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

CRIMINAL APPEAL NO. AAU 038 of 2019
[High Court of Labasa Case No. HAC 48 of 2015]

BETWEEN	**:**	**EPELI LEALEAVONO**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Mataitoga, RJA** **Qetaki, JA**
Counsel	**:**	**Appellant absent and unrepresented** **Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**17 & 22 November 2023**
Date of Judgment	**:**	**29 November 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the High Court at Labasa for having committed *'Obtaining Financial Advantage by Deception'* of $500 (on 29 September 2015 at Naqara, Taveuni in the Northern Division) contrary to section 318 of the Crimes Act, 2009 and penile rape (on 30 September 2015 at Mua, Taveuni in the Northern Division) contrary to section 217(1)(a) and (b) of the Crimes Act, 2009. The appellant had committed both offences against the same complainant named S.D.

[2] At the trial where the appellant had been tried in absentia, the assessors had expressed a unanimous opinion that he was guilty of the second count of rape and the majority of assessors had expressed the opinion that the appellant was guilty of the first count as well. The learned High Court judge had agreed with the assessors and convicted

the appellant of both counts and sentenced him on 13 December 2017 to 12 months imprisonment on the first count and 14 years of imprisonment with a non-parole period of 13 years on the second count of rape (his sentences to run from the day of his arrest); both sentences to run concurrently.

[3] A judge of this court allowed enlargement of time to appeal against the conviction and released the appellant on bail pending appeal on 09 October 2020[1].

[4] However, when the appeal was taken up for hearing on 17 November 2023 the appellant was absent and unrepresented. This court re-fixed the hearing for 22 November 2023 and issued notice of hearing of the appeal on the appellant and the sureties for them to be present and explain why they should not be dealt with for failure to produce the appellant to court.

[5] The Sherriff Officer on 16 November 2023 in his Report had stated that when he visited the appellant's address at 56 Namena Road, Nabua, where he undertook to reside after being released on bail, to serve the notice of full court hearing on the following day, the appellant was not there and the family members had informed that he was residing in Taveuni Island.

[6] The appellant was also obliged as part of bail conditions to report to Nabua police station every Saturday but according to the memorandum dated 20 November 2023 submitted to the DPP by IP Peter Voi of Nabua police station, the appellant had signed the Bail Register Book for 2021 only on 03 days in October 2021 and 02 days in November 2021. State counsel Mr. Kumar's written correspondence to the CA registry on 20 November 2023 has confirmed this position and he had also submitted that the appellant's conduct of going to Taveuni without informing the CA Registry and his erratic bail signing may properly form the basis for revocation of bail pending appeal. The same police officer had informed the DPP in writing on 23 November 2023 that he had checked the bail registers for 2022 and 2023 and it was evident that the appellant had not signed them.

[1] **Lealeavono v State** [2020] FJCA 192; AAU038.2019 (9 October 2020)

[7] The CA Registry had issued formal notice on 17 November 2023 to be served on the appellant to Taveuni Magistrates Court and the Sheriff there had duly served it personally on the appellant at his address in Taveuni on the 20 November 2023. The court officer at Taveuni Magistrates' court had confirmed to the CA Registry that the two sureties were also living in different parts of at Taveuni Island but their exact locations were unknown. The appellant and the two sureties had not responded to calls from the CA Registry via their respective telephone numbers either.

[8] When the matter was taken up for hearing on 22 November 2023, neither the appellant nor his sureties were present. The hearing was concluded in their absence. The appellant had turned up at the CA Registry on 23 November 2023 and informed that he received notice of hearing of his appeal around noon on 20 November 2023 and boarded the next available boat which however reached Suva late, possibly afternoon or evening on 22 November 2023. He had also informed the Registry that he left for Taveuni last year (2022). The Registry had asked him to be present on the day of delivery of the judgment.

[9] It is very clear that both the appellant and his sureties are in material breach of several bail pending appeal conditions and bail pending appeal granted to the appellant should accordingly be cancelled.

[10] The facts in brief are that prior to 29 September 2015, the appellant and the complainant (PW1) knew each other. She was a businesswoman running a shop in Taveuni, and she was buying and selling grog to customers. The appellant sold yaqona to her, which she later sold to others. This commercial relationship had been in existence for months, prior to the offending. On 29 September 2015, the appellant asked for a $500 cash advance, in exchange for supplying grog to PW1 on the same day. PW1 advanced him $500 cash on 29 September 2015, but the appellant failed to provide her with the grog that day. On 30 September 2015, PW1 again asked him to provide her with her $500 worth of grog. He told her that the grog was still being processed in the bush. He later invited her to the bush to see his grog. The appellant took her to a secluded spot in the bush, near a tin house and later threatened to kill her if she didn't do what he wanted. The appellant then forced himself on her by

penetrating her vagina with his penis without her consent. He knew that she was not consenting to sex at the time.

[11] Grounds of Appeal urged on behalf of the appellant:

> ***Conviction***
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> *'**Ground 1:** Whether the conviction entered against the Appellant should be set aside upon being satisfied that the Appellant's absence from the trial was from causes which the Appellant has control over?*
>
> ***Ground 2:*** *Whether the trial in absentia of the Appellant on a charge is an indictable offence a procedural irregularity pursuant to Section 171 (1) (a) of the Criminal Procedure Act of 2009 resulting to a miscarriage of Justice?*
>
> ***Ground 3:*** *That I did not receive a fair trial by reason of the failure of the prosecution (DPP) not informing the trial court that the Appellant was detained in custody on remand at the Lautoka Remand Centre in Criminal Case NO. HAC 161/24 of 2017.*
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> ***Ground 4****: That I did not receive a fair trial by reason of my trial conducted and held in my absence and total denial of the rules of natural justice of the opportunity to be heard before any decision is given.'*

[12] It is convenient to consider all grounds of appeal against conviction together. The gist of the appellant's complaint against conviction relates to the trial against him in absentia. His position is that he had not willingly evaded the trial but been detained in Lautoka Correction Centre in connection with HAC 161/16 in Lautoka High Court from 03 September 2016 to 23 August 2019 until he was acquitted after trial. He had also stated that whilst the trial against him in Labasa in HAC 048 of 2015LAB (current case) was being heard he was detained at Lautoka Correction Centre in connection with HAC 124 of 2017 in Lautoka High Court as well.

[13] On a perusal of the Order made by the trial judge in HAC 161 of 2016 in Lautoka High Court on 23 August 2019 it appears that upon a *nolle prosequi* entered by the DPP the appellant had been discharged. The judgment in HAC 124 of 2017 dated 17 May 2019 of Lautoka High Court reveals that the assessors had unanimously opined that the appellant was not guilty of both counts of rape and the trial judge had agreed

with them and acquitted the appellant. The trial in HAC 124 of 2017 had taken place on 16 May 2019.

[14] The record of the Magistrates' court at Nadi in Case No. 640 of 2017 shows that the appellant had been denied bail on 01 June 2016 and the case had been transferred to Lautoka High Court which had tried him under HAC 124 of 2017 and acquitted him on 17 May 2019.

[15] The record of the current case HAC 48 of 2015 shows that the appellant had been present before Labasa High Court on 11 December 2015 until 18 April 2016 and pleaded not guilty to all charges. The ruling on bail pending trail dated 26 November 2015 in HAM 42 of 2015 shows that the appellant had been bailed out in HAC 48 of 2015 on 26 November 2015. Thus, the appellant had been on bail during this period.

[16] However, from 17 May 2016 he had been absent and a bench warrant had been issued. On 20 July 2017 the prosecution had applied to try the appellant in absentia and the learned trial judge had allowed the application taking his absence as a sign that he had chosen to attend and proceeded to try him in absentia in terms of section 14(2)(h)(i) of the Constitution on 11 and 12 December 2017 and sentenced him on 13 December 2017.

[17] The available material does not reveal when the appellant had been arrested after being bailed out on 26 November 2015. He may have been arrested and detained before 17 May 2016. However, it appears that at least since 01 June 2016 until 17 May 2019 the appellant had been in remand in respect of HCA 124 of 2017 which means that when the trail was fixed to be taken up in his absence in HAC 48 of 2015 the appellant was in remand and unfortunately the state had made the application to try him in his absence whilst he was being detained in remand in respect of HCA 124 of 2017.

[18] The affidavit filed on behalf of the DPP while conceding that the appellant was in remand custody from 27 November 2017 to 18 January 2018, had stated that the fact of his being in remand had gone undetected due to a slight change in the appellant's name (Epeli Lealeavono) in its case management data base called CASES. Thus, it

was not due to any lack of care on the part of the DPP but due to circumstances beyond its control.

[19] 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)……'*

[20] 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.

[21] 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.

[22] 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.'*

[23] **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.'*

[24] 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. However, given the above factual scenario relating to his detention unknown to the prosecution and the trial judge, the judge at the instance of the prosecution had proceeded on a wrong factual basis (of course, due to no fault on his part) to try the appellant in his absence.

[25] The following paragraphs in the summing-up deal with the trial without the appellant:

> *'9. In a pre-trial conference on 18 February 2016, in his presence, the prosecution and the accused agreed for a trial from 26 to 30 September 2016. On 23 October 2015, he waived his right to counsel and choose to represent himself. He was warned on 18 February 2016 that if he*

absconded from trial, he will be tried in absentia in accordance with the law stated in paragraph 8 hereof. He was then released on bail.

10. On 17 May 2016, the accused failed to appear in court. He had not appeared in court ever since. He was aware of the present court proceeding, but by his conduct, has chosen not to attend. In the meantime, the court trial date had been amended to start from yesterday. Because of the above, the prosecution applied for the accused to be tried in absentia on 20 July 2017. Although the prosecution's application was granted, the court hoped he would turn up yesterday, so that the trial would proceed in his presence.'

[26] Therefore, given the fact that the state concedes that the trail in absentia against the appellant was not warranted and justified because he was in fact detained in remand custody during the relevant time, a substantial miscarriage of justice has occurred by the decision of the learned trial judge to try the appellant in absentia. His appeal should succeed and the conviction should be quashed.

[27] The appellant should be granted an opportunity to face a new trial. In **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) the Court of Appeal laid down some guidance for a retrial to be ordered which has guided this court in this instance.

'[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App No AAU0060 of 2006S: 14 November 2008).'

Mataitoga, RJA

[28] I concur with the reasons, conclusion and orders proposed by Prematilaka, RJA in this judgment.

Qetaki, JA

[29] I agree with the judgment of Prematilaka, RJA which I have considered in draft. I agree with the reasoning and the proposed orders.

Orders of the Court:

1. Appeal against conviction is allowed.
2. Appellant's conviction is quashed.
3. A new trial is ordered against the appellant.
4. Bail pending appeal is revoked and the appellant is committed to remand custody forthwith.
5. Appellant is to be produced from remand before a High Court before 15 December 2023 for the High Court to make appropriate orders with regard to the new trial.
6. High Court is directed to deal with the sureties for breach of bail conditions according to law.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL

.....
Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent