

Accordingly, the learned Magistrate, on the 20th January, 2017, discontinued proceedings and discharged the Appellant.

3. The Appellant, being dissatisfied with the discharge order filed a petition of appeal within appealable period seeking that the discharge order be substituted with an acquittal and that costs be awarded.

Grounds of Appeal

- i. *That the learned trial Magistrate ought to have acquitted him instead of discharging.*
- ii. *The learned Magistrate should have ordered the prosecution to pay costs to meet the natural ends of justice.*

Law

4. Section 169 of the Criminal Procedure Act 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 (sic) 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.

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

6. 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.)

7. An order made pursuant to Section 169 (2) (b) of the Criminal Procedure Act is clearly discretionary. The discretion given to the Magistrate should be exercised judiciously.

8. 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”

9. In *Sada Siwan* HAA 050. 2008 Ltk., (29th August 2008), having examined the similar section in Criminal Procedure Code, Gounder J observed:

*“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)”*.

10. High Court further said that in exercising the discretion pursuant to Section 201 (2) (b) the court must not only take into account the interests of the Prosecution but those of the accused as well. The Supreme Court in *Mototabua v State* [2011] FJSC 10; CAV0005.09 (12 August 2011) noted that the High Court in the case of *Sada Siwan* (supra) had applied the correct approach when deciding on the discretion of the Magistrate under the above Section 201 (2) of the Criminal Procedure Code.

11. In *State v Mototabua* [2012] FJSC 14; CAV0005.2009 (9 May 2012) stressed that to decide the question as to whether there had been a correct exercise of the magisterial discretion it would be necessary to have before any appeal court the full record of the proceedings in the trial Court. The Supreme Court further observed:

“With the prosecutor forced onto trial and being unable to offer any evidence, judgment would follow that there was no case against the Accused. In those circumstances the result would have been acquittal not discharge”.

Analysis

Ground i

12. It is appropriate to examine chronology at the magistracy. The matter was set down for hearing on 16th August, 2011. The hearing did not proceed as two State witnesses were not present. On two subsequent occasions, 5th June, 2012 and 21st June, 2012, the Appellant was not present.
13. On 16th October, 2012, the Appellant was not present because he was remanded in another matter and the hearing was vacated. On 15th November, 2016, hearing was vacated without any reason being recorded. Finally, on 20th January, 2017, the State moved to withdraw the charges under Section 169(2) (b) (ii) as they could not locate their witnesses.
14. As per *State v Mototabua* [2012] FJSC 14; CAV0005.2009 (9 May 2012) the test is that if the State were forced into trial, will they be able to proceed to prove the case against the accused within days. If the witnesses cannot be located, prosecution will not be able to prove the charges against the Appellant.
15. The learned Magistrate noted – ‘*Prosecution withdraw the charge as witnesses could not be located. I discharge all the Accused under Section 169(2) (b) (ii)*’.
16. The learned Magistrate did not give reasons why he discharged the accused, instead of acquitting. Nowhere in his decision the learned Magistrate considered the interests of the Appellant. The Appellant like any other accused person is entitled to the presumption of innocence and all other rights to a fair trial. The date of the alleged offences was 4th September, 2010. The withdrawal application was made on 20th January, 2017 after a lapse approximately seven years. Prosecution was given ample time to locate the witnesses but no meaningful steps had been taken to get them down. There is no material before this Court to

suggest that the presence of witnesses will ever be secured by the Prosecution. Appellant was a serving prisoner and not responsible for the failure. His Constitutional Right to have the trial begun and concluded without unreasonable delay has to be guaranteed. The duty to ensure that the process is not abused is on the Courts.

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.
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. This ground succeeds.

Ground ii

19. The Appellant has made an application for costs to be paid by the Prosecution. Section 150 of the Criminal Procedure Act (CPA) deals with costs. The relevant parts of the Section reads as follows:

150 (2) 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

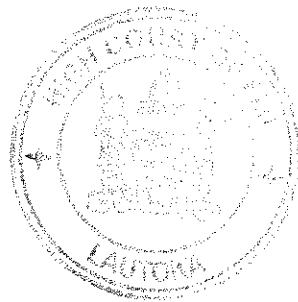
(3) An order shall not be made under sub-section (2) unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter.


20. In *State v Ravuou* [2004] FJHC 105; HAA0065].2003S (4 June 2004) interpreting Section 158 (2) of the Criminal Procedure Code (similar Section to Section 150 of the CPA) Shameem J observed:

"In considering a costs application, a Court should ask both parties to make submissions, and should specify the ground on which costs are awarded. There are no other grounds on which costs may be awarded (Graham Southwick v. State

CAV0001 of 2003S) and a ruling on costs should specify whether the prosecution was unreasonably brought, or unreasonably prolonged”.

21. It is apparent that neither ground applied in this case. There is no evidence that Prosecution brought this case unreasonably nor is there evidence that Prosecution dragged this matter unreasonably.
22. The application for costs should therefore be dismissed.
23. Only ground one succeeds. The appeal is allowed to that extent. Discharge order is set aside. The appellant is acquitted.




Aruna Aluthge
Judge

At Lautoka
22nd August, 2017

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