IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates' Court]

CRIMINAL APPEAL NO. AAU 0076 of 2017
[In the Magistrates' Court of Suva Case No. 309 of 2012]

BETWEEN : **SITIVENI TUISAMOA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. Nasedra for the Appellant**
: **Mr. R. Kumar and Ms. S. Lodhia for the Respondent**

Date of Hearing : **25 and 27 August 2020**

Date of Ruling : **28 August 2020**

RULING

[1] The appellant had been arraigned in the Magistrates' Court of Suva under extended jurisdiction on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and five counts of theft contrary to section 291(1) of the Crimes Act, 2009.

[2] On 30 June 2015 (according to the appellant it was 05 June 2015), the prosecution had made an application under section 169(2)(b)(ii) of the Criminal Procedure Act, 2009 to withdraw the case against the appellant and pursuant to that application the learned Magistrate had discharged the appellant.

[3] The appellant is now challenging the order of discharge on the basis that the learned Magistrate instead of discharging him should have acquitted him. Section 169 is as follows.

> *'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.*

[4] Though the record of proceedings relating to the application by the prosecution and the appellant's discharge is not available at this stage, both counsel agree that the learned Magistrate had not given any reasons as to why he had exercised his discretion to record a discharge instead of an acquittal under section 169(2)(b) of the Criminal Procedure Act, 2009. It is also common ground that the case in the Magistrates Court was at the stage contemplated in section 169(2)(b).

[5] The respondent argues that the appellant was represented by counsel but no application was made for an acquittal or objection raised to the discharge. It has also been submitted that whether or not there was a prospect to re-charge the appellant after the discharge could not be confirmed with certainty when the application was made seeking a withdrawal but it could now be confirmed that there is no such prospect of re-charging

the appellant. The appellant had been charged in February 2012 and withdrawal had been done in June 2015.

[6] In **Mototabua v State** [2011] FJSC 10; CAV0005.09 (12 August 2011) Mototabua had been discharged under section 201(2) (b) of the Criminal Procedure Code (which is similar to present section 169(2)(b) of the Criminal Procedure Act, 2009) when the charge was withdrawn as the prosecution was not ready for the 04th time and Mototabua had challenged his discharge in the High Court on the basis that he should have been acquitted. In the High Court, the Director of Public Prosecutions had indicated that Mototabua could not be recharged due to technical reasons and Mototabua's application had been dismissed by the High Court on that submission. It appears that the Court of Appeal too had not held in favour of Mototabua.

[7] The Supreme Court held that neither the High Court nor the Court of Appeal had considered the issue of whether or not the learned Magistrate had properly exercised discretion under section 201(2)(b) of the Criminal Procedure Code and both courts had simply acted on the DPP's letter that Mototabua would not be re-charged. While acquitting Mototabua the Supreme Court approved the approach explained in **Siwan v State** [2008] FJHC 189; HAA050 of 20008L (29 August 2008) as to how the discretion under section 201(2)(b) of the Criminal Procedure Code should be exercised.

[8] In ***Siwan*** the High Court held

> *'...an order made pursuant to section 201 (2) (b) is clearly discretionary. 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, **Evan**s v **Bartlam** (1937 AC 473) . Failure to give weight or sufficient weight to the relevant consideration 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."*

[9] The High Court in **Kean v State** [2014] FJCA 130; HAM417.2013 (29 July 2014) had followed ***Siwan*** and ***Mototabua*** and usefully set down the following list of circumstances relevant to exercise the discretion under 169(2)(b) of the Criminal Procedure Act, 2009 which, obviously, are not exhaustive.

