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

CRIMINAL APPEAL NO.AAU 084 of 2018
[High Court Criminal Case No. HAC 172 of 2015]

BETWEEN	:	**VERETI WAQA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in Person**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**18 March 2020**
Date of Ruling	:	**20 April 2020**

RULING

[1] The appellant had been charged together with the two appellants in AAU 086 of 2018 and AAU 077 of 2018 and another in the High Court of Lautoka for having committed aggravated robbery contrary to section 311(1)(a) of the Crimes Act. The charge was as follows.

FIRST COUNT

Statement of Offence

***AGGRAVATED ROBBERY**: Contrary to section 311 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

> ***KELEPI SALAUCA , VERETI WAQA & TUI LESI BULA in the company of another*** *on the 11th October, 2015 at Sigatoka in the Western Division robbed* ***KAVITESH KIRIT PRASAD*** *of the following items: Nissan Navara (Registration HA 448) valued at $60,000.00, $300.00 cash, Assorted cards namely Westpac, Westpac Debit Card, Australian Master Card, Australian Drivers Licence, Joint FNPF/FIRCA, Black SFIDA pair of canvas, Gym Gloves, White iPod, Nokia Lumia Phone, Euphoria Calvin Klein Perfume, Encounter Fresh Calvin Klein perfume, Mangal Sutra valued at $10, 000.00, Bangles valued at $6,000.00, Hair set valued at $9,000.00, Bracelet valued at $2,000.00, Ear ring valued at $3,000.00, Bedstone Necklace valued at $900.00, Wedding Ring (Female) valued at $2,000.00, Wedding Ring (Male) valued at $1,200.00, Gold Chain (22 carat) valued at $1,200.00, Wrist Watch (Fossil-Citizen) valued at $800.00, Ladies Watch (Pulsar) valued at $300.00, Black Label (x 15 bottles) valued at $1,350.00, Bombay Sapphire (x 5 bottles) valued at $400.00, Galaxy Samsung S5(x2) valued at $2,400.00, ITB Hardware (x2) valued at $1,000.00, 1 Flash Drive valued at $500.00, 1 Toshiba laptop valued at $1,800.00 and assorted branded BLK Clothing valued at $80.00 all to the* ***Total Value of Approximately $93, 930.00.***

[2] After full trial where the appellant had been tried in absentia, the assessors had expressed a unanimous opinion that all the accused were guilty of the single count of aggravated robbery. The Learned High Court Judge had agreed with the unanimous opinion of the assessors and convicted the appellant of the same count on 15 June 2018 and sentenced him on 10 July 2018. He was sentenced to 13 years 9 months and 27 days imprisonment with a non-parole period of 12 years (his sentence to commence from the day of his arrest).

[3] At the first call over of AAU 086 of 2018 a judge of the Court had directed that all three appeals including those of the other two appellants in AAU 0084 of 2018 and AAU 077 of 2018 be taken up together and similar orders had been made in those appeals as well. Therefore, all three appeals were taken for leave to appeal hearing together as they arise from one and the same High Court trial. I shall now deal with the appellant's appeal.

[4] The appellant's counsel had filed an untimely appeal on 28 August 2018 against conviction and sentence supplemented by amended grounds of appeal by the appellant himself on the same day. The delay is about 18 days. The appellant had tendered written submissions on 13 November 2019 where he had sought to consolidate all

grounds of appeal. At the leave to appeal hearing, the appellant filed Form 3 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence which will be considered by the Court on a future date. The State had tendered its written submissions on 27 January 2019 where no serious objection had been raised to the delay in filing the appeal and therefore, I would consider only the mater of leave to appeal in this ruling though the miscalculation of the appealable time by the appellant's lawyers as adverted to by the appellant in his affidavit is hardly an acceptable reason to excuse a belated appeal, particularly given the fact that the notice of appeal had been signed by his lawyers on 10 August 2018.

[5] The facts are briefly as follows. On 11 October, 2015 the complainant and his wife (husband and wife) were asleep in their house at Malaqereqere, Sigatoka. At about 2.00 a.m. they were awoken by the sound of someone breaking into their bedroom. Three persons of i-Taukei origin in the company of each other and another had broken into the house of the victims. The victims were asked to cooperate so that no one was harmed, blankets were thrown over them, curtains drawn and the lights in the house turned on. The victims were questioned regarding the whereabouts of their valuables in the house. The pregnant wife of the complainant was grabbed by her hair and dragged from one room to the other so that she could show them where the valuables were. The house was searched for about an hour and the intruders fled from the scene having stolen the following properties belonging to the victims namely Nissan Navara vehicle (registration no. HA 448), mobile phone, assorted jewellery, assorted liquor, wallet with cash of $300.00, credit cards, perfumes, laptops. BLK clothes, shoes, black and white SFIDA canvas, watches etc. all to the value of about $93,000.00. Upon police investigation the accused were found to be in possession of most of the items stolen from the complainants. They were arrested and charged.

[6] The Court of Appeal has rightly raised the bar in timely leave to appeal applications by applying the test of **'reasonable prospect of success'** to determine whether leave to appeal should be granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and

Grounds of Appeal

[7]

Conviction

1. ***THAT*** *the Learned Trial Judge erred in law when he failed to properly direct the Assessors in the Summing Up on the principles regarding Trial in Absentia and thereby breached section 14(2)(h)(i) of the Constitution.*

2. ***THAT*** *the Learned Trial Judge erred in law when he failed to properly warn himself in the Judgment on the principles regarding Trial in Absentia and thereby breached Section 14(2)(h)(i) of the Constitution.*

3. ***THAT*** *the Learned Trial Judge erred in law and fact when he failed to properly investigate the whereabouts of the Appellant during the trial and sentencing, especially since the Appellant had been in remand for certain periods in 2017 and 2018.*

4. ***THAT*** *the Learned Trial Judge erred in law and in fact, when he proceeded with the hearing of the matter pursuant to section 14(2)(h)(i) of the Constitution whereby the requirements of the same was not satisfied, whereas the court had failed to ascertain beyond reasonable doubt that the Appellant was aware of the date of trial but had voluntarily chosen not to attend.*

5. ***THAT*** *the Learned Trial Judge erred in law and in fact that the Appellant did not evade the Court on purpose since the Appellant was remanded by the Suva Magistrates Courts in August 2017, for criminal cases CF 1291/17 and CF 1292/17 and it was beyond the appellants control to attend the case.*

6. ***THAT*** *the Learned Trial Judge erred in law and in fact, when he failed to consider the second limb of section 14(2) (h) (i) of the Constitution as he failed to satisfy the requirement of a summon or similar process to be served requiring his attendance where by the similar process would include a bench warrant port to be provided to court where by the appellant was arrested just days before the sentence was passed.*

7. ***THAT*** *the Learned Trial Judge erred in law and in fact when he failed to consider the provision of section 172 of the Criminal Procedure Act 2009.*

[8] The gist of the appellant's complaint against conviction relates to the trial against him in absentia. His position is that he had no intention to evade the trial but attended all mention dates whilst on bail since 23 December 2015. He had pleaded not guilty to the information on 26 November 2015. According to him the trial had been fixed to take place originally from 31 July 2017 to 04 August 2017 but had finally been conducted from 31 May to 12 June 2018. He submits that he was in remand in Suva Remand Centre in respect of some other cases [Nasinu Magistrates Court (2) Case No. CF 900/17 and Suva Magistrates Court (4) Cases No.CF1291/17 and CF1292/17] during the period of the trial in the High Court. He claims to have missed appearances in the High Court from 19 September 2017 due to his remand in prison commencing from early September. He states that he was in remand in respect of case No. HAC 289 of 2018 of Suva High Court when conviction and sentence were recorded against him. He further submits that he had received no summons or any other process of court for his appearance in the High Court regarding the current case.

[9] The appellant argues that his rights under section 14(2) (h) (i) of the Constitution had been violated as a result of the trail against him in absentia. Section 14(2) (h) (i) is as follows.

