IN THE COURT OF APPEAL
[On Appeal From The High Court]

CRIMINAL APPEAL NO: AAU0084 OF 2011
(High Court Case No: HAC 138 of 2010)

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**SAKIUSA BASA**
		Respondent
Coram	:	Goundar JA
Counsel	:	Ms P. Madanavosa for the Appellant Ms S. Vaniqi for the Respondent
Date of Hearing	:	14 March 2014
Date of Ruling	:	2 June 2014

RULING

[1] The respondent and his co-accused were tried in the High Court at Suva on one count of aggravated robbery. After the main prosecution witness did not come up to proof, the prosecution sought a short adjournment to reconsider the evidence. When the Court resumed after the adjournment, the prosecution terminated the proceedings against the co-accused, but not against the respondent. After further evidence from the investigating officer, the prosecution reconsidered its position and terminated the proceedings against the respondent by entering a nolle prosequi. The respondent was discharged. Counsel for the respondent then applied for costs. The State opposed the application for costs. After receiving oral and written submissions from both parties, on 18 August 2011, the learned trial judge ordered the State to pay the respondent costs in a sum of $5120.00. The costs were categorized as:

Exemplary damages - $5000.00
Loss of earnings - $120.00

[2] The State appeals against the costs order and seeks a stay of that order on the following grounds:

> "(1) That the Learned Judge erred in law in entertaining an application for costs brought in the absence of a Notice of Motion and an Affidavit or Affidavits in support of the Motion.
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> (2) That the Learned Judge erred in law in determining an application made pursuant to Section 150(4)(a) and (d) of the Criminal Procedure Decree, 2009, as an order for discharge had been made pursuant to Section 49(2) of the Criminal Procedure Decree, 2009;
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> (3) That the Learned Judge erred in law and fact by failing to consider that Section 150(2) of the Criminal Procedure Decree, 2009 is operative subject to Section 150(3) of the said Decree;
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> (4) That the Learned Judge erred in law and in fact by considering the 'solitary confinement' of the Respondent in Prison in the award of costs; when in fact no evidence had been adduced to show cause why the Appellant ought to be held responsible for either: a decision taken by a public officer not employed at the Office of the Director of Public Prosecutions; or, an act or acts carried out as a result of that decision within the procedures and protocols of a separate and autonomous State entity; and
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> (5) That the Learned Judge erred in law in that he allowed irrelevant and extraneous matters to guide him, inter alia
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> (i) a reliance on principles of tort law – and –
> (ii) the outcome of High Court Criminal Case No. 77/2011 and High Court Criminal Case HAC 213/11,
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> which, in and of themselves, had no bearing on the considerations and decision taken in respect of High Court Criminal Case No. HAC 138/10."

[3] The Court of Appeal provides for three avenues for the State to bring criminal appeals. Section 21(2) provides the State with a right of appeal against acquittal. Section 22 provides the State with a right of appeal against a decision of the High Court in its appellate jurisdiction. These two sections are not relevant to this appeal.

[4] Section 3(3) of the Court of Appeal Act provides:

> Appeals lie to the Court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court.

[5] The costs order was made after the proceedings had come to an end and the respondent was discharged. In ***Graham Southwick v State*** *[2002] AAU 16/99 (1 March 2002)*, the trial judge refused to make an order for costs against the State after the prosecution was permanently stayed. The application for costs was made by the defence under section 158(2) of Criminal Procedure Code (now repealed). The accused appealed against the refusal order to the Court of Appeal. The State moved to strike out the appeal on the basis that there was no right of appeal against an order refusing costs because the decision was not final. The Court of Appeal held that the refusal order was given in the exercise of the original jurisdiction of the High Court under section 158(2) of the Criminal Procedure Code and the order was final.

[6] In this case, the costs order against the State was made in the exercise of the original jurisdiction of the High Court. The order is final because the proceedings in the High Court came to an end after the State entered a nolle prosequi and terminated the proceedings against the respondent. Section 3(3) of the Court of Appeal Act does not require the appellant to seek leave to appeal. The merit of the appeal is a matter for the Full Court.

[7] The State seeks a stay of the costs order. In criminal appeals, a single judge has no power to stay a decision of the court below. I have been told from the bar table that the State has not paid the costs because the respondent is indigent and he may not be able to repay the State if the State's appeal is allowed. In these circumstances, I recommend that the State's appeal should be heard without any further delay. The State is to expedite the filing of the Court Record and the appeal is to be listed before the President of the Court of Appeal in the next call over to fix a hearing date

Result

[8] Stay refused.

[9] The State may proceed with this appeal without any further delay.

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Hon. Justice D. Goundar
JUSTICE OF APPEAL