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

CIVIL APPEAL NO. ABU 101 of 2023
[Labasa High Court Civil Case No. HBC 58 of 2019]

BETWEEN	:	**ATISH ATENDRA PRASAD**	***Appellant***
AND	:	**DC 2969 RUP NARAYAN**	***1st Respondent***
		TUACI TASO QOSOQO	***2nd Respondent***
		COMMISSIONER OF POLICE	***3rd Respondent***
		ATTORNEY GENERAL OF FIJI	***4th Respondent***

Coram	:	**Prematilaka, RJA**
		Qetaki, RJA
Counsel	:	**Mr S. Valenitabua for the Appellant**
	:	**Ms. S. Pratap for the Respondents**
Date of Hearing	:	**27th January, 2025**
Date of Ruling	:	**17th February, 2025**

RULING

Background

[1] This an appeal from the judgment of Honourable Justice Brito Mutunayagam made on the 23rd of August 2023 in Civil Action No. HBC 58 of 2019 in the High Court at Labasa. The learned Judge declined the Plaintiffs' claims, and ordered that the first, second and third Plaintiffs shall pay cost summarily in the sum of $ 4,500.00 to the first, second and third defendants.

[2] The Plaintiffs' Claims in Civil Action No. HBC 58 of 2019 are:

(A) The first and second defendants arrested the Plaintiff without a warrant and maliciously charged them for damaging the vehicle of the first plaintiff without reasonable and probable cause, when no complaint was lodged against them and no offence was committed.

(B) The Plaintiffs' allege they were assaulted by the first defendant.

(C) The Plaintiffs' allege their Constitutional rights were breached.

(D) The Plaintiffs' allege they were unlawfully detained at Taveuni Police Station (TPS) and imprisoned at Vaturekuka prison for 7 days.

(E) The Plaintiff's say that they were acquitted at the hearing, as the Police did not provide any evidence.

(F) The Plaintiffs claim damages for assault, false imprisonment and malicious prosecution. They also seek declarations that their arrests were unlawful, the defendants breached the constitution. And the first and second defendants are unfit and improper persons to carry out duties as Police Officers and be investigated for abuse of office and human rights.

(G) The Plaintiffs' allege the conduct of the first and second defendants entitle the Plaintiffs to exemplary damages in a sum of $50,000.00 each.

(H) The first defendant was Police Officer at TPS.The second defendant was Station Officer.

[3] The delivery of the High Court Judgment was substantially late, and the reasons are not clear. However, on 29 February 2024 Sen Lawyers, Barristers & Solicitors, of Labasa filed a Summons in the Court of Appeal, with an Affidavit in Support seeking on behalf of the Appellant for the following orders, namely:

1). That leave be given to the Appellant to file Notice of Appeal and Notice of Grounds of Appeal out of time.

2). That execution of the orders made by Honourable Justice Brito Mutunayagam on 23rd August 2023 be stayed pending determination of the appeal.

3). That costs of the application be costs in course.

[4] The Appellant was the first Plaintiff in the High Court, and the first, second and third Respondents were first, second and third Defendants in the High Court proceedings.

Affidavit in Support by Appellant filed on 29th February 2024

[5] Paragraphs 5 to 17 of the Appellant's affidavit are reproduced below for convenience, as follows:

"5. The cause of action arose from the fact that I was charged from damaging my own property…….

6. My claim was premised upon the fact that I was the owner of motor vehicle Registration number LT 493 and I should not have been charged by law for an offence of damaging my own property.

7. Furthermore, the arrest was made by police officers without any investigation into this matter whereby I was kept in police custody in Taveuni and thereafter in Savusavu Police Station and then produced in the Labasa Magistrates Court where the police had objected to my bail.

8. At the time of the hearing at the Labasa Magistrates Court, the prosecution had failed to adduce any evidence relating to the offence.

9. There was clear unequivocal evidence that I should not have been charged with any offence until such time police had concluded with the investigation.

10. At the hearing of the said High Court civil action, I had adduced sufficient evidence from my independent witness of my assault.

11. It was evidently clear from the proceedings, that the entire charges framed against me and the other plaintiffs was ill-founded and maliciously done and my Constitutional right were breached.

12. Furthermore, the learned Magistrate took into consideration the caution interview, a challenge of which was put but not taken into consideration.

13. After the hearing of the case, the judgment in this matter was delivered several years later on the 23rd August 2023.

14. The judgment was collected by my Solicitors agent in Suva but was not forwarded to him until late September.

15. I live in Taveuni and once I was advised about the judgment, I travelled to Labasa to see my Solicitor.

16. Once I was advised, I therefore instructed my Solicitors that I intend to appeal but by such time, I was out of time to appeal the said judgment.

17. I believe that I have got great prospect of success and meritorious grounds of appeal……..."

Grounds of Appeal

[6] The Grounds of Appeal (see *Annexure AAP-3A* of the Appellant's Affidavit in Support) is reproduced below. A close reading of the grounds shows that there were omissions and or mistakes in paragraphs 1, 3, 5, 6 and 7, which with more care (in proof-reading), on the part of the Appellant's Solicitors, could have been avoided, ensuring the Appellant's grounds are accurately and wholly stated. The grounds are:

"1. The learned trial Judge erred in holding that the 1st defendant on behalf of the Fiji Police had reasonable suspicion to arrest and charge the Appellant when the doctrine of was never pleaded nor put to the Appellants in cross examination and further when the doctrine of reasonable suspicion is placed by virtue of the fact that the charges against the appellant was a nullity and was framed without the complaint being lodged by any persons.

2. *The learned trial Judge erred in failing to hold that the Appellant had never committed any crime and should not have been charged of the same as the respondents had owed a duty to carry out a due diligence investigation and obtain necessary statements before filing of formal charge against them.*

3. *The learned trial Judge erred in failing to make correct inferences which should have been drawn from the fact that there were no charges in law that could be filed against the as no crime was committed.*

4. *The learned trial Judge erred in failing to analyse the evidence especially the evidence of the witnesses who had testified of the assault against the appellant and which was evidentially clear from the testimony and documents adduced at trial.*

5. *The learned trial Judge erred in failing to hold the constitutional rights of the Appellant who was taken into custody without any complaint, uncastrated and their freedoms curtailed when the charges against them could not be framed and which was a nullity perse.*

6. *The learned trial Judge dismissed the plaintiff's action against the tenure of cogent and reliable evidence produced in Court which was not contested through any credible evidence by the respondents.*

7. *The learned trial Judge erred in failing to take into consideration the overall conduct of the respondents and in particular failed to analyse the contradictions especially when the evidence of Divisional Prosecution Officer Northern, Subramani at categorically advised that he had never advised the 1st respondent to file the charges as he had one so as the investigating officer."*

Affidavit In Opposition

[7] An Affidavit was filed on behalf of the Respondents on 18th April, 2024, sworn by Rajesh Krishna of Suva, Director Legal, Fiji Police Force in opposition to the affidavit filed by the Appellant. Mr Krishna was replying to the matters deposed by the Appellant, specifically, the contents of paragraphs 13, 14 and 15 of the Appellant's affidavit, on the circumstances of the delay by the Appellant; paragraph 17 of the Appellants affidavit in relation to the merit and prospects of success of the grounds of appeal; paragraph 18 of the Appellant's affidavit, on the length of the delay, and the prejudice that the Respondents' will endure, in the event the Appellant's application is granted. The

substance of the contents of the affidavit by Mr Krishna, are reflected in the Respondents' written submissions which are discussed below.

The Law

[8] Under section 20 (1) (a) and (b) of the Court of Appeal Act 1949, a Judge has the power to *"give leave to appeal"* and *"to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter may be done."*

4.1 Rule 16(b) of the Court of Appeal Rules 1949 provides:

Time for appealing

16. Subject to the provisions of this rule, every notice of appeal or application for leave to appeal shall be filed and served under Rule 15(4) within the following period calculated from the date on which the Judgment or order of the Court below was pronounced that is to say- (a) in the case of an appeal for an application for leave from an interlocutory order, 21 days;(b) in any other case, 6 weeks.

Criteria - Application for Enlargement of Time

[9] On the exercise of the Courts discretion whether or not to grant leave, there has been numerous judicial decisions over time. For instance, in **Sundar v Prasad** Civil Appeal No. ABU022 of 1997: 10 November 1997 [1997] FJCA 39 and **NLTB v Ahmed Khan and Another** (unreported CAV 2 of 2013; 15 March 2013), Supreme Court , where the following criteria were affirmed and applied:

(a) The length of the delay.

(b) The reason for the delay.

(c) Whether there is a ground of merit justifying the appellate court's consideration, or where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed; and

(d) The degree of prejudice to the Respondent if the application is granted.

[10] In **Sundar v Prasad** (supra), the Court also reminded of the balancing exercise that is needed in the exercise of the discretion by the court.