> *'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)……'*

[10] In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2)(h)(i) of the Constitution would provide guidance to court as to the conditions that should be satisfied before an accused can be tried in his absence. Those conditions are that (i) the accused should be served with summons or similar process requiring his attendance at the trial and (ii) despite summons or similar process the accused should have chosen not to attend (waiver of the right to be present). Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court.

[11] The first of these conditions is an obligation on the part of the court envisaging sufficient notice on the accused that he should appear at the trial or a direction on the authority holding him to produce the accused in court for the trail while the second condition is a conscious, deliberate or voluntary decision on the part of an accused not to present himself for the trial. However, once such notice has been given to an accused, if not detained under the authority of court, it is his responsibility to make himself available to face trial on every occasion without any further notice unless prevented from doing so for reasons beyond his control. Therefore, section 14(2)(h)(i) of the Constitution is no license for an accused to evade process of court and course of justice.

[12] The common law sheds more light on this issue. It appears that even when an accused waives his right to be present the court is not necessarily bound by law to proceed with the trial without the accused. Discretion is vested in the trial judge to decide whether the accused should be tried in his absence or not. In **R v Abrahams** 21 VLR 343 where the appellants were present at the commencement of the trial but were absent at a later stage due to illness, Williams J said, at p 346:

> *'The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present, and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence.'*

[13] **Regina v Jones** (On Appeal From The Court of Appeal (Criminal Division) [2002] UKHL 5 Lord Hutton said

> *'23. I consider that the authorities make it clear that a court has power to proceed with a trial when the defendant has deliberately absconded before the commencement of the proceedings to avoid trial, although it is clear that the power to proceed in such circumstances should be exercised by the trial judge with great care.*
>
> *24. The authorities also show that there are two stages in the approach to be taken to the matter. The first stage is that although the defendant has a right to be present at his trial and to put forward his defence, he may waive that right. The second stage is that where the right is waived by the defendant the judge*

must then exercise his discretion as to whether the trial should proceed in the absence of the defendant.'

[14] It is not ascertainable at this stage without the full record whether the learned trial judge had been satisfied with the fulfillment of the conditions set out in section 14(2)(h)(i) of the Constitution and thereafter exercised his discretion in proceeding with the trial in the absence of the appellant.

[15] Only the following paragraphs in the summing-up deal with the trial without the appellant and nothing more can be found in the judgment either to find an answer to the above questions.

> *'6. You will notice that the information has three accused persons mentioned, however, only accused one and accused three are present in court. The second accused Mr. Vereti Waqa is not present in court. The law provides for an accused to be tried in his absence known as trial in absentia. Although the second accused was not in court throughout the duration of the trial he is entitled to all the rights of an accused who is present in court that is a fair trial*
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> *'145.As mentioned earlier the burden to prove the guilt of all the accused persons beyond reasonable doubt remains with the prosecution. The absence of the second accused is not an admission of guilt and adds nothing to the prosecution case it does not make this burden any lesser on the prosecution remember you are not to draw any negative inference against the second accused because he is not here to defend his case.'*
>
> *'17. You are reminded not to take the absence of the second accused from this trial to his disadvantage or against him or his non-attendance negatively.'*
>
> *'174. The second accused was absent from the proceedings so he was taken to have exercised his right to remain silent.'*

[16] Therefore, if the appellant's complaint can be sustained at a hearing before the full court, there is a reasonable prospect of his succeeding in his appeal and being granted an opportunity to face a new trial. The respondent too does not object to leave to appeal being granted against conviction. However, if the appellant's position is not borne out by the copy record, he will have to advise himself as to place material before the full court to substantiate his contention. The respondent is advised to verify the appellant's claims of having been in remand before and after the trial and

not having had notice of the trial in order to assist the full court at the hearing of the appeal.

[17] Thus, leave to appeal is granted to the appellant on the ground whether a miscarriage of justice has occurred by the decision of the learned trial judge to try the appellant in absentia.

Order

1. Leave to appeal against conviction is granted.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL