTV footages obtained from cameras helped the police to identify the culprits who were later apprehended. 1st accused made a confession to police. Other accused were positively identified by the prosecution witnesses. The CCTV footage displayed during trial showed a systematic and coordinated brutal attack on the victims and their property.'*

01st ground of appeal

[11] The appellant's complaint is that he should not have been tried *in absentia* and the *ex parte* trial had violated his constitutional rights to a fair trial under section 15(1) of the Constitution. He also submits that the trial in his absence had deprived him of his rights under section 14(2)(j), 14(2)(l) of the Constitution and sections 171(2) and 179(1)(b)(i) and (ii) of the Criminal Procedure Act, 2009.

[12] According to the ruling delivered by the learned trial judge on 25 May 2016 allowing the application by the prosecution for the appellant to be tried *in absentia*, he had absconded after the *voir dire* inquiry was concluded and a bench warrant had been issued for his arrest. After he was arrested later the appellant had sought bail but refused by court. Thereafter, the court had fixed the case for trial in the presence of the appellant. In the meantime the appellant had been produced in the magistrate's court in Nadi in respect of another case where he had been granted bail by the learned Magistrate without any knowledge of the High Court case already fixed for trial. The

appellant with the full knowledge that his application for bail pending trial had been refused by the High Court and a date for the commencement of the trial had been fixed, had furnished bail in the magistrate's court and secured his release from the remand prison. Thereafter, he had failed to appear on the date the trial was scheduled to commence in the High Court or on any other subsequent dates from 23 May 2016 to 03 June 2016 during the trial. Finally, after being at large for months he had been arrested only in September 2016.

[13] The trial judge in allowing the state's application to try the appellant *in absentia* had stated as follows:

> *"[10] The Constitution of the Republic of Fiji 2013 under Article 14(2) (h) specifically provides for trial in absentia which states:*
>
> *Every person has a 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;*
>
> *[11] The Respondent was aware of this case and the trial date when he 'escaped' from remand custody. Remand Committal Warrant had been issued by this Court for him to be produced before this Court. He failed to appear in court on the day fixed for trial. Warrant was issued to arrest him. State has not been able to execute the warrant.*
>
> *[12] The Respondent is charged with four others who are awaiting speedy disposal of this case. There are number of eye witnesses and their memory will fade away with the passage of time. Prosecution is greatly prejudiced if the trial is further delayed. Long delay would cause irreparable damage to the Prosecution and to the justice system. The general public will lose confidence in the system.*
>
> *[13] 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.*

[14] I am mindful that facts that Respondent's right to a fair trial have to be safeguarded at the trial in absentia even though he is not present at the trial. Assessors shall be clearly warned not to hold the absence of the Respondent against him. I would advise the prosecution to disclose all the evidence against him on relevant material facts and highlight evidence advantageous to the Respondent in my summing up to the assessors. I will also warn the assessors that the absence of the accused is not an admission of guilt and adds nothing to the prosecution case. I will also take steps to expose weaknesses of the prosecution case in the summing up.

[14] In fact the trial judge had warned the assessors in paragraph 37 as follows.

'37. I must also caution you about evidence adduced against the 4th accused Mr. Ulaiasi Qalomai. He was not present in Court and not represented by a Counsel. He did not have the opportunity to cross examine the witnesses called by the Prosecution. You must not draw the inference that he evaded court and waived his right to be present in Court and other rights available to him in conducting his Defence because he was guilty. That does not mean that evidence against him should be rejected. I only caution you and remind that evidence against him was not tested by cross examination.

[15] Therefore, this ground of appeal has no reasonable prospect of success.

02nd and 03rd grounds of appeal

[16] The appellant is challenging his dock identification at the *voir dire* inquiry under the second ground of appeal on the premise that it was done without a prior identification parade. However, it is clear from the evidence that his identification is not that of a first time dock identification but he had been clearly identified before and whilst committing the crime at the crime scene by one of his schoolmates named Mr. Jone Toga. I quote from the summing-up.

82. In the early morning of the 6th of April 2014, Mr. Toga was in Martintar near the Daily Shop drinking beer with Mr. Joeli Lotawa and two other friends.

83. They went to Daily Shop and bought 6 bottles and started drinking beside the shop when group of five iTaukei people came and joined them. They were drinking together for some time and, after that, they left and went inside the Daily Shop.

84. He knew only one of them. He was Ulaiasi Qalomai one of his school mates at Namaka Public School. When Qalomai recognized him, he came closer to him and was telling stories. There was light. His friend, Ulaiasi Qalomai, went inside the shop with other boys.

85. In a short while, Toga heard a scream from the shop. He and his friends went inside the shop to see what's going on. He was the first one to enter the shop. He saw his friend Ulaiasi Qalomai and other boys breaking in, stealing things inside the shop. They threw beer bottles at him. His forehead got injured. Then he ran back outside and joined Joeli Lotawa and other friends who were standing at the entrance of the shop. One of them chased him outside whom he managed to catch. Person caught was punched. Toga identified the person who was caught and got punched as Peni Yalibula. Police came around 3.00 a.m.

86. After the incident, he saw Ulaiasi Qalomai, attending this case during his first call in Court. Toga came last year as a witness in this case for Ulaiasi Qalomai. He was not to be seen in the accused box today. On the earlier occasion, he came to Court as a witness and identified Ulaiasi Qalomai.

119. 4th accused was not present during trial. Mr. Jona Toga said that he recognised Ulaiasi Qalomai before and during the robbery. He knew Ulaiasias a school mate at Namaka Public. Toga had talked to Ulaiasi in that crucial morning soon before the robbery. He had seen Ulaiasi steeling inside the Daily Shop. In this regard, Mr. Toga had given a statement to police. He had earlier identified Ulaiasi in this case when he testified as a witness. Having considered the caution I have given in respect of trials taken up in the absence of an accused, you decide what weight you should give to Mr. Tog's evidence.

[17] The learned trial judge had himself considered identification evidence against the appellant in the judgment as follows.

'24. Trial proceeded in the absence of the 4th accused Ulaiasi Qalomai. Witness, Jona Toga said that he recognised Ulaiasi Qalomai before and during the robbery. Toga had even talked to Ulaiasi few minutes before the robbery. He had seen Ulaiasi steeling inside the Daily Shop. In this regard, Toga had given a statement to police. Togahad known Ulaiasi as a school mate at Namaka Public school.

25. Ulaiasi was in the dock when Toga was testifying at the voir dire hearing. He was recognised in the dock by Toga. Since then Ulaiasi knew very well that Jona Toga is an adverse witness for his defence case at the trial. He could have discredited Jona Toga at the trial if Jona Toga was lying. Ulaiasi, knowing very well the trial date, absconded and waived his right to be present and right to cross examine. Only inference that Court can draw is that Toga told the truth to this court.'

[18] The appellant's legal submissions contained in his written submissions are irrelevant to the facts of his case as his was not a first time dock identification. Dock identification at the *voir dire* inquiry was only a formality.

[19] The appellant now makes another submission to the effect that Mr. Jone Toga in his police statement had said that he and the appellant had not met nor had they consumed liquor together prior to the robbery. Jone had also said to the police that he was consuming liquor with others and saw the robbery happening and identified only the person caught after the robbery who was not the appellant. However, the appellant also submits that Jone had given evidence at the *vior dire* inquiry consistent with his evidence at the trial of his identification of the appellant at the crime scene but does not say that he confronted and contradicted Jone with his alleged police statement. In fact he admits that he had not done so at the *voir dire* inquiry as his focus was on challenging his confession and due to lack of legal assistance.

[20] It appears that the appellant had successfully challenged his confessional statement without any legal assistance and therefore, there was no reason why he could not have challenged Jone when the witness gave evidence implicating him with the robbery as an eye witness and a known person.

[21] Secondly, even if the appellant was preoccupied with challenging his confession at the *voir dire* inquiry but not his identification by Jone, he should have known that Jone would give the same evidence at the trial proper implicating him in the crime and he should make use of that opportunity to challenge him with his alleged police statement as to his identification. The appellant instead of doing that deliberately kept away from trial proceedings.

[22] There is no reasonable prospect of success in these two grounds of appeal.

04th ground of appeal

[23] The appellant's complaint here is on accepting Mr. Jone Toga's evidence *vis-a-vis* his alleged police statement. This matter has already been dealt with under the 2nd and 3rd grounds of appeal. This ground of appeal too has no reasonable prospect of success.

05th ground of appeal

[24] The appellant argues that because his cautioned statement had been ruled inadmissible the subsequent trial became invalid. The cautioned statement had been ruled out by the trial judge in his ruling on 28 May 2015 due to the presence of injuries on the appellant unexplained by the prosecution.

> *'(55). According to prosecution witnesses, 4th and the 5th accused did not have any serious injuries at the time of the arrest. Police Constable Jona Toga who interviewed the 4th accused on 24th May 2014 did not notice any injury at all on the 4th accused's face during the interview. Police witness Leone Vurukami who interviewed the 5th accused also did not notice any injury on 5th accused. Then how come the injuries noted by Dr. Terry who examined both of them on 27th May 2014 came into being? Certain answer would be that they had been assaulted at the Nadi Police Station.'*

[25] However, the very purpose of the *voir dire* inquiry was to determine the voluntariness of the confessional statements. The appellant had successfully convinced the trial judge that his cautioned interview had not been voluntarily made and should not be admitted. That decision did not in any way affect the trial proper against the appellant.

[26] The appellant's argument is baseless and his ground of appeal is frivolous and vexatious.

[27] The delay is substantial and the reasons for the delay are unconvincing though an extension of time would not necessarily prejudice the respondent.

Order

1. Extension of time to seek leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL