

IN THE MAGISTRATES' COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. 21 of 2018

STATE

v.

VULI LEVUIWASA

For the State: Constable T. Naicker

For the Accused: Ms. Takinana of the Legal Aid Commission

RULING

1. **Vuli Levuiwasa** stands charged with one count of *Assault Causing Actual Bodily Harm* contrary to section 275 of the **Crimes Act 2009** in that he “on the 2nd day of January, 2018 at Suva in the Central Division, unlawfully assaulted **Lilly Adimaisawau**.”
2. The charge was filed in Court on 4 January 2018.
3. These proceedings were first fixed for trial to 29 June 2021. It had to be vacated due to COVID-19 restrictions. The matter was then fixed for trial to 16 December 2021. It was vacated by the Court due to a scheduling conflict with the Lau outer court sitting. It was then fixed for trial to 28 November 2022. It was not called on that day. Finally, on 9 December 2022, the matter was fixed for trial to today.
4. This is the fourth trial day fixed for this matter.

5. This morning the prosecutor indicated that the State was not ready for trial. He sought an adjournment on the basis that their main witness, the police complainant, had changed address and telephone numbers in the intervening time. It was not until this Monday that the Investigating Officer received information of the complainant's new whereabouts. They seek two weeks to locate and bring their witness to Court.
6. Learned counsel for the Defendant objects to an adjournment. She indicates that her client is ready for trial. He had to take leave to be present here today. She notes that the trial was fixed from 9 December 2022 and then re-confirmed on 26 January 2023 to today. She argues that that is more than ample time for the State to have located and summonsed its complainant for Court. She argues that the reasons given are unacceptable. She asks the Court to compel the prosecution to lead the evidence that it has. Her client earns \$6.00 an hour and works 8 hours in a day. When he takes leave like this, he gets paid nothing so all told he lost \$48.00 by being here today. He also spent \$3.20 to travel by bus from Pacific Harbour to Suva and he will spend \$3.20 to return. These costs will be wasted if the trial does not proceed today.

The Law

7. In *Singh v. State*, Criminal Case No. HAA 036 of 2020S, the High Court of Fiji per Temo J. (as his Lordship then was) held:

“Before discussing the answers to the above problems as contained in the Criminal Procedure Act 2009, it is important to remind ourselves again of the rights of the accused as enshrined in section 14 (2) of the 2013 Constitution, as it relates to this case.

8. Section 14 (2) (g) of the **Constitution** provides in clear, unambiguous, direct language:

“Every person charged with an offence has the right –
(g) to have the trial begin and conclude without unreasonable delay.”

(Underline added)

9. In **R v. Jordan**, 2016 SCC 27 (CanLII), [2016] 1 SCR 631 the majority per Abella, Moldaver, Karatsanis, Cote and Brown JJ¹ in their introduction observed:

“[1] Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. Section 11(h) of the *Canadian Charter of Rights and Freedoms* attests to this, in that it guarantees the right of accused persons “to be tried within a reasonable time”.

[2] Moreover, the ... public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

[3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.”

10. Adjournments are determined pursuant to section 170 of the **Criminal Procedure Act 2009**. Section 170 of the said Act provides:

“170. (1) *During the hearing of any case, the Magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless there is good cause, which is to be stated in the record.*

¹ **Overruled:** *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771; **referred to:** *R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199; *R. v. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 S.C.R. 45; *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659; *R. v. Elliott* (2003), 2003 CanLII 24447 (ON CA), 114 C.R.R. (2d) 1; *R. v. Vossell*, 2016 SCC 26, [2016] 1 S.C.R. 625; *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Tremblay*, 1987 CanLII 28 (SCC), [1987] 2 S.C.R. 435; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *R. v. Brydges*, 1990 CanLII 123 (SCC), [1990] 1 S.C.R. 190; *R. v. Feeney*, 1997 CanLII 343 (SCC), [1997] 2 S.C.R. 117; *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *Lavallee, Rockel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493; *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74.

(2) For the purpose of subsection (1), "good cause" includes the reasonably excusable absence of a party or a witness or of a party's lawyer.

(3) An adjournment under subsection (1) must be to a time and place to then be appointed and stated in the presence and hearing of the party or parties, or their respective lawyers then present.

(4) During the adjournment of a case under subsection (1), the Magistrate may

(a) permit the accused person to leave the court until the further hearing of the case; or

(b) commit the accused to prison; or

(c) release the accused upon him or her entering into a bond (with or without sureties at the discretion of the Magistrate) conditioned for his or her appearance at the time and place to which the hearing or further hearing is adjourned.

(5) If the accused person has been committed to prison during an adjournment the adjournment may not be for more than 48 hours.

(6) If a case is adjourned, the Magistrate may not dismiss it for want of prosecution and must allow the prosecution to call its evidence or offer no evidence on the day fixed for the adjourned hearing, before adjudicating on the case.

(7) A case must not be adjourned to a date later than 12 months after the summons was served on the accused unless the Magistrate (for good cause which is to be stated in the record) considers such an adjournment to be required in the interests of justice.

11. In **State v. Devi**, Criminal Appeal No. HAA 017 of 2022 the High Court of Fiji per Rajasinghe J observed:

7. According to section 170 (1) of the Criminal Procedure Act, the Magistrate must not allow any adjournment of a hearing other than from day to day consecutively until the conclusion of the hearing. However, the Magistrate is allowed to adjourn the hearing for another date if she finds a good cause to do so. Section 170 (1) and (2) state:

8. Accordingly, the default position is to refuse any adjournment other than from day to day basis until the conclusion. Therefore, an adjournment to another day is an exception under section 170 of the **Criminal Procedure Act 2009**.”

12. In **State v. Inia Vetaukula**, Criminal Appeal No. HAA 15 of 2020 the High Court of Fiji per Goundar J. made it very clear that a lack of diligence in securing the attendance of one’s witnesses in circumstances where ample time has been given to do so, and it seems clear from the prosecutor’s answers that the State do not know where their witnesses are *not* good grounds for adjournment.

13. However, in **State v. Sinha** [2014] FJHC 477; HAA 1.2014 (30 June 2014) the High Court of Fiji per DeSilva J. took the view that where a police witness was unavailable on the trial date because she was involved in an on-going wedding ceremony and had to participate in rituals as a family member, but had indicated through the prosecutor that she would be available on any day the week after, the Court should have accommodated the short adjournment to allow the witness to be present to testify. Clearly, if witnesses can be located and time given without undue prejudice to a defendant or the State, a rule of reason should apply.

14. Counsel for the Defendant asserts financial prejudice to her client by reason of any further delay.

15. Section 150 (4)(a) of the **Criminal Procedure Act 2009** provides:

“150. A Judge or Magistrate may make any other orders as to costs as may be required in the circumstances:

(a) defray the costs incurred by any party as a result of an adjournment sought by another party.”

16. In all the circumstances, I am of the view that the best way to resolve the competing interests of the parties involved in the specific circumstances of this case is to grant the State a short adjournment to enable it to summons and bring its witness to Court *and* make an order as to costs to defray the accused the costs incurred by him as a result of this adjournment.

17. That being so, I grant the State's application for adjournment and will adjourn the matter for trial to December 2023 but I order that the State pay to the Accused the sum of \$100.00 in wasted costs to defray him the costs to him in lost income, wasted travel expenses and lost time. This sum is to be paid to the Criminal Court Registry within 30 days and the said amount will be transferred to the Accused person's bank account immediately thereafter. The Accused and his Counsel are to ensure that the Accused's bank account details are provided to the Magistrates' Court Criminal Registry within 30 days.
18. The prosecutor and the investigating officer have done the best they could in the circumstances. This is a systems error, to borrow a computing phrase. Witness sometimes move and forget to notify police officers of their new address and contact information. It is my recommendation that the Fiji Police Force develop an in person and online system for witness follow ups and witness change of address notifications in order to ensure that this problem does not re-occur.
19. In fairness to the Accused, I order that \$100.00 be paid by the State from its Consolidated Fund Operating Account to defray the Accused the wasted costs of today's appearance while permitting time to it to locate its witness and present her to Court in December 2023 at trial.
20. **28 days to appeal this Court's costs order to the High Court.**



Seini Puamau
RESIDENT MAGISTRATE



Dated at Suva this 25th day of October 2023.