

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

**CRIMINAL APPEAL CASE NO.:** HAA 36 OF 2016

**BETWEEN:** DAVID LOCKINGTON

**APPELLANT**

**AND:** STATE

**RESPONDENT**

**Counsel** : Ms. Narara for Appellant  
Mr. J.B.Niudamu for the State

**Date of Hearing** : 08<sup>th</sup> December 2016

**Date of Judgment** : 25<sup>th</sup> January 2017

**JUDGMENT**

1. The Appellant was charged before the Lautoka Magistrates Court with one count of Robbery contrary to Section 310 (1) (a) (i) of the Crimes Decree, 2009 and one count of Breach of Suspended Sentence contrary to Section 26 and 28 (1) (2) of the Sentencing and Penalties Decree, 2009.
2. The Appellant was first produced before the Magistrates Court on the 12<sup>th</sup> of April 2013. Subsequent to series of prolonged adjournments over the period

between 2013 and 2016, Prosecution sought permission to withdraw the charges under Section 169 (1) and (2) (b) (ii) of the Criminal Procedure Decree on the basis that it was not in a position to proceed with the hearing as the complainant who is a Japanese national had left the country. Accordingly, the learned Magistrate, on the 11<sup>th</sup> of April 2016, discontinued the proceedings and discharged the Appellant.

3. On 15<sup>th</sup> August 2016, the Appellant filed his letter or petition of Appeal which was outside the 28 days appealable period. The delay was almost 3 months and no reasons were given by the Appellant as to the delay. However, the Respondent did not object to leave to appeal out of time being granted as there are merits in this appeal.

#### **Grounds of Appeal**

4. The appellant now wishes to appeal against the order of discharged made by the learned Magistrate on 11<sup>th</sup> of April 2016 on the following grounds, which I reproduce in verbatim as follows:
  - i. *That the learned trial Magistrate erred in law when he failed to impose an acquittal order instead of a discharge order.*
  - ii. *Rights to a fair trial has been denied and deprived.*

#### **Analysis**

5. Section 169 of the Criminal Procedure Decree deals with withdrawals of complaints:

169. — (1) *The prosecutor, may with the consent of the court, withdraw a complaint at any time before a final order is made.*

(2) *On any withdrawal under sub-section (1) —*

*(a) where the withdrawal is made after the accused person is called upon to make his or her defence, the court shall acquit the accused;*

*(b) where the withdrawal is made before the accused person is called upon to make his or her defence, the court shall subject (?) make one of the following orders —*

*(i) an order acquitting the accused;*

*(ii) an order discharging the accused; or*

*(iii) any other order permitted under this Decree which the court considers appropriate.*

*(3) An order discharging the accused under sub-section (2)(b)(ii) shall not operate as a bar to subsequent proceedings against the accused person on the basis of the same facts.*

6. Section 201 of the Criminal Procedure Code is almost identical to the present Section 169 of the Criminal Procedure Decree and therefore, cases decided under the Criminal Procedure Code are relevant to the present Appeal.

7. Section 201 of the Criminal Procedure Code states:

*201.-(1) The prosecutor may with the consent of the court at any time before a final order is passed in any case under this Part withdraw the complaint.*

*(2) On any withdrawal as aforesaid-*

*(a) where the withdrawal is made after the accused person is called upon to make his defence, the court shall acquit the accused;*

*(b) where the withdrawal is made before the accused person is called upon to make his defence, the court shall subject to the provisions of section 210, in its discretion make one or other of the following orders:-*

*(i) an order acquitting the accused;*

*(ii) an order discharging the accused.*

*(3) An order discharging the accused under paragraph (b)(ii) of subsection (2) shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts. (Section substituted by 24 of 1950, s. 11.)*

8. The section expressly provides that regard must be made to section 210 if withdrawal is made before the accused is called upon to make his defence.

Section 210 provides for an acquittal of accused person where there is no case to answer.

9. An order made pursuant to Section 169(2)(b) of the Criminal Procedure Decree is clearly discretionary. The discretion given to the Magistrate should be exercised judiciously. The learned Magistrate discharged the appellant without giving any reasons when a discretion is conferred on him either to acquit the accused or discharge.
10. The law in relation to an appeal against the exercise of discretion is settled. The discretion will be reviewed on appeal, if the trial court acts on a wrong principle, or mistakes the facts, or is influenced by extraneous considerations or fails to take account of relevant considerations. In addition, if it should appear that on the facts the order made is unreasonable or plainly unjust, even if the nature of the error is not discoverable, the order will be reviewed (House v The King [1936] HCA 40; (1936) 55 CLR 499, Evans v Bartlam [1937] AC 473). Failure to give weight or sufficient weight to relevant considerations will also vitiate the exercise of a judicial discretion but only if that failure is central to the exercise of the discretion (Charles Osenton & Co. v Johnston [1942] AC 130).
11. Nowhere in his decision the learned Magistrate considered the interests of the Appellant. The Appellant like any other accused person was entitled to the presumption of innocence and all other rights to a fair trial. The date of the alleged offence of robbery was 10<sup>th</sup> April 2013. The withdrawal application was made on 11<sup>th</sup> April, 2016 after a lapse approximately three years. The Complainant is a Japanese national and no meaningful steps had been taken by the Prosecution to get him down. There is no material to say that complainant

will ever come back to Fiji. Right throughout, the Appellant appeared in all hearings and was not responsible for any delay. His Constitutional Right to have the trial begun and concluded without unreasonable delay has been violated. The duty to ensure that the process is not abused is on the courts.

12. The Supreme Court of Fiji in *Mototabua v State* [2011] FJSC 10; CAV0005.09 (12 August 2011) (decided under the Penal Code) observed:

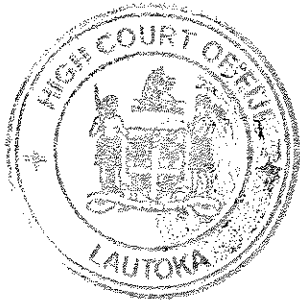
*“Having considered the submissions made by the petitioner and the State Counsel who conceded the fact that there is a discretion conferred on the Magistrate under section 201 (2) (b) either to acquit the accused or discharge, we are of the view that Special Leave to Appeal should be granted to the petitioner.*


*On a careful reading of the section 201 (2) it can be seen that an accused can be acquitted or discharged consequent upon a withdrawal of a charge only before the accused person is called upon to give evidence. However, if the accused is discharged under the above section, that discharge order shall not operate as a bar to subsequent proceedings against him on account of the same facts.*

13. The possibility of recharging the Appellant would not arise in view of the fact that the Director of Public Prosecutions has advised this Court that the presence of the complainant cannot be ensured.
14. It appears that there has been some injustice caused to the Appellant due to the failure on the part of learned Magistrate to consider the applicable legal provisions as to whether the petitioner should have been acquitted when

exercising the discretionary power vested in the learned Magistrate under the above section of the Criminal Procedure Decree.

15. Based on these reasons I am of the view that the learned Magistrate erred in the exercise of his discretion when he failed to consider the interests of the accused and the overall interests of justice when he discharged the appellant instead of acquitting him.
16. The appeal is allowed. Discharge order is set aside.
17. The appellant is acquitted.



  
**Aruna Aluthge**  
**Judge**

**At Lautoka**

**25<sup>th</sup> January 2017**

**Solicitors: Office of the Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecution for the State**