

IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

Criminal Appeal Case No. HAA 016 of 2018
Criminal Case Number 291 of 2008

BETWEEN : SAULA VUNIVESI

AND : STATE

Counsel : Mr K Chang for the Appellant
Ms S Tivao for the State

Date of Hearing : 21 September 2018

Date of Judgment : 16 November 2018

JUDGMENT

- [1] The appellant was jointly charged with his co-accused with three counts of burglary related offences in the Magistrates' Court at Nausori. After the end of the case for the prosecution, the learned trial magistrate acquitted the appellant of all three charges on the basis that there was no evidence to link the appellant to the alleged offences. Following his acquittal, the appellant applied for costs against the State. On 3 October 2017, the learned trial magistrate refused the application. This is an appeal against the decision refusing costs. The appeal was filed on 6 February 2018. The appeal is out of time by about two months. The appellant is a serving prisoner in an unrelated case. The appellant has not offered any compelling reasons for the delay except that he is incarcerated in prison. The real issue is whether the appeal is likely to succeed?
- [2] The grounds of appeal in summary are:
- The learned trial magistrate did not allow the prosecutor to offer a response to the appellant's application for costs.
 - The learned trial magistrate treated the appellant unfairly by putting no weight on his grounds for costs.

- The learned trial magistrate was bias in concluding that the prosecution was not solely responsible for the post charge delay that had occurred in the case.
- The learned trial magistrate did not properly consider the statutory provisions on costs against the State.
- The learned trial magistrate did not properly consider all the grounds for costs.

[3] At trial, the appellant was unrepresented. He raised the following grounds for costs:

- He was wrongly charged.
- He was assaulted, abused and tortured during police interrogation.
- He was wrongfully confined.
- He faced hardship while in custody on remand.
- His family suffered while he was in custody on remand.

[4] No formal evidence was tendered by the appellant in support of his grounds for costs. The learned trial magistrate made her decision after hearing both parties. In dismissing the application, the learned magistrate considered the statutory provisions regarding costs against the State in criminal proceedings and concluded that the prosecution had reasonable grounds to prosecute the appellant and that the prosecution was not solely responsible for the delay in bringing the case to a finality. The learned trial magistrate referred to the fact that the only incriminating evidence against the appellant was his confession made to police under caution and once the court ruled the confession inadmissible after holding a *voir dire*, the prosecution case collapsed. The learned trial magistrate also referred to a chronology of events and summarized the reasons for the delay in paragraph 29 of her ruling as follows:

I do not find the reason for delay was solely due to the Prosecution.

Factors such as both accused securing legal representation; witnesses not available; transfer of judicial officers; change in solicitors for co-accused; application for *Voir dire* by co-accused led to delay in having the matter finalized.

[5] It is settled law that any power to award costs in favour or against the State in criminal proceedings must be expressly conferred by statute (*State v Patel* Cr App No AAU0002 of 2002S; *State v Bidesi* Cr App No AAU0026 of 2002S; *State v Cavubati* Cr App No AAU0022 of 2003S. The power to award costs against the State in a case of an acquittal is conferred by section 150(2) of the Criminal Procedure Act. Section 150(2) states:

A judge or magistrate who acquits or discharges a person accused of an offence, may order the prosecutor, whether public or private, to pay to the accused such reasonable costs as the judge or magistrate determines.

[6] However, there is also a statutory caveat against award of costs in a case of an acquittal provided by section 150(3) of the Criminal Procedure Act. Section 150(3) states:

An order shall not be made under sub-section (2) unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter.

[7] The decision to award or refuse costs involves an exercise of judicial discretion. The learned trial magistrate exercised her discretion and concluded that the statutory caveat applied to the appellant's case. She gave reasons for her conclusions. The decision is fair and balanced. There is no evidence of bias in the decision as suggested by the appellant. The learned trial magistrate applied the law to the facts before her and concluded that the grounds for costs were not made out. No error of law or fact has been shown in the exercise of the discretion not to award costs. The appeal is bound to fail.

[8] An enlargement of time is granted but the appeal is dismissed.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of Legal Aid Commission for the Accused
Office of the Director of Public Prosecutions for the State