> *'(i) The date of offence is 17.8.2005 - 18.8.2005*
> *(ii) The nature of the allegation*
> *(iii) The application to withdrawal was on 28.12.2011*
> *(iv) No meaningful steps had been taken by the prosecution to recharge the appellant*
> *(v) No reasons given by prosecution to withdraw the charges*
> *(vi) The interests of the appellant*
> *(vii) Constitutional Right of the appellant to have the trial begin and conclude without unreasonable delay.'*

[10] While attendant circumstances may vary from one case to another, it is always prudent on the part of the Magistrates (i) to consider the lapse of time since the accused was charged to the date of withdrawal application, (ii) the reason for the delay in non-prosecution of the case till the date of withdrawal *i.e.* whether the delay is due to lack of due diligence on the part of the prosecution and/or whether the accused himself had contributed to the delay, (iii) the reason why the application for withdrawal is made and (iv) the future prospect of and time likely to be taken in re-charging the accused, before exercising the judicial discretion either to discharge or acquit an accused under 169(2)(b) of the Criminal Procedure Act, 2009. Needless to say, that the above considerations are not in an all-inclusive list. There must be a healthy consideration of the interests of the prosecution *i.e.* the public as well as the accused.

[11] It does not appear that the learned Magistrate had been mindful or interested in educating himself of any of the above matters that may have influenced his discretion under 169(2)(b) of the Criminal Procedure Act, 2009. In fact the state has not disclosed even in its written submissions before this court why it sought to withdraw the case against the appellant.

[12] On the material available, it is doubtful whether the learned Magistrate had given his mind to any of the above matters highlighted above. Therefore, there appears to be a reasonable prospect of success in the appellant's appeal before the full court on the ground of appeal urged.

[13] The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[14] However, there is one more mater of vital importance to be commented upon the question of jurisdiction of this court to entertain the appellant's appeal, for in terms of section 21 of the Court of Appeal Act right of appeal has been granted to the Court of Appeal against conviction, sentence, acquittal and grant or refusal of bail by the High Court. What the appellant is appealing against is an order of discharge by the Magistrate exercising extended jurisdiction.

[15] I have held in **Rakesh Prasad Charan v State** AAU 179 of 2019 (24 August 2020) in a different context that when a Magistrate exercises extended jurisdiction he is deemed to be exercising the jurisdiction of the High Court subject to sentencing limitations.

> *'On the other hand, when the Magistrate's Court exercises jurisdiction invested in it by the High Court by virtue of section 4(2) of the Criminal Procedure Act, 2009 ('extended jurisdiction') to try an offence, which, in the absence of such extension of jurisdiction, would be beyond the Magistrate's jurisdiction, the Magistrates' Court is deemed to exercise original jurisdiction of the High Court (subject, of course to the limitation of powers of sentencing) and therefore, the right of appeal is provided in section 21 of the Court of Appeal Act.*

[16] Therefore, if the proceedings before the Magistrate against the appellant could be deemed to be flowing from the original jurisdiction of the High Court pursuant to section 4(2) of the Criminal Procedure Act, 2009, the proper forum to invoke the appellate jurisdiction is the Court of Appeal. However, the appellate jurisdiction of the Court of Appeal as enshrined in section 21 of the Court of Appeal Act could be invoked only against a conviction, sentence, acquittal or grant or refusal of bail pending trial. A discharge under section 169(2(b)(ii) does not fall into any of the above categories.

[17] On the other hand, if the Magistrates' Court in fact exercises the original jurisdiction of the High Court pursuant to section 4(2) of the Criminal Procedure Act, 2009, then it cannot act under section 169(2(b)(ii) of the Criminal Procedure Act, 2009, for the jurisdiction under section 169(2(b)(ii) is reserved only to the Magistrates' Court. In that event, if proceedings are to be discontinued in the Magistrates' Court the state has to enter a *nolle prosequi* in terms of section 49(1) of the Criminal Procedure Act, 2009 and not make an application under section 169(2(b)(ii) to withdraw the case.

[18] Nevertheless, one may argue that section 21 should be read with section 3(3) of the Court of Appeal Act and section 3(3) dealing with general jurisdiction of the Court of Appeal enables appeals 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. However, in **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) Calanchini AP as single judge had held that criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act effectively ruling out the general jurisdiction under section 3(3). The full court in **State v Chand** [2015] FJCA 64; AAU0085.2012 (28 May 2015) had held that the interpretation of Calanchini P was the correct interpretation.

