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

CRIMINAL APPEAL CASE NO.: HAA 34 OF 2017

BETWEEN: ISAIA BOBO

APPELLANT

AND: STATE

RESPONDENT

Counsel : Ms. P. Chand for Appellant

Mr. S. Seruvatu for the State

Date of Hearing : 2nd November, 2017

Date of Judgment : 21st November, 2017

JUDGMENT

1. The Appellant along with one other person was charged in the Magistrates Court at Nadi with one count of Burglary and one count of Larceny from Dwelling House contrary to Sections 299 (a) and 270 of the Penal Code Cap. 17.

2. The Appellant was first produced before the Magistrates Court on the 12th November, 2009 and he was served with disclosures on 22nd February, 2010. The matter was fixed for hearing on 12th May, 2010. However, the trial did not proceed on that day due to non-availability of the 2nd Accused. Subsequent to series of adjournments over the period between 2010 and 2016, hearing was

again fixed for 18th August, 2016. The Prosecution was not ready on that day on the basis that the complainant had left Fiji in 2007. The matter was then stood down. Having consulted senior officers the Prosecution sought permission to withdraw the charges under Section 169 (1) and (2) (b) (h) of the Criminal Procedure Act. Accordingly, the learned Magistrate, on the 18th of August, 2016, discontinued proceedings and closed the file.

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

Ground of Appeal

That the learned trial Magistrate ought to have acquitted him from the charge

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 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

12. The matter was set down for hearing on 18th August, 2016. The hearing however did not proceed as the State witness (virtual complainant) was not present.

13. The prosecution was unable to conduct the prosecution due to non-availability of the virtual complainant. Prosecution informed court that he had left the county way back in 2007.

14. The Prosecution had not taken any step to secure the attendance of the complainant. After a lapse of nearly six months form the said impugned order, the Prosecution does not say the witness is available and they are ready to prosecute the case.

15. 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 accused.

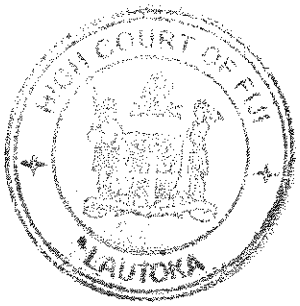
16. The learned Magistrate did not give reasons why he discharged the accused, instead of acquitting. Nowhere in his decision, had the learned Magistrate considered the interests of the Appellant. The Appellant is entitled to the presumption of innocence and all other rights to a fair trial. The date of the alleged offences was 21st August, 2009. The withdrawal application was made on 18th August, 2016 after a lapse approximately seven years. Prosecution was given ample time to locate the witness but no meaningful steps had been taken to get the witness down.

17. There is no material before this court to suggest that the presence of witnesses will ever be secured by the prosecution in the foreseeable future. Appellant was a serving prisoner serving a long term prison sentence and not responsible for the failure. His Constitutional Right to have the trial begun and concluded without unreasonable delay and presumption of innocence had to be guaranteed. The duty to ensure that the process is not abused is on the courts.

18. 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.

19. 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 closed the file without acquitting him.

20. The appeal is allowed. The Order of the learned Magistrate is set aside. The Appellant is acquitted.



Aruna Aluthge
Judge

At Lautoka
21st November, 2017

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