

**IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION**

Criminal Case No. 532/2020

BETWEEN: STATE

PROSECUTION

AND: NIRMAL NAVIN PRATAP

ACCUSED

Counsel: WCPL 3443 Vaciseva Marawa for Police Prosecution
 Accused in person.

Date of Ruling: 12 March 2025

RULING

[on section 172 of the Criminal Procedure Act]

Introduction

1. On 24 September 2020, Mr. Nirmal Navin Pratap ("the Accused") was charged and produced in Court with another person for 1 count each of Uttering and Possession with Intent to Utter Counterfeit Note contrary to section 166(3)(a)(a) of the Crimes Act 2009.
2. On 13 November 2020, the Accused with another pleaded Not Guilty to the charge against them. As per this Court's first predecessor's notes, on 18 January 2021, Prosecution amended the charge to include the serial number of the fake note. This amendment was put to the Accused on the same date and he pleaded Not Guilty.
3. On 22 April 2022, Prosecution filed an Amended Charge. The particulars of the offence were as follows:

Statement of Offence

Uttering and Possession with Intent to Utter Counterfeit Note: Contrary to Section 166(3)(a)(b) of the Crimes Act 2009.

Particulars of Offence

Nirmal Navin Pratap between 21st day of September 2020 and 22nd day of September 2020 at Ba in the Western Division had in his possession 3x \$50.00 counterfeit notes with serial number FEB6230034 and 1x \$100 counterfeit note with serial number FFA0003103 knowing them to be counterfeit with intent to utter the said currency.

4. Given the above amendment, the other person charged with the Accused was discharged. On the same date, the Accused entered a plea of Not Guilty. The matter was subsequently fixed for Trial and the Accused was released on bail.
5. On 27 March 2023, which was the date of Trial, the Accused was not present as such, this Court's first predecessor ordered for the matter to proceed to Trial in absentia as the Accused was aware of the Trial date.

6. The matter then proceeded to Trial with the Prosecution calling 10 witnesses and thereafter closing its case. This Court's first predecessor found that there was a case to answer. As the Accused was absent and unrepresented, the Court's first predecessor then adjourned the matter for Judgment.
7. On 27 June 2023, this Court's first predecessor delivered its Judgment where it found the Accused guilty as charged and convicted the Accused for the offence of Uttering and Possession with Intent to Utter Counterfeit Note.
8. The matter was then adjourned on various dates for Sentence before this Court's second predecessor. Subsequently, on 4 December 2023, the Accused appeared before this Court's second predecessor and was remanded with the matter pending Sentence.
9. On 19 January 2024, this Court's second predecessor released the Accused on bail with the matter then being adjourned for mitigation. When this Court took over proceedings on 24 July 2024, the Accused failed to appear in Court as such a Bench Warrant was issued against the Accused.
10. On 11 October 2024, the Accused was arrested under Bench Warrant and his bail in this matter was revoked. On 18 November 2024, this Court explained section 172 of the Criminal Procedure Act to the Accused and the Accused submitted that at the time of Trial, he was in Suva and that he had forgotten his Court date. With respect to whether the Accused had an arguable defence on merits, the Accused informed this Court that he completely denies the allegation against him.
11. The matter was then adjourned for Ruling on section 172 of the Criminal Procedure Act, however, the Accused filed a document titled 'Further Submission' at the Registry on 25 November 2024. In the document filed, the Accused submitted the following:
 - i. The matter was delayed by the State given that the matter had been set for Trial on 3 occasions where the Accused was present;
 - ii. The matter is defective as the first and second complainants in their statement reported an itaukei man came to their shop to purchase BH10 with a fake \$50 note;
 - iii. The matter was an act of fabrication by the Police;
 - iv. Prosecution has no solid or concrete evidence.
12. Given that the Accused had filed the above, the Court provided a copy to Prosecution and granted Prosecution time to file a Reply which was filed on 22 January 2025.
13. Having read the submissions filed by the Accused and Prosecution, I now pronounce my Ruling.

Law

14. For ease, section 172 of the Criminal Procedure Act is reproduced in its entirety herein:

Conviction in absence of accused may be set aside

172. If the court convicts the accused person in his or her absence, it may set aside the conviction upon being satisfied that the absence was from causes over which he or she had no control, and that there is an arguable defence on the merits.

15. Accordingly, the Court is required to apply both limbs when considering whether to set aside a conviction entered in the absence of an accused under section 172 of the Criminal Procedure Act.
16. Thus, considering the above, the Court now turns its mind to the first limb, which is, whether there were causes outside of the Accused's control which caused his absence on the date of Trial.
17. As highlighted in paragraph 10 herein, the Accused informed the Court on 18 November 2024, that he had been in Suva and that he had forgotten his Court date. The Court is mindful that the Trial was set in the Accused's presence on 22 April 2022. The Accused had also informed this Court's first predecessor that he had 3 witnesses for his case which included himself. The trial was set for 27 March 2023 with a mention date being given for 25 November 2022 to check on any preliminary issues.
18. From the above, it is evident that the Accused's absence on the date of Trial was of his own actions. Neither was the Accused serving a court sentence nor was he in remand for any other matters. Thus, the Accused has failed to satisfy the Court that his absence on 22 April 2022 was due to causes outside his control.
19. Now turning my mind to whether the Accused has an arguable defence on merits, section 172 of the Criminal Procedure Act has not defined the meaning of 'arguable defence', however, the Court is guided by jurisprudence in *Evans v Bartlam* [1937] A.C. 473 which dealt with setting aside judgments in default of appearance. Lord Atkins stated:
- "The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence."*
20. Thus, an accused is required to raise a defence or an issue in contention which would affect the process of adjudication at trial.
21. The Accused, on 18 November 2024 informed the Court that he completely denied the allegation against him but then he raised further grounds by way of the "Further Submission" he filed on 25 November 2024. The Court will address these grounds.
22. The Accused firstly submits that there was delay by the State given that the matter had been set for Trial on 3 occasions where the Accused was present. This does not go towards an arguable defence on the merits of the case. However, the Court would like to highlight that Trial was set for 18 November 2021 and 5 February 2022 wherein Prosecution sought an adjournment on both dates due to administrative issues. On both dates, the Accused was present as he had been in State's custody.
23. The third Trial date was set for 22 April 2022, which was coincidentally, the date that the Accused failed to avail himself in Court whilst being enlarged on bail.

24. In addition, the Accused submits that the matter is defective as the first and second complainants in their statement reported an itaukei man coming to their store to purchase BH10 with a fake \$50 note.
25. It is important to highlight that an out of Court statement to the Police is not evidence unless it is used to impeach the credibility of a witness when his or her evidence in Court materially departs from his or her out of court statement (vide *State v Hill*; Criminal Appeal No: AAU0109 of 2015 (11 November 2016)).
26. Thus, the Court is unable to accept the Accused's contention especially considering that the first witness for Prosecution, Viliame Pasoni gave evidence that he had seen the Accused give a \$50 note to Qera and Joshua when they were at the respective stores they were sent to buy from.
27. Additionally, the Accused submits that the matter was an act of fabrication by the Police as they had conducted a search at his in-laws residence without the Accused being present. However, the Accused has failed to substantiate how this is an arguable defence especially considering that it was the Accused's father-in-law, Sevanaia Ratumaitavuki, who was Prosecution's fourth witness that testified that after becoming aware of the fake notes in his home, he called the Police and informed them of the same.
28. Moreover, the Accused submits that Prosecution has no solid or concrete evidence to allow the Court to convict him especially as he is innocent. However, the Accused has not substantiated this with any evidence that goes towards his defence.
29. The Court thus finds that the Accused has failed to satisfy that he has an arguable defence on merits.

Determination

30. Accordingly, pursuant to section 172 of the Criminal Procedure Act 2009, the Accused has failed to satisfy the Court that his absence on 22 April 2022, the date of Trial was due to causes outside of his control. Further, the Accused has failed to satisfy the Court that he has an arguable defence on merits.
31. Thus, I refuse to set aside the conviction entered against the Accused in his absence on 27 June 2023.



N. Mishra
Resident Magistrate

