IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246 of the Criminal Procedure Act 2009.

RAVIN CHAND

Appellant

CASE NO: HAA. 13 of 2017
[MC Nausori, Crim. Case No. 644 of 2014]

Vs.

STATE

Respondent

Counsel	:	Ms. N. Mishra for Appellant
		Ms. S. Serukai for Respondent
Hearing on	:	22 September 2017
Judgment on	:	17 November 2017

JUDGMENT

1. The appellant was convicted by the magistrate court for the offence of theft after a trial held in his absence on 01/08/16 and he was sentenced to 24 months imprisonment on the same day. The charge reads as follows;

Statement of Offence

***THEFT**: contrary to section 291 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***JEKE VAKARARAWA** and **RAVIN CHAND**, between the 31st day March 2013 and the 1st day of April 2013 at Nalase village, Rewa in the Central Division dishonestly appropriated a 18 horsepower Tohatshu outboard engine valued at $5000.00 the property of Aseri Taubuli.*

2. A document indicating the appellant's intention to appeal against the Learned Magistrate's conviction which was prepared by the appellant in person was received by the high court registry on 13/02/17. A proper application for leave to appeal out of time was filed by the Legal Aid Commission on 19/05/17 on behalf of the appellant.

3. The grounds of appeal are as follows;

   1) *The learned magistrate erred in law when he proceeded with the trial in absentia without being fully satisfied as to the appellant's absence.*
   2) *The learned magistrate erred in law when he convicted the appellant on insufficient evidence.*

Leave to appeal out of time

4. As reflected in the charge reproduced above the appellant was charged with another person before the magistrate court. One Jeke Vakararawa was the 1st accused and the appellant was the 2nd accused. The 1st accused had pleaded guilty to the charge on 22/04/15 and had been sentenced on 28/05/15 to 09 months imprisonment, suspended for 18 months.

5. On 28/05/15, the case has been fixed on 01/12/15 to fix a hearing date for the trial against the appellant. The appellant had failed to appear on 01/12/15. The Learned Magistrate had issued a bench warrant against the appellant on 01/12/15 and also had fixed the hearing on 01/08/16. On 01/08/16, the Learned Magistrate had proceeded with the trial against the appellant *in absentia.*

6. According to the appellant, he was sentenced in criminal case no. 809/16 to 09 months imprisonment on 22/06/16 by a different magistrate and was released from prison on 21/12/16 after serving the said sentence. The appellant had submitted a copy of the aforementioned sentence and a letter from the Suva Corrections Centre in support of the above. The appellant submits that after his release on 21/12/16, he was arrested for this matter on 24/01/17 and was incarcerated. The appellant further submits that he prepared his application to

appeal on 01/02/17 and submitted same to the Suva Corrections Centre though it was ultimately received by the registry on 13/02/17.

7. Accordingly, the delay in lodging this appeal is about 05 months. Section 248 of Criminal Procedure Act 2009 ("Criminal Procedure Act") states thus;

> *(1) Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against –*
>
> *(a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;*
>
> *(b) a copy of the petition shall be filed at the registry of the High Court; and*
>
> *(c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.*
>
> *(2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.*
>
> *(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include –*
>
> *(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*
>
> *(b) any case in which a question of law of unusual difficulty is involved;*
>
> *(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;*
>
> *(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.*

8. Based on the documents submitted by the appellant, it is manifestly clear that the appellant was serving the sentence imposed on him in criminal case no. 809/16 when he was convicted and sentenced in the case at hand following the decision made to proceed with the trial against the appellant in absentia. The appellant had taken steps to indicate his intention to appeal against the conviction and the sentence in this case within 3 weeks from the date he was arrested. In my view,

the above circumstances constitute a good cause to enlarge the period of limitation prescribed under section 248 of the Criminal Procedure Act. The said period of limitation is accordingly enlarged in order for the appellant to proceed with this appeal.

Appeal against the conviction

Ground One

9. On the first ground of appeal, the appellant submits that the Learned Magistrate erred in law when he commenced the trial in his absence without being satisfied as to the reasons for his absence.

10. Section 171(1)(a) of the Criminal Procedure Act provides the following in relation to trial in ansentia;

> *171. – (1) If at the time or 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 person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present*

11. Section 14(2)(h) of the 2013 Constitution ("the Constitution") provides thus;

> *(2) Every person charged with an offence has the right –*
>
> *(h) 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;*

12. Needless to say, the provisions of section 14(2)(h) of the Constitution supersedes section 171(1)(a) of the Criminal Procedure Act.

13. Subsection 14(2)(h)(i) of the Constitution in fact could be read as follows;

> *"Every person charged with an offence has the right to be present when being tried, unless 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."*

14. Given its construction, what is provided under the subsection 14(2)(h)(i) in my view is a situation where the right provided under subsection 14(2)(h) of the Constitution for an accused to be present at his/her trial can be regarded as waived by the accused. In other words, a situation where the said right of the accused does not exist. Moreover, it is manifestly clear that mere absence of the accused on the day the case is fixed for trial (or hearing) is not sufficient to proceed with the trial in his/her absence.

15. In my view, the process of making the decision to commence or to continue with the trial in the absence of an accused under subsection 14(2)(h)(i) of the Constitution should involve two stages.

16. Firstly, the court should be satisfied that the right of the accused to be present when being tried can be regarded as waived by the accused. In that the court should make a finding based on the facts and circumstances involving the absence of the accused that the accused had chosen not to attend his/her trial and the accused has been served with a summons or similar process requiring his or her attendance at the trial.

17. It is pertinent to note that subsection 14(2)(h)(i) of the Constitution or any other law does not provide that the court <u>should</u> proceed with the trial in the absence of an accused given the situation provided under the said subsection. As I have pointed out, what is provided under the said subsection is a situation which the right of an accused to be present when being tried can be regarded as waived or does not exist. Therefore, in my opinion, the court still has the discretion to decide whether to proceed with the trial in absentia if the court is satisfied that the right

of the accused to be present when being tried can be regarded as waived or does not exist given the provisions in subsection 14(2)(h)(i) of the Constitution.

18. It should also be noted that what is provided under subsection 171(a) is that *'the court **may** . . . **proceed** with the hearing'* which clearly indicates that the court is granted discretion to proceed with the hearing.

19. Therefore, after making the finding as stated above, the court should then consider whether to exercise its discretion to proceed with the trial in the absence of the accused. It is trite law that the court is required to exercise its discretion judicially and judiciously after considering the facts and the circumstances relevant to the exercise of that discretion.

20. In the case of ***R v. Hayward*** (2001) EWCA Crim 168 the Court of Appeal of England and Wales outlined certain principles relevant to the exercise of the discretion to commence a trial in the absence of an accused. In the said judgment, the Court of Appeal at paragraph 22(5) said thus;

> *In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular (i) the nature and circumstances of the defendant's behavior in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behavior was deliberate, voluntary and such as plainly waived his right to appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings, (iii) the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation; (v) whether an absent defendant's legal representatives are able to receive instructions from his during the trial and the extent to which they are able to present his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should*

take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

21. In ***R v. Jones (Anthony)***(2002) UKHL 5, the House of Lords affirmed the judgment of the Court of Appeal in ***R v. Hayward*** (supra). However Lord Bingham made the observation that seriousness of the offence is not relevant to the exercise of the discretion and that it is generally desirable if the defendant who is voluntarily absconding is represented.

22. In my view, the principles outlined above which are not exhaustive as indicated in the relevant judgment itself, provide a useful guidance in identifying the facts and circumstances relevant to the exercise of the discretion under subsection 14(2)(h)(i) of the Constitution to proceed with the trial against an accused in absentia.

23. In ***R v. Hayward*** (supra), the court also said this on conducting a trial in absentia;

> *If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.*

24. In the present case, I find that the Learned Magistrate has not exercised his discretion judicially and judiciously when he decided to commence the trial in the absence of the appellant. The following statement is all I could find in the case record in relation to the said decision;

". . . . Accused had notice. [O]n bench warrant. Trial in Absentia."

25. Given the fact that the hearing date was fixed in the absence of the appellant the conclusion that the appellant had notice was erroneous. The Learned Magistrate had not given his mind to consider whether the appellant had chosen not to attend his trial. According to the case record there was no report on the execution of the bench warrant issued on 01/12/15 before the Learned Magistrate when he decided to proceed with the trial in the absence of the appellant.

26. As it has been clearly made out, the appellant was incarcerated during the period between 22/06/16 and 21/12/16 and his absence on the trial date which was 01/08/16 should therefore be regarded as involuntary.

27. In view of the above, the first ground of appeal is decided in favour of the appellant.

Ground two

28. On the second ground, the appellant submits that he was convicted on insufficient evidence.

29. The appellant was charged for committing the offence of theft with another. The evidence presented by the prosecution according to the impugned judgment was that a boat engine was stolen from the first prosecution witness on 01/04/13 and on 26/11/14, the appellant came with another to the second prosecution witness and obtained a loan from the said witness and the boat engine (that was stolen) was given to the said witness as security for that loan. According to the second prosecution witness, the appellant had not returned the money and the police had seized the engine about 1 year later.

30. Considering the fact that the charge in the magistrate court was filed on 27/11/14 the date the appellant brought the boat in question to the second prosecution witness cannot be 26/11/14 as stated in the judgment if the evidence that the said engine was seized by the police after one year from the second prosecution witness is true. In fact, according to the evidence as recorded in the case record

the second prosecution witness had not mentioned the date the appellant came with the boat engine which in fact is a vital piece of evidence.

31. Upon perusing the evidence led in this case, I note that the prosecution had called three lay witnesses and one police witness. The evidence of the first and the third prosecution witnesses only establishes that a boat engine belong to them was stolen and it was later recovered. The evidence of the second prosecution witness only establishes that the appellant came with another and obtained a loan having the boat engine in question kept with that witness as security.

32. I also note that the Learned Magistrate had stated in his judgment that according to the cautioned interview statement of the appellant, the appellant had assisted the co-accused person in selling the stolen engine. The police witness called by the prosecution had tendered the said cautioned interview of the appellant. I have two observations to make in this regard.

33. Firstly, the Learned Magistrate had not considered whether the cautioned interview statement was given voluntarily before using the admissions in the said cautioned interview as evidence against the appellant. The fact that the trial was held in the absence of the appellant does not justify using the admissions in the appellant's cautioned interview as evidence against the appellant without first considering the voluntariness of the said cautioned interview.

34. Secondly, upon perusing the cautioned interview of the appellant, I find that the answers therein indicate the following;

- that the appellant went in his taxi to pick up two individuals one night around 12.00am upon receiving a call;
- the duo loaded an engine into the boot of his taxi;
- thereafter on the next day he negotiated with one Vicky who is related to him to pawn the said engine; and
- accordingly, he managed to get $200 from Vicky out of which he kept $80 for the taxi fare and gave the balance to the two individuals.

35. According to the answers in the cautioned interview, the appellant had clearly denied stealing the engine. When a cautioned interview that can be considered as containing mixed statements as the one in this case is adduced in evidence, the court is required to consider the incriminating statements and the exculpatory statements in determining where the truth lies. (***Sharp*** *[1988] 1 W.L.R. 7;* ***R v Aziz*** *[1996] 1A.C. 41*)

36. However, it appears that the Learned Magistrate has not considered the exculpatory statements at all but considered only the admissions that are not in the appellant's favour in his judgment.

37. Leaving aside the aforementioned issues concerning the use of the cautioned interview as evidence in this case, and taking all the evidence adduced at its highest, I am not satisfied that the facts established by the evidence are sufficient to prove beyond reasonable doubt that the appellant committed theft of the engine in question. Even if the appellant's cautioned interview is considered as admissible evidence, the answers therein only establishes that the engine was loaded onto the appellant's taxi when he went upon receiving a call to pick one 'Papa Ju'. On the face of it, it appears that the engine was already stolen when the appellant came into contact with it.

38. In the circumstances, the second ground of appeal should also be decided in favour of the appellant.

Conclusion

39. In the light of the above, the conviction against the appellant should be quashed.

40. Now the question is whether a retrial should be ordered. Based on my finding on the second ground of appeal and considering the fact that the appellant had already served close to 10 months in prison pertaining to this case, I am inclined to hold the view that there is no justification in ordering a retrial.

Orders of the court

i. Appeal allowed; and

ii. The conviction dated 01/08/16 in Magistrate Court Nausori, Crim. Case No. 644 of 2014 is quashed and the ensuing sentence set aside.

Vinsent S. Perera
JUDGE

Solicitors for the Appellant : Legal Aid Commission, Suva.
Solicitors for the State : Office of the Director of Public Prosecutions, Suva.