

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 36 of 2024**  
(Magistrate's Court Criminal Case No. CR.372 of 2022)

**BETWEEN** : **PENI NAKARAWA**

**APPELLANT**

**A N D** : **THE STATE**

**RESPONDENT**

**Counsel** : Appellant in person.  
: Ms. M. Lomaloma for the Respondent.

**Date of Submissions** : 17 February, 2025

**Date of Hearing** : 15 April, 2025

**Date of Judgment** : 17 April, 2025

---

**JUDGMENT**

---

**BACKGROUND INFORMATION**

1. The appellant was charged in the Magistrate's Court, Lautoka for the following offences:

**FIRST COUNT**

***Statement of Offence***

**ROBBERY:** Contrary to Section 310 (1) (a) (i) of the Crimes Act 2009.

***Particulars of Offence***

**PENI NAKARAWA** on the 28<sup>th</sup> day of May, 2022 at Lautoka in the Western Division, robbed NIRMALA WATI of her Gold Chain valued at \$2,000.00 and during the time of such robbery used force on the said NIRMALA WATI.

**SECOND COUNT**

***Statement of Offence***

**BREACH OF BAIL CONDITION:** Contrary to Section 25 (1) (b) and 26 (1) of the Bail Amendment Act 2012.

***Particulars of Offence***

**PENI NAKARAWA** on the 28<sup>th</sup> day of May, 2022 at Lautoka in the Western Division, breached the bail condition imposed by Lautoka Magistrates Court vide case no. 632/21 dated 24/06/21 by 24 hours curfew imposed on him.

**THIRD COUNT**

***Statement of Offence***

**BREACH OF BAIL CONDITION:** Contrary to Section 25 (1) (b) and 26 (1) of the Bail Amendment Act 2012.

***Particulars of Offence***

**PENI NAKARAWA** on the 28<sup>th</sup> day of May, 2022 at Lautoka in the Western Division, breached the bail condition imposed by Lautoka Magistrates Court vide case no. 632/21 dated 24/06/21 by re-offending whilst on bail.

#### **FOURTH COUNT**

##### ***Statement of Offence***

**BREACH OF BAIL CONDITION:** Contrary to Section 25 (1) (b) and 26 (1) of the Bail Amendment Act 2012.

##### ***Particulars of Offence***

**PENI NAKARAWA** on the 28<sup>th</sup> day of May, 2022 at Lautoka in the Western Division, breached the bail condition imposed by Lautoka Magistrates Court vide case no. 855/21 dated 5/08/21 by 24 hours curfew imposed on him.

#### **FIFTH COUNT**

##### ***Statement of Offence***

**BREACH OF BAIL CONDITION:** Contrary to Section 25 (1) (b) and 26 (1) of the Bail Amendment Act 2012.

##### ***Particulars of Offence***

**PENI NAKARAWA** on the 28<sup>th</sup> day of May, 2022 at Lautoka in the Western Division, breached the bail condition imposed by Lautoka Magistrates Court vide case no. 855/21 dated 5/08/21 by re-offending whilst on bail.

#### **SIXTH COUNT**

##### ***Statement of Offence***

**BREACH OF BAIL CONDITION:** Contrary to Section 25 (1) (b) and 26 (1) of the Bail Amendment Act 2012.

### ***Particulars of Offence***

**PENI NAKARAWA** on the 28<sup>th</sup> day of May, 2022 at Lautoka in the Western Division, breached the bail condition imposed by Lautoka Magistrates Court vide case no. 1780/20 dated 16/12/20 by re-offending whilst on bail.

### **SEVENTH COUNT**

#### ***Statement of Offence***

**BREACH OF SUSPENDED SENTENCE:** Contrary to Section 28 (1) (2) and (4) of the Sentencing and Penalties Act 2009.

### ***Particulars of Offence***

**PENI NAKARAWA** on the 28<sup>th</sup> day of May, 2022 at Lautoka in the Western Division, breached the suspended sentence of four months imprisonment which was suspended for three years dated 13<sup>th</sup> April, 2022 vide Lautoka criminal case file no. 85/22 by committing an offence namely robbery.

2. On 17<sup>th</sup> June, 2022, the appellant appeared in the Magistrate's Court and elected for a Magistrate's Court trial because the first charge was an indictable offence triable summarily. On the same day, the appellant pleaded not guilty to all the charges. After numerous adjournments, on 15<sup>th</sup> December, 2023, in the appellant's presence the court granted leave for the appellant's legal aid counsel to withdraw.
3. On this date, the appellant was informed of the hearing date and was told by the learned Magistrate to be present in court on 31<sup>st</sup> July, 2024. The learned Magistrate also warned the appellant that if he failed to appear in court, the hearing would proceed in his absence. On 31<sup>st</sup> July, 2024, the accused did not appear in court. After hearing the prosecution, the learned Magistrate ruled that the hearing would proceed in the appellant's absence. The prosecution called three witnesses on that day and one witness on 27<sup>th</sup> September, 2024.

4. On 30<sup>th</sup> September, 2024, the appellant was found guilty as charged and was convicted accordingly. On 7<sup>th</sup> October, 2024, the appellant was sentenced in absentia to 2 years, 8 months and 10 days imprisonment (as per the warrant) to be served concurrently with another sentence in criminal case no. 183/19 - 3 years and 3 months imprisonment with a non-parole period of 2 years.
5. The brief summary of facts is as follows:
  - a) On 28<sup>th</sup> May, 2022, at about 3pm, the victim and her daughter were about to get in their car after shopping and buying vegetables in Lautoka City when someone snatched the victim's gold chain along with a pendant. As a result of the force, the victim sustained an injury to the right side of her neck. According to the victim, the gold chain was valued at \$2,000.00 (Singapore dollars).
  - b) When the perpetrator grabbed the chain from behind, the victim turned and saw the perpetrator's face and the t-shirt he was wearing. The victim shouted in Hindi "*chor, chor*" meaning "thief", "thief". After grabbing the gold chain, the perpetrator ran away.
  - c) The victim chased the perpetrator from one street to another, and with the assistance of some bystanders, the perpetrator was caught and handed over to the police officers who were on foot patrol. The victim was taken to the Lautoka Hospital for medical attention. The medical report stated that the victim received bruises on the right side of her neck. The gold chain was not recovered.
  - d) During the police investigation, the appellant's identity was confirmed. It was revealed that the appellant had breached his bail conditions and a suspended sentence order by committing the new offence of robbery. The appellant was charged and produced in court.

6. The appellant and the state counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

### **APPEAL TO THE HIGH COURT**

7. The appellant aggrieved by the conviction and sentence filed a timely appeal in this court. The grounds of appeal are as follows:

### **APPEAL AGAINST CONVICTION**

- a. That the learned Magistrate erred in law in fact when he did not direct on the required standard of proof on each of the charges hence there has been a substantial miscarriage of justice.*

### **APPEAL AGAINST SENTENCE**

- b. That the sentence is harsh and excessive.*
8. In respect of the appeal against conviction, the appellant submitted that the learned Magistrate did not direct his mind to the required standard of proof in respect of each charge separately. This error affects the convictions entered. In respect of the count of robbery, the appellant stated that the evidence was of theft only and not of robbery since there was no violence inflicted upon the victim. Finally, the appellant stated that at the time of the trial held in absentia, he was serving.

### **DETERMINATION**

9. There is no doubt that the appellant was caught in close proximity to the actual offending with respect to count one. For the other offences, the prosecution had tendered a paper trail as evidence. In respect of the offence of robbery, contrary to the assertion of the appellant, the evidence before the

court included, inter alia, details about the force used on the complainant at the time when the gold chain was snatched from her neck. The medical report tendered in evidence showed bruises on the right side of the victim's neck.

10. Moreover, as per the Magistrate's Court copy record in his judgment under the heading ANALYSIS, the learned Magistrate at paragraphs 8, 10 and 12 had mentioned the elements of the offences alleged in the following manner:

*"The prosecution must prove beyond reasonable doubt the elements of robbery (count 1)...breach of bail conditions (count 2, 3, 4, 5, and 6)... breach of suspended sentence..."*

11. Furthermore, at paragraph 21 the learned Magistrate mentioned the following about the burden and standard of proof:

*"...The burden and the standard of proof stills rests with the prosecutor."*

12. Finally, at paragraph 29 the learned Magistrate concluded his judgment as follows:

*"Considering the evidence in totality, I am satisfied that the prosecution has proved beyond reasonable doubt the offence of count 1, count 2, count 3, count 4, count 5, count 6, and count 7 against the accused."*

13. In view of the above excerpts, there is no error made by the learned Magistrate in respect of the standard of proof to be applied in this case. Since the trial was conducted in the absence of the appellant, I have once again perused the copy record to see if there is any element of prejudice caused to the appellant. At page 43 of the copy record Constable Alick McComber's evidence has been recorded as follows:

*"... Q: And did you know Peni Nakarawa?"*

A: Yes, Sir.

Q: How well did you know Peni Nakarawa?

A: He's the customer at CID office in regards to other cases that he was arrested for and investigated for.

Q: And which cases are you referring to?

A: The cases of similar nature Sir, robbery and theft Sir.

Q: And can you explain Mr. Nakarawa, how long have you known him?

A: For 3 years Sir..."

14. Ideally, the above questions and answers should not have been allowed. The question before this court is whether there has been a substantial miscarriage of justice and/or prejudice caused to the appellant as a result of the above evidence. The test for determining a substantial miscarriage of justice is that the appellate court must be satisfied, based on the evidence adduced and the application of the law, that the conclusion reached could only have been one of guilt.
15. 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."*

16. The evidence adduced, when considered holistically and beyond a doubt, presents a case where the appellant was caught within close proximity to the incident. The eyewitness account in respect of count one and the paper trail evidence for the other counts overwhelmingly support the prosecution's case. Hence, the probative value of the evidence adduced by the prosecution in respect of all the counts outweighs any prejudice caused to the appellant by the evidence of Constable McComber.
17. The learned Magistrate properly analyzed the evidence and correctly applied the law in respect of each offence, and I am satisfied that the only verdict supported by the evidence adduced is the guilt of the appellant as charged. Regarding the appellant's assertion that, at the time of trial, he was serving, this has not been substantiated by the appellant. He did not raise this as a ground of appeal but instead made a passing comment in his reply.
18. At paragraph 4 of the Judgment, the learned Magistrate addressed the issue of the appellant's absence and, after being satisfied that the appellant had voluntarily absented himself, proceeded with the trial in absentia. The following observations of the learned Magistrate are crucial:

*"...the hearing to proceed in absence of the accused since he was aware of the hearing date and prosecutor informed the court that the accused was not serving or in remand in any of the Correctional Facilities and Remand Centers in Fiji."*
19. The appeal against conviction is dismissed due to lack of merits.

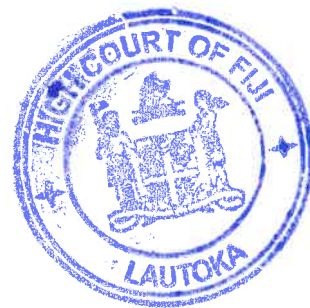
### **APPEAL AGAINST SENTENCE**

- a) The sentence is harsh and excessive.
20. The appellant withdrew his appeal against sentence at the start of the appeal hearing.

### **ORDERS**

1. The appeal against conviction is dismissed due to lack of merits;
2. 30 days to appeal to the Court of Appeal.

  
**Sunil Sharma**  
**Judge**



**At Lautoka**  
17 April, 2025

### **Solicitors**

**Appellant in person.**

**Office of the Director of Public Prosecutions for the Respondent.**