[11] In **Salote Kaimacuata v Ashwen Gibson Blake** Civil Appeal No. ABU 89 of 2016 (per Chandra RJA, following **NLTB v Ahmed Khan & Others**), the Court, in applying the test, and taking into account the length and reasons adduced for the delay, refused the application for leave to appeal out of time.

The Length of the Delay

[12] There has been substantial delay (around 3 years) in the High Court delivering its judgment. Once the judgment is delivered, time runs as far as the rules relating to the filing of the notice and application for leave to appeal, in compliance with the *Rules of the Court*. In explaining the situation, the Appellant, in paragraph 8 of his submissions, makes reference to the contents of paragraphs 13, 14 and 15 of the Appellants affidavit. That the judgment was collected by the Appellant's Solicitor's Town Agent in Suva. It was not forwarded to their Labasa office until late September. The Appellant had travelled to Labasa to see his Solicitor Mr Sen, after being advised that the judgment was received at the Labasa office. The Appellant then instructed his Solicitors that he intended to appeal but by such time, the time to appeal the said judgment was over.

[13] The Appellant admits the delay, and submits that the appeal grounds are compelling and meritorious and has great prospect of success, and the overriding contention is "*whether there is an arguable issue"* in the facts and circumstances of the case. That if leave was given, there is likelihood of success, The Appellant relied on the case **Ghim Li Fashion (Fiji) Ltd v Ba Town Council** [2014] FJCA 192, especially paragraph [27] thereof, and **Gregory Clark v Zip Fiji** [2014] FJCA 189. I will comment on the application of these case later in this ruling.

[14] The Respondents contend that the delay is by approximately 4 months 24 days, and the length of the delay must be considered against the criteria established in **NLTB v Ahmed Khan & Another** (supra). In **Kumar v Kumar** [2018] FJCA 212; ABU 56 of 201, where the delay was 45 days, this Court stressed the importance of adhering to the timelines set by the *Rules of the Court* and emphasised that *"[10].On an application for leave out of time substantial reasons would need to be advanced before such an enlargement would be granted*." Adopting the principle from **Ratnam v Cumarasamy and Another**[1964] 3 All ER at 935 *"Rules of court must, prima facie be obeyed; and in order to justify a court in extending the time during which some steps in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.* Delays even as short as 2 days and 16 days resulted in Courts refusing to extend time to appeal due to lack of sufficient justification: see **McGaig v Manu** [2012] FJSC 18), and **Ali v Dominion Insurance Limited** [2011] FJHC 689).

[15] Justice Chandra, in the Ruling in **Kaimacuata** (supra), seems to infer that the circumstances of the delay (the reasons adduced for the delay), is to be explained satisfactorily. He stated, at paragraph 19:

> *"[19] But what is now under consideration is the application for leave to appeal out of time filed on 9th of August 2016 which as shown above was filed after a considerable delay. The reasons adduced for the delay are not satisfactory."*

Reasons for Delay

[16] The reasons for the Appellant's delay in the filing of the application for leave to appeal, are set out in paragraphs 13 to 16 of the Appellant's Affidavit-see paragraph [5] above. The Appellant admits there has been considerable delay. Counsel for the Respondents submits that the reasons advanced are not satisfactory for the reasons, due to the following:

(a) There was no attempt by the Appellant's Solicitors having instructed their city agents on 23 August 2023 to uplift the Judgment, to follow up with their City agents on the same day or as soon as practically possible thereafter to immediately forward the Judgment to them;

(b) The Appellant Counsel ought to have followed up with their City Agents and requested a copy of the judgment, in the event the agent had failed to forward the Judgment to the Appellant Counsel;

c) The excuses/reasons stated in the Appellants Affidavit is baseless and unsubstantiated, there being no disclosures by the Appellant's Counsel or any evidence or correspondence with its City Agents to show that his office had followed up, but the City Agents had caused the delay alleged;

(d) Assuming the Judgment was forwarded to the Appellant's counsel in late September 2023, the Appellant failed to act quickly and file its appeal. Instead, the Appellant's counsel waited until the end of February 2024 to file an application out of time. The delay from September 2023 to 29th February 2024 is not explained nor is any evidence submitted to justify the delay as relate to that time segment,

(e) Finally, the Appellant had not been specific on the dates, firstly, the date on which he was informed by his Counsel about the Judgment of the High Court (assuming the Appellant's Counsel had received the Judgment in late September) and the date the Appellant travelled to Labasa to see his Counsel, and as such, the Appellant's explanations is unfounