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

CRIMINAL APPEAL NO.AAU 0096 of 2019
[In the High Court at Suva Case No. HAC 114 of 2018]

BETWEEN : **MATAIYASI NAVUGONA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Ms. E. A. Rice for the Respondent**

Date of Hearing : **27 August 2021**

Date of Ruling : **03 September 2021**

RULING

[1] The appellant (01st accused in the High Court) had been indicted with another (02nd accused in the High Court and the appellant in AAU 168 of 2019) in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 11 March 2018 at Kinoya in the Central Division.

[2] The information read as follows:

Statement of Offence

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

Particulars of Offence

> ***MATAIYASI NAVUGONA*** *and* ***KEVERIELI DUIGIGIDIGO WAQA*** *on the 11th day of March, 2018 at Kinoya in the Central Division, in the company of each other robbed, Reapi Kawanikailekutu of $249 in case cash, the property of Reapi Kawanikailekutu.*

[3] The appellant had been tried *in absentia*. Following the summing-up, the assessors had expressed a unanimous opinion of guilty against the appellant. The learned High Court judge in his judgment had agreed with the assessors and convicted the appellant. He had been sentenced on 28 May 2019 to 05 years of imprisonment with a non-parole period of 04 years.

[4] The appellant being dissatisfied with the conviction and sentence had in person lodged a timely appeal against conviction and sentence (14 June 2019). He had preferred additional grounds of appeal from time to time. The appellant informed this court on 24 December 2020 that he would rely only on amended grounds of appeal filed on 27 August 2020. In his written submissions lodged on 08 January 2021 the appellant had stated that he was relying on consolidated grounds of appeal consisting of grounds filed on 14 June 2019 and amended grounds filed on 27 August 2020. His application to abandon the sentence appeal was allowed by this court on 01 April 2021. The respondent's written submissions had been tendered on 25 February 2021. The appellant was heard *via* Skype at the leave to appeal hearing.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (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, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 and

Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Grounds of appeal urged by the appellant against conviction are as follows:

> ***Appeal grounds - 14/06/2019***
>
> ***Ground 1***
>
> *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 failed to ascertain beyond doubt that the Appellant was aware of the date of trial but had chosen not to attend.*
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> ***Ground 2***
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> *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 whereby the similar process would include a bench warrant report to be provided to Court whereby the Appellant was arrested after the trial was concluded.*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and in fact when failed to consider the provision of Section 171(i)(4) of the Criminal Procedure Act of 2009 which clearly provides as follow:*
>
> > *Section 171(1)(a):-*
> >
> > *"If at the time or place to which the hearing or further hearing is adjourned. The accused does not appear before the Court which has made the order of adjournment, the Court may (unless the Accused is charged with an indictable offence) proceed with the hearing of further hearing as if accused were present."*
>
> *The failure to consider the above provisions that provide the appellant's rights to a fair trial as stipulated under section 15 of the constitution has been breached thus rendering the conviction unsafe and the trial based to the appellant.*

Appeal grounds - 27/8/20

Ground 1

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.

Ground 2

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the provision of Section (14)(2)(l) of the Constitution of Fiji.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the provision of Section (15)(1) of the Constitution of Fiji.

[7] The evidence of the case had been summarised by the learned trial judge as follows in the sentencing order.

> *'5. The facts of the case were that the complainant was running a car wash at Kinoya. On the 11th of March, 2018, the complainant was at the said 'car wash' with her co-worker and her one year old daughter. In the morning, both of you approached the room of the 'car wash' and pulled open the grill door. You forcefully entered the room and took the days' cash collection from the cashier, three mobile phones and fled the scene in a taxi when the complainant was yelling for help in fear.'*

Grounds of appeal

[8] These grounds of appeal could be considered together. 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* on the premise that there was no summons, warrant or a similar process served on him and the court had failed to ascertain whether the appellant was aware of the trial date on 29 March 2019 because he had 05 pending cases against him in Suva and Nasinu Magistrates courts to attend. His position is that he had forgotten to attend the High Court and the cause for the absence in court was beyond his control. He argues that the trial judge should have adjourned the matter and served summons, warrant or similar process on him before exercising his discretion to proceed with the trial in his absence. In gist, the appellant seems to

submit that his absence from court was not deliberate but unintentional the reason being that he had forgotten this particular date due to his multiple cases in other courts.

[9] Unfortunately, the respondent in its written submissions or oral submission failed to shed any light on what had transpired in court on 29 March 2019 which according to the appellant appears to be the date on which the trial judge had decided to proceed with the trial in his absence. Whether on 29 March 2019 (if not on another day) the prosecution had applied for the appellant to be tried *in absentia* in terms of Article 14 (2((h)(i) of the Constitution and what matters had been considered by the trial judge before allowing it is also not ascertainable due to the non-availability of trial proceedings at this stage. However, the judgment and the sentencing order shed sufficient light on what had transpired relating to the trial judge's decision to go ahead with the trial against the appellant *in absentia*.

[10] At paragraphs 39 of the summing-up the trial judge had cautioned the assessors about evidence led against the appellant who did not test it in cross-examination as he was not present in court during the trial. The trial judge at paragraph 52 referred to the appellant's election to be silent and cautioned the assessors not to draw any adverse inference arising therefrom and told them that despite his absence from court the prosecution still had to prove that the appellant was one of the offenders who took part in the robbery (see paragraph 59).

[11] The trial judge had stated in the judgment as follows:

> *'2. 'The 1st accused was tried in absentia as he waived his right to be present at his trial. The assessors were cautioned as to the weakness of the evidence against the 1st accused that it was not tested by cross examination. The assessors were properly directed not to draw a negative inference against the first accused merely because he failed to attend court to face his trial.'*

[12] Paragraph 02 of the sentencing order is as follows:

> *'2 **Mataiyasi Navugona**, you appeared in court and pleaded not guilty to the charge. Thereafter you absconded and failed to appear in court on the*

date assigned for trial. The bench warrant issued by this court to arrest you could not be executed. The court proceeded to trial in your absence when it was satisfied that you were deliberately absconding court proceedings and that your presence cannot be secured in due course. At the ensuing trial you were found guilty and convicted as charged.'

[13] 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).....'*

[14] 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.

[15] 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 subvert the course of justice.

[16] 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.'*

[17] **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.*
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> *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.'*

[18] In **R v O'Hare** [2006] EWCA Crim 471, [2006] Crim LR 950 the accused had absconded even before a date had been set for his trial and made no effort to contact the court either directly or through counsel, and the court concluded that the accused had waived his right to be present at the trial.

[19] It is clear from the sentencing order that the appellant had in deed appeared in court and pleaded not guilty but thereafter absconded and failed to appear on the trial date. His lawyer had continued to appear for him throughout the trial and even on the date

of the judgment. On the date of the sentence the counsel had not appeared for the appellant but only for his co-accused. It also appears that the trial judge had been satisfied that the appellant was deliberately avoiding court proceedings and that his presence could not be secured in due course. In fact the bench warrant issued against the appellant could not be executed.

[20] The appellant had not stated that there was any impossibility, physical or otherwise, for him to attend court to face trial. His excuse appears to be that he had forgotten the trial date (but not the case or the pending trial against him) as he was having several cases against him in different courts. However, on his reasoning this was the only High Court trial he was facing at the relevant time and since he was aware of the trial against him in the High Court it was his duty to surrender to court even subsequently after the trial date if he had 'forgotten' the trial date which he had not done. He appears to have instructed his lawyer to continue to represent him during the trial. I find his absence to be conscious and deliberate. The appellant had chosen not to attend (waiver of the right to be present).

[21] In the circumstances, the trial judge had every right to proceed to try the appellant *in absentia*. There is no violation of the appellant's rights under section 14(2)(h)(i) of the Constitution or the Criminal Procedure Act, 2009.

[22] Therefore, I am not inclined to grant leave to appeal as I cannot see that there had been any violation of the appellant's rights under section 14(2)(h)(i) of the Constitution or the Criminal Procedure Act, 2009.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL