

IN THE HIGH COURT OF FIJI
AT LABASA
[CRIMINAL JURISDICTION]

CRIMINAL APPEAL NO. HAA 023 OF 2022

BETWEEN : **TEARI KAURE**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Mr P Niubalavu for the Appellant
Ms L Latu for the State

Date of Hearing : **28 February 2023**

Date of Judgment : **28 February 2023**

JUDGMENT

- [1] This is an appeal against conviction and sentence arising from a trial in absentia at the Savusavu Magistrates' Court.
- [2] On 11 August 2021, the appellant was charged with common assault and released on bail to appear in court on 19 August 2021 to answer the charge. The incident allegedly occurred on 11 June 2021 at Savusavu. The complainant was the appellant's partner.
- [3] When the police charged the appellant they took all her identification details. The appellant was a Fisheries Officer based at Galoa Fisheries Station. She resided at Makosoi, Pacific Harbour and she provided all her contact details (mobile number and email address) to the police.

- [4] On 19 August 2021, the court did not sit due to the Covid-19 pandemic. A court clerk adjourned the case to 21 December 2021 for mention.
- [5] On 21 December 2021, the case was called in court without an appearance from the appellant. There is no record of the appellant being informed of the court date of 21 December 2021, but there is an email dated 20 December 2021 to the Savusavu Court Registry from the appellant requesting for an adjournment until 3 March 2022 as she was not able to engage in any travelling due to her late stage of pregnancy. The learned magistrate acknowledged this email and adjourned the case to 30 June 2022. There is no record of the appellant being informed of her court date of 30 June 2022.
- [6] On 30 June 2022, the case was called in court and the appellant was not present. The case was adjourned to 28 July 2022 for hearing.
- [7] On 28 July 2022, the hearing proceeded in absentia without the appellant's attendance.
- [8] On 23 August 2022, the learned magistrate found the appellant guilty of the charge in a judgment pronounced in court without the appellant being present. On the same day, the learned magistrate sentenced the appellant to 5 months imprisonment suspended for 3 years.
- [9] On 16 September 2022, the appellant filed a timely appeal against her conviction and sentence. She has advanced four grounds of appeal, but her principal complaint is that the learned magistrate made an error of law in convicting and sentencing her in her absentia.
- [10] The Constitution allows for trials in absentia in the following circumstances:

“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) 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. (s 14(2)(h))

[11] It is clear that the Constitution provides every person accused of a crime to be present and to participate in his or her trial. An accused can only be deprived of the right to be present in his or her trial only in the two circumstances set out in section 14(2) (h) (i) & (ii). Subsection (ii) did not apply to this case.

[12] The trial could have proceeded in absentia only if the appellant had been served with a summons or similar process requiring her attendance at the trial, and after being notified of the hearing, she had chosen not to attend.

[13] In *Ariana's Used Car and Spare Parts v Fijian Competition & Consumer Commission* [2022] FJHC 40; HAA005.2021 (4 February 2022) the Court held that to hold a trial in absentia, the court must be satisfied of the following:

1. The Accused had notice of the proceedings;
2. The Accused deliberately chose not to attend his trial; and
3. A fair trial can be held without the Accused's attendance.

[14] In the present case, the learned Magistrate did not direct his mind to any of these matters before proceedings to hold trial in absentia.

[15] When the appellant sent an email on 21 December 2021 requesting for her case to be adjourned to a later date after 3 March 2022, she made it plain that she wanted to be present in court for her case. At no stage she waived her right to be present in her trial. Any waiver of the right to be present in the trial must be clearly

waived by the accused (*Chand v State* [2017] FJHC 865; HAA13.2017 (17 November 2017)).

[16] A more specific statutory provision for trial in absentia relates to minor offences punishable with imprisonment not exceeding 12 months. Section 167 of the Criminal Procedure Act provides:

(1) This section applies to any case in which an accused person is charged with any offence punishable with imprisonment for a term not exceeding 12 months and/or a fine not exceeding 10 penalty units, and where the accused person-

(a) does not appear at the time and place -

(i) appointed by the summons; or

(ii) by any bond for his appearance that he or she may have entered into;

and

(b) personal attendance has not been dispensed with under section 83.

(2) Notwithstanding section 165, where the matters specified in sub-section (1) apply in any case, the court may -

(a) proceed to hear and determine the case in the absence of the accused; or

(b) adjourn the case and issue a warrant for the arrest of the accused in accordance with the provisions of section 84.

(3) A court shall only proceed in accordance sub-section (2) upon production of the bond entered into by the accused, or upon -

(a) it being proved that there has been proper service of the summons a reasonable time before the date fixed for the case, or on production of the relevant bond; and

(b) the court being satisfied that the accused was informed verbally or by the documents served upon the accused, that the case might be proceeded with if the accused did not attend the court as notified.

- [17] Common assault is punishable with 12 months imprisonment. After the police charged the appellant with common assault she was released on bail bond to appear in court on 19 August 2021.
- [18] On 19 August 2021, the court did not sit. On the next court date the appellant did not make an appearance in court because she could not travel from Viti Levu to Vanua Levu due to her late stage of pregnancy. Thereafter, she was not informed of her court date or the trial date. The trial took place without her being notified of the date. She was not at fault when she did not appear for her trial.
- [19] In these circumstances, the learned magistrate made a fundamental error of law by holding the trial in absentia.
- [20] The conviction and sentence of the appellant are set aside and the case is remitted for trial de novo before another magistrate.
- [21] Both parties consent to a change of venue for trial from Savusavu to Suva.
- [22] The case is listed before the Chief Magistrate in Suva on 3 April 2023, 9.30am to assign a new magistrate for trial de novo.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Ocenica IP Law for the Appellant