

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

**CRIMINAL APPEAL CASE NO.:** HAA 058 OF 2017

**BETWEEN:** JOSEFA LUTUNATABUA  
**APPELLANT**

**AND:** STATE  
**RESPONDENT**

**Counsel** : Appellant in Person  
Ms. R. Uce for State

**Date of Hearing** : 10<sup>th</sup> March 2017

**Date of Judgment** : 10<sup>th</sup> March 2017

**JUDGMENT**

1. The Appellant was formally charged on the 16<sup>th</sup> day of July 2009 in the Magistrates Court at Lautoka with six counts of Robbery with Violence contrary to Section 310 (1) (b) of the Penal Code.
2. On the 17<sup>th</sup> December, 2012, the charge sheet was amended to reduce the number of counts to four.

3. Subsequent to series of prolonged adjournments over the period between 2009 and 2016, and upon the pronouncement of the Ruling on *voir dire* on 8<sup>th</sup> November, 2016, Prosecution sought permission to withdraw the charges, apparently under Section 169 (1) and (2) (b) (ii) of the Criminal Procedure Decree. Accordingly, the learned Magistrate, on the 22<sup>nd</sup> November 2016, discontinued proceedings and discharged the Appellant.
4. The Appellant filed a Notice of Application in the Magistrate Court at Lautoka seeking an Order for an Acquittal under Section 169(2) (b) (1) of the Criminal Procedure, Decree, 2009. The learned Magistrate having refrained from making an order sent the file back to the Registry on the basis that an order had already been made on the 22<sup>nd</sup> of November, 2016 discharging the Appellant.
5. Being aggrieved by the said Order, the Appellant filed this Appeal within time.
6. The Appellant now wishes to appeal on the ground that the learned Magistrate erred in law when he was discharged instead of being acquitted.

### Law

7. 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.*

8. Section 201 of the Criminal Procedure Code is almost identical to the present Section 169 of the Criminal Procedure Decree.

9. 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.)*

10. The Appellant claims that the only evidence relied upon by the State was the unlawfully extracted confession and, since the learned Magistrate by his Ruling dated 8<sup>th</sup> November, 2016 held that to be inadmissible, there was no evidence to prosecute the case against him and that being the reason why the State moved to withdraw the charge upon which an order of discharge was made. He argues in this appeal that he should have been acquitted.
11. It is clear that an order made pursuant to Section 169(2)(b) of the Criminal Procedure Decree is 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. Furthermore, no ruling was given on the subsequent application for an order of acquittal.


12. 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).
  
13. Nowhere in his decision the learned Magistrate considered the interests of the Appellant and his entitlement to the presumption of innocence. The date of the alleged offence of robbery was 16<sup>th</sup> July, 2009. The withdrawal application was made on 22<sup>nd</sup> November, 2016, after a lapse approximately eight years. The four Prosecution witnesses had concluded their evidence when it was brought to the notice of the trial Magistrate that no disclosures had been served on the Defence. Then the proceedings of trial proper were discontinued to pave way for a *voir dire* proceeding. Upon the conclusion of *voir dire* proceeding, the trial Magistrate found the caution statement to be inadmissible.

14. The Counsel for Respondent concedes that there is no evidence against the Appellant when the trial Magistrate held the caution interview to be inadmissible. The test therefore at that stage was whether, taken at its highest, a reasonable court could have convicted on the evidence led in Prosecution case. Since there was no evidence against the Appellant, the trial Magistrate could have acquitted him.
15. Furthermore, Appellant's Constitutional Right to have the trial begun and concluded without unreasonable delay has been violated. (*It was held in Seru Crim App. AAU.0041/42 of 1995, the ground of delay alone is sufficient to quash a conviction and sentence if prejudice thereby caused is proved*).
16. 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.*
17. 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 him under the above Section of the Criminal Procedure Decree.

18. 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 Appellant and the overall interests of justice when he discharged the Appellant instead of acquitting him.
19. The appeal is allowed. Discharge order is set aside.
20. The Appellant is acquitted.



  
Aruna Aluthge  
Judge

**At Lautoka**

**10<sup>th</sup> March 2017**

**Solicitors: Appellant in Person  
Office of the Director of Public Prosecution for State**