

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 99 of 2017

1. RAM SWAMY GOUNDAR
2. PERMAL REDDY

Appellants

STATE

Respondent

Counsel : Mr. D. Naidu for the Appellants
Mr. A. Singh for the State

Date of Hearing : 19th February 2018
Date of Judgment: 22nd February 2018

JUDGMENT

- 1.] In the Magistrates Court at Lautoka, both accused were charged with two offences of fraud and the first Appellant with a charge of impersonation. The case was subsequently transferred to the Magistrates Court at Nadi. They first appeared at Nadi on the 10th May 2014.
- 2.] The matter proceeded at a slow pace in the Nadi Court, until the 15th June 2017 when the State sought to withdraw the charges against the two accused on the basis that there was insufficient evidence. The State asked that the accused persons be

discharged, rather than acquitted, the record showing that that request was directed by the DPP.

- 3.] Defence counsel in return asked that his clients be acquitted. The Magistrate in a ruling delivered on the 11th August 2017 discharged the accused pursuant to section 169(2) (b) (ii) of the Criminal Procedure Act 2009.
- 4.] Both accused now come before this Court appealing that decision of the learned Magistrate below, and asking that an order for acquittal be imposed in place of the discharge. The appeal was filed in time.
- 5.] Section 169 of The Criminal Procedure Act 2009 reads:

“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 subsection (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.

Discussion

6.] The withdrawal of a case or the offering of no evidence are, along with *nolle prosequi* the prerogative of the Director of Public Prosecutions and no tribunal has the right to go behind that prerogative and ask for reasons.

7.] As the High Court of Australia said in **Barton** [1980] HCA48,

“It has generally been considered to be undesirable that the Court whose ultimate function is to determine the accused’s guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced”.

8.] **Sada Siwan** HAA 50 of 2008 (29 August ’08) was an appeal on the same question of discharge vs acquittal In that case Goundar J. said:

“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 irrelevant considerations” and later

“In exercising the discretion the Court must not only take into account the interests of the prosecution but that of the accused as well”.

9.] The Supreme Court in **Mototabua** CAV 005 of 2009, stressed that the interests of the accused must also be considered.

10.] As a result of these principles the exercise of the Magistrates discretion becomes a balancing exercise- weighing up the

competing interests of both prosecution and accused. It might well entail enquiry of the prosecution “behind the veil” as to the likelihood of proceeding with the prosecution in the future.

The Instant Case

- 11.] Before the learned Magistrate made his decision to discharge the two accused rather than acquit them, he heard extensive oral argument from Counsel on the matter. Defence counsel was particularly aggrieved that the case took 14 years for charges to be laid and was also aggrieved that the prosecution had misread the evidence and had laid charges for what had been lawful and legitimate activity on the part of the two accused.
- 12.] The learned Magistrate did not discuss these competing submissions when exercising his discretion and he should have.
- 13.] Defence counsel renewed those arguments before this Court, and the Court is of the view that insufficient weight was given to the defence in the exercise of the Magistrates discretionary ruling.
- 14.] Prosecution Counsel tells this Court that it is extremely unlikely that the actions of the two applicants will ever be the subject of any charge in the future.
- 15.] In the premises, I find that this is one of the rare circumstances when this Appellate Court will go behind the discretion.
- 16.] The pair were wrongly prosecuted, fourteen years after the event, and they should have been acquitted.

17.] Pursuant to section 256 of the Criminal Procedure Act, I quash the order of dismissal made below and I order that the two accused be acquitted.



P.K. Madigan
Judge

At Lautoka High Court
22nd February 2018