[19] Even if it is assumed that the Magistrates' court exercises the original jurisdiction of the High Court when acting under extended jurisdiction invested under section 4(2) of the Criminal Procedure Act, 2009, still it is doubtful whether a discharge under section 169(2(b)(ii) of the Criminal Procedure Act, 2009 could be considered as a final judgment, for there is the probability and possibility of the accused being recharged. In

that event, the appellant cannot call section 3(3) of the Court of Appeal Act in aid to sustain his appeal to the Court of Appeal against the discharge.

[20] However, in **State v Chand** (supra) the Court of Appeal had held in the context of limitation contained in section 246(7) of the Criminal Procedure Act, 2009 that because proceedings are brought to an end with an order of discharge made under section 169(2) an aggrieved party could appeal to the High Court under section 246(1). According to section 246(7) no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person and the Court held that section 246(7) limitation does not apply to an order of discharge under section 169(2).Thus, ***Chand*** has preserved a right of appeal to an accused aggrieved by an order of discharge to the High Court, who otherwise would have been left without a relief.

[21] However, in ***Chand*** the Magistrate was concerned with charges under the Penal Code and he appears to have exercised original jurisdiction and not an extended jurisdiction and the Court of Appeal was considering section 246 of the Criminal Procedure Act which includes judgment, sentence or order and not section 21 of the Court of Appeal which only refers to conviction, sentence, acquittal or grant or refusal of bail pending trial.

[22] Therefore, ***Chand*** is not an authority to buttress the proposition that a discharge under section 169(2(b)(ii) of the Criminal Procedure Act, 2009 could come under section 21 of the Court of Appeal Act or even to support the proposition that a discharge is a final judgment within section 3(3) of the Court of Appeal Act.

[23] There is also an argument to the effect, not without merit that in terms of section 99(3), (4) and (5) of the Constitution of the Republic of Fiji, the Court of Appeal has jurisdiction to hear and determine appeals only from the High Court as prescribed by the Constitution and other written law. Further, section 100 (5), (6) and (7) of the Constitution specifying appellate jurisdiction of the High Court, support the above contention. Therefore, the argument goes that there cannot be a direct appeal to the Court of Appeal against the judgment, sentence or order of a Magistrates Court whether given in its original jurisdiction or extended jurisdiction. In other words an appeal

against a discharge made under section 169(2(b)(ii) of the Criminal Procedure Act, 2009 should be filed in the High Court and not in the Court of Appeal. ***Chand*** lends some support to this argument though it did not consider the question arising from original and extended jurisdiction of the Magistrates Court *vis-à-vis* the correct appellate forum.

[24] If this line of argument is adopted, all appeals from the Magistrates Court will have to be heard in the High Court as the court of first appeal in its appellate or supervisory jurisdiction and only a second tier appeal could be filed in the Court of Appeal in terms of section 22 of the Court of Appeal Act upon a decision of the High Court made in its appellate or supervisory jurisdiction.

[25] This thinking appeals to me as it could do away with the artificially created direct appeal to the Court of Appeal from any judgment, sentence or order given in the Magistrates Court. Such a direct right of appeal to the Court of Appeal is unsanctioned by any provision of the Constitution or any other written law. It also sits in harmony with purposive interpretation of section 21 and 22 of the Court of Appeal Act and section 246 of the Criminal Procedure Act, 2009. However, for this proposition to apply it has to be based on the premise that when the Magistrates Court exercises extended jurisdiction it does not exercise the original jurisdiction of the High Court but its own jurisdiction, for the High Court cannot entertain appeals from its own judgments, sentences or orders or exercise supervisory jurisdiction over such judgments, sentences or orders.

[26] Since these are important questions of law the appellant should be given leave to appeal to enable the full court to determine all issues arising from this appeal and to clarify the law and procedure for future guidance.

Order

1. Leave to appeal is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL