

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAA 52 of 2023

KAARTIK KAMAL SINGH

APPELLANT

V

THE STATE

RESPONDENT

Counsel : Mr. M. Kumar for the State.
: Mr. M.I. Rafiq for the Respondent.

Date of Hearing : 18 December, 2023
Date of Judgment : 20 December, 2023

JUDGMENT

1. The accused was charged with the following offences in the Magistrate's Court at Lautoka.

COUNT ONE

Statement of Offence

Theft: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 30th day of November, 2017 at Lautoka in the Western Division dishonestly appropriated the sum of \$700.00 in monies from Bank of Baroda account number 91020200000656 of Veger Fresh by virtue of cheque number 1179363 with the intention of permanently depriving the said Veger fresh of the monies thereof.

COUNT TWO

Statement of Offence

Theft: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 2nd day of December, 2017 at Lautoka in the Western Division dishonestly appropriated the sum of \$697.00 in monies from Bank of Baroda account number 91020200000656 of Veger Fresh by virtue of cheque number 1179345 with the intention of permanently depriving the said Veger Fresh of the monies thereof.

COUNT THREE

Statement of Offence

Forgery: Contrary to Section 156 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 13th day of December, 2017 at Nadi in the Western Division made a false document namely a Bank of Baroda cheque number 1179366 of Veger Fresh account number 91020200000656 by forging the signature of Roshni Lata and the contents on the said cheque and dishonestly induced third person namely Ashika Devi Singh a bank of Baroda teller, a public official, to accept it as genuine and dishonestly obtaining a gain.

COUNT FOUR

Statement of Offence

Using Forged Document: Contrary to Section 157 (1) (b) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 13th day of December, 2017 at Nadi in the Western Division knowingly and dishonestly induced Ashika Devi Singh, a Bank of Baroda teller to accept cheque number 1179366 of Veger Fresh with an amount of \$620.00 for encashment and dishonestly obtained cash of \$620.00.

COUNT FIVE

Statement of Offence

Theft: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 13th day of December, 2017 at Lautoka in the Western Division dishonestly appropriated the sum of \$620.00 in monies from Bank of Baroda account number 91020200000656 of Veger Fresh by virtue of cheque number 1179366 with the intention of permanently depriving the said Veger Fresh of the monies thereof.

COUNT SIX

Statement of Offence

Forgery: Contrary to Section 156 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 18th day of December, 2017 at Lautoka in the Western Division made a false document namely a Bank of Baroda cheque number 1179387 of Veger Fresh account number 91020200000656 by forging the signature of Roshni Lata and the contents on the said cheque and

dishonestly induced third person namely Ashika Devi Singh a Bank of Baroda teller, a public official, to accept it as genuine and dishonestly obtaining a gain.

COUNT SEVEN

Statement of Offence

Using Forged Document: Contrary to Section 157 (1) (b) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 18th day of December, 2017 at Nadi in the Western Division knowingly and dishonestly induced Ashika Devi Singh, a Bank of Baroda teller to accept cheque number 1179387 of Veger Fresh with an amount of \$850.00 for encashment and dishonestly obtained cash of \$850.00.

COUNT EIGHT

Statement of Offence

Theft: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 18th day of December, 2017 at Lautoka in the Western Division dishonestly appropriated the sum of \$850.00 in monies from Bank of Baroda account number 91020200000656 of Veger Fresh by virtue of cheque number 1179387 with the intention of permanently depriving the said Veger Fresh of the monies thereof.

COUNT NINE

Statement of Offence

Forgery: Contrary to Section 156 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 21st day of December, 2017 at Lautoka in the Western Division made a false document namely a Bank of Baroda cheque number 1179397 of Veger Fresh account number 91020200000656 by forging the signature of Roshni Lata and the contents on the said cheque and dishonestly induced third person namely Ashika Devi Singh a Bank of Baroda teller, a public official, to accept it as genuine and dishonestly obtaining a gain.

COUNT TEN

Statement of Offence

Using Forged Document: Contrary to Section 157 (1) (b) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 21st day of December, 2017 at Nadi in the Western Division knowingly and dishonestly induced Ashika Devi Singh, a Bank of Baroda teller to accept cheque number 1179397 of Veger Fresh with an amount of \$620.00 for encashment and dishonestly obtained cash of \$620.00.

COUNT ELEVEN

Statement of Offence

Theft: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 21st day of December, 2017 at Lautoka in the Western Division dishonestly appropriated the sum of \$620.00 in monies from Bank of Baroda account number 91020200000656 of Veger Fresh by virtue of cheque number 1179397 with the intention of permanently depriving the said Veger Fresh of the monies thereof.

COUNT TWELVE

Statement of Offence

Forgery: Contrary to Section 156 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 29th day of December, 2017 at Lautoka in the Western Division made a false document namely a Bank of Baroda cheque number 1179408 of Veger Fresh account number 91020200000656 by forging the signature of Roshni Lata and the contents on the said cheque and dishonestly induced third person namely Ashika Devi Singh a Bank of Baroda teller, a public official, to accept it as genuine and dishonestly obtaining a gain.

COUNT THIRTEEN

Statement of Offence

Using Forged Document: Contrary to Section 157 (1) (b) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 29th day of December, 2017 at Nadi in the Western Division knowingly and dishonestly induced Ashika Devi Singh, a Bank of Baroda teller to accept cheque number 1179408 of Veger Fresh with an amount of \$850.00 for encashment and dishonestly obtained cash of \$850.00.

COUNT FOURTEEN

Statement of Offence

Theft: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 29th day of December, 2017 at Lautoka in the Western Division dishonestly appropriated the sum of \$850.00 in monies from Bank of Baroda account number 91020200000656 of Veger Fresh by

virtue of cheque number 1179408 with the intention of permanently depriving the said Veger Fresh of the monies thereof.

COUNT FIFTEEN

Statement of Offence

Forgery: Contrary to Section 156 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 3rd day of January, 2018 at Lautoka in the Western Division made a false document namely a Bank of Baroda cheque number 1179409 of Veger Fresh account number 91020200000656 by forging the signature of Roshni Lata and the contents on the said cheque and dishonestly induced third person namely Ashika Devi Singh a Bank of Baroda teller, a public official, to accept it as genuine and dishonestly obtaining a gain.

COUNT SIXTEEN

Statement of Offence

Using Forged Document: Contrary to Section 157 (1) (b) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 3rd day of January, 2018 at Nadi in the Western Division knowingly and dishonestly induced Ashika Devi Singh, a Bank of Baroda teller to accept cheque number 1179409 of Veger Fresh with an amount of \$650.00 for encashment and dishonestly obtained cash of \$650.00.

COUNT SEVENTEEN

Statement of Offence

Theft: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Kaartik Kamal Singh on the 3rd day of January, 2018 at Lautoka in the Western Division dishonestly appropriated the sum of \$650.00 in monies from Bank of Baroda account number 91020200000656 of Veger Fresh by virtue of cheque number 1179409 with the intention of permanently depriving the said Veger Fresh of the monies thereof.

BACKGROUND INFORMATION

2. The appellant was first produced in court on 8th June, 2018 and on the same day he was released on bail. Thereafter on 15th October, 2018 he was present with counsel and the court was informed that the appellant was ready for plea. The charge was read to the appellant in the English language and he understood the charge from counts 1 to 17 and pleaded not guilty.
3. On 5th July, 2022 the appellant was present and the matter was fixed for trial but was vacated due to another matter. This matter was fixed for trial from 12th to the 16th December, 2022. On the 12th of December, 2022 the accused was not present. The prosecution made an application pursuant to section 171 of the Criminal Procedure Act 2009 for a trial in absentia.
4. The application for trial in absentia was granted on the grounds that the accused had signed his bail undertaking to always appear on every date the matter was to be called in court. The accused was present when the matter was fixed for trial, as such, the accused was fully aware of his trial date. Furthermore, the Magistrate's Court had noted that this was not the first time the accused had not appeared in court but had not appeared on four occasions including the trial date.
5. The trial proceeded in the absence of the appellant and on 9th June, 2023 the learned Magistrate found the appellant guilty and he was convicted for all the counts as charged.

6. After the conviction on 24th July, 2023 the appellant appeared in court and informed the learned Magistrate that he has made restitution but the prosecution after checks informed the court that this had not been done. After taking into account mitigation the appellant was sentenced to 3 years, 4 months and 20 days imprisonment with a non-parole period of 2 years to be served before he was eligible for parole.
7. The appellant aggrieved by the conviction and sentence filed a timely appeal in this court as follows:

APPEAL AGAINST CONVICTION

- i. *That there has been a substantial miscarriage of justice in that the trial took place in the absence of your petitioner through no fault of his.*
- ii. *That your petitioner's rights to a fair trial as enshrined in the Constitution of Fiji has been breached by the trial process.*
- iii. *That the conviction and sentence by different Magistrate had led to a substantial miscarriage of justice.*
- iv. *That the learned Magistrate erred in law and in fact convicting the appellant in the absence of any evidence that the appellant had committed theft as alleged.*
- v. *That the learned Magistrate erred in law and in fact in convicting the appellant on the forgery charges as there was no evidence beyond a reasonable doubt that the appellant had committed the forgery offence.*

APPEAL AGAINST SENTENCE

- i. *That the learned Magistrate failed to give any credit to the appellant's previous good character.*

- ii. *That the learned Magistrate erred in law and in fact in declaring the appellant to be of bad character when there was no such evidence.*
 - iii. *That the learned Magistrate erred in law and in fact by not considering alternative forms of punishment as prescribed under the Sentencing and Penalties Act.*
 - iv. *That the sentence is manifestly harsh and excessive in all the circumstances of the case.*
8. The appellant's counsel filed written sentence submissions and also made oral submissions whereas the state counsel only made oral submissions in court for which this court is grateful.
9. The appellant's counsel in his written submissions and during the hearing withdrew grounds 3, 4 and 5 in respect of appeal against conviction and all the grounds of appeal against sentence. Counsel only argued two grounds of appeal against conviction.

APPEAL AGAINST CONVICTION

Ground one

THAT there has been a substantial miscarriage of justice is that the trial took place in the absence of your petitioner through no fault of his.

Ground two

THAT your Petitioner's right to a fair trial as enshrined in the Constitution of Fiji has been breached by the trial process.

10. Both the grounds of appeal can be dealt with together. Counsel argued that the learned Magistrate's comments that the appellant knew the provisions of

section 171 of the Criminal Procedure Act are wholly wrong in law and in fact since the appellant was unrepresented.

11. Counsel also submitted that the learned Magistrate should not have proceeded with the trial in absentia but should have issued a bench warrant under section 171 (2) of the Criminal Procedure Act. Counsel also argued that the trial was not conducted fairly as a result a substantial miscarriage of justice has been caused to the appellant.

LAW

12. It is trite law that a court having the jurisdiction to hear a matter has the discretion to proceed in the absence of the accused if the court is satisfied that the accused has been served with the summons or similar process requiring his or her attendance in court and has chosen not to attend see *Lekima Rokolisoa vs. The State, HAA 024 of 2017 (28 July, 2017)*
13. Section 14 (2) (h) of the Constitution of the Republic of Fiji states:
“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 impractical and the court has ordered him or her to be removed and the trial to proceed in his or her absence”*
14. Before an application for trial in absentia is granted the court must be satisfied of the following:
 - a) The accused had notice of the proceedings;

- b) The accused deliberately chose not to attend trial; and
 - c) A fair trial can be held in the absence of the accused.
15. A perusal of the copy record shows that the appellant had notice of the proceedings since he was present in court when the hearing date was assigned on 5th July, 2022 (page 212 of the copy record). Furthermore, the copy record shows that the appellant was represented by counsel during the early stages of the call overs but when the bench warrant was issued no reason or explanation was given in court for the absence of the appellant. Limb (a) and (b) above was satisfied.
16. In respect of limb (c) a perusal of the judgment delivered will show that the learned Magistrate was mindful of the appellant's absence and also the fact that the absence of the appellant did not mean he was guilty. At paragraphs 3 and 4 of her judgment the learned Magistrate stated as follows:

Paragraph 3

On the 5th of July, 2022 this matter was fixed for trial but it was vacated for a one week trial. A one week trial date was fixed for the matter to be heard with Prosecution's 9 witnesses. This matter was fixed for trial for the 12th to the 16th of December, 2022. On the 12th of December, 2022 the accused was not present, however Prosecution made an application pursuant to Section 171 of the Criminal Procedure Act, 2009 for Trial in Absentia. The Trial in Absentia procedure was laid in the FICAC v Fiona Tukana, Criminal Case No. HAC 37(A) of 2010 and Peniame Drova v State, Criminal Appeal No. HAA 23 of 2012.

Paragraph 4

Prosecution made an application for trial in absentia and this court granted the same on the grounds that the accused had signed his bail undertaking to always appear every date this matter is called. The accused was also present

with counsel when the matter was fixed for trial, as such, the accused was fully aware of his trial date. This was not the first time the accused did not appear in court; the accused had missed a total of 4 dates including the trial date. The matter was fixed for a one-week trial. Consequently, trial in absentia was granted accordingly.

17. Appellant's counsel in his submissions did not specifically draw this court's attention to the unfairness caused to the appellant as a result of the trial in absentia. Merely saying that the trial had resulted in an unfair trial is not good enough. The appellant has to point to the unfairness with reference to the copy record. The appellant has not been able to do this. What counsel did point out was after the conviction was entered the appellant had appeared in court and was remanded. The appellant was not brought to court for renewal of his remand warrant so there was no fair trial accorded to him. The above contention is misconceived since the non-renewal of the remand warrant after his conviction was a procedural aspect of the proceedings and it did not affect the substantive trial at all.

18. In this regard to the above I reiterate the observations made in *Lekima Rokolisoa* (supra) at paragraphs 15, 16 and 17 as follows:

[15] ...When conducting trial in absentia the court must exercise caution reason being such a trial will have to be fair to the absent accused as the circumstances permit resulting in a just outcome. The rights of the absent accused had to be safeguarded so that the principles of fair trial are not compromised.

[16] The trial court should remind itself not to hold the absence of the accused against him or her and it is incumbent upon the prosecution to disclose and present evidence of all relevant facts that would be favourable to the accused. The above safeguards are, however, not exhaustive (see Fiji Independent Commission against Corruption vs. Fiona Tukana Nemani, Criminal Case no.

HAC 37(A) of 2010). Furthermore trial in absentia not only includes substantive trial but trial within trial (see *Krishneel Deepak Kumar vs. State, Criminal Misc. Case No. HAA 03 of 2016 (2 May, 2016)*).

[17] *The House of Lords in R v Jones (2002) UKHL 5* stated that it is an overriding duty of the judge to ensure that the trial if conducted in the absence of the defendant will be as fair as circumstances permit and lead to a just outcome.

19. In the Magistrate's Court for the court to grant a trial in absentia section 171(1) (a) is the enabling provision which states:

"If at the time of place to which the hearing or further hearing is adjourned -

(a) the accused person does not appear before the court which has made the order of adjournment the court may (unless the accused is charged with indictable offence) proceed with a hearing or further hearing as if the accused were present..."

20. The above provision gives discretion to the Magistrate's Court to conduct a trial in absentia unless the accused is charged with an indictable offence. Here the appellant was charged with some counts of theft which is a summary offence and some counts of forgery and using forged documents which were indictable offences triable summarily. According to section 2 of the Criminal Procedure Act indictable offences are only tried in the High Court upon the filing of the information. Here the accused had elected to be tried in the Magistrate's Court so the learned Magistrate was able to exercise her jurisdiction in trying the appellant as a result of his election to be tried in the Magistrate's Court.

21. The learned Magistrate had the jurisdiction to try the matter in the absence of the appellant who had chosen not to attend court and the learned Magistrate had properly exercised her discretion to do so. There is no error made by the learned Magistrate in this respect. There is no evidence before

this court to suggest that the appellant was absent through no fault of his is an afterthought. The appellant was within his right to invoke section 172 of the Criminal Procedure Act in the Magistrate's Court but he did not.

SUBSTANTIAL MISCARRIAGE OF JUSTICE

22. The appellant's ground of appeal mentions that since the learned Magistrate had heard the trial in absentia there was a substantial miscarriage of justice caused to the appellant. Unfortunately counsel did not to point to the test which this court should take into account. The test is that the appellate court had to be satisfied on the evidence adduced and the application of law that the only conclusion reached would have been one of guilt.
23. I have once again reviewed the evidence adduced to assure myself whether the judgment in its current form had served justice bearing in mind the applicable law.
24. The Court of Appeal in *Munendra vs. The State*, criminal appeal no. AAU 0023 of 2018, 25 May, 2023 from paragraphs 40 to 42 stated the above in the following words:

*[40] The test as propounded on the proviso to section 4(1) of the Criminal Appeal Act, 1907 in UK which is identical with the proviso to section 23(1) of the Court of Appeal Act in Fiji, is that the appellate court may apply the proviso and dismiss the appeal if it is satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty [see **R. v. Haddy** [1944] K. B. 442; 29 Cr. App. R. 182; **Stirland v D. P. P.** [1944] A.C. 315; 30 Cr. App. R. 40; **R. v. Farid** 30 Cr. App. R 168)].*

[41] The proviso to section 23(1) of the Court of Appeal Act is almost identical with section 256 (2) (f) of the Criminal Procedure Act and

therefore, the same test applied to the proviso to section 23 (1) should apply to proviso in section 256 (2) (f) of the Criminal Procedure Act.

[42] The Court of Appeal in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) adopted the same test in the application of the proviso to section 23(1) of the Court of Appeal Act as follows:

[55]if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.

[56] This test has been adopted and applied by the Court of Appeal in Fiji in **R -v- Ramswani Pillai** (unreported criminal appeal No. 11 of 1952; 25 August 1952); **R -v- Labalaba** (1946 – 1955) 4 FLR 28 and **Pillay -v- R** (1981) 27 FLR 202. In **Pillay -v- R** (supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in **R -v- Weir** [1955] NZLR 711 at page 713:

"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."

[57]when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

In **Vuki -v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:

"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."

25. I have read through the evidence and I am satisfied that upon the analysis of the evidence adduced the only verdict is the guilt of the appellant. There is no evidence of any unfairness caused to the appellant the learned Magistrate was alert to the fact that no adverse inference could be drawn from the absence of the appellant which was followed. The evidence given by the victim was admissible and relevant to the charge and therefore no criticism can be made of the trial process or the final decision. Both grounds of appeal against conviction are dismissed due to lack of merits.

ORDERS

1. The appeal against conviction is dismissed due to lack of merits;
2. The conviction entered against the appellant in absentia is upheld;
3. 30 days to appeal to the Court of Appeal.



Sunil Sharma

Judge



At Lautoka

20 December, 2023

Solicitors

Messrs Fazilat Shah Legal, Lautoka for the Accused.

Office of the Director of Public Prosecutions for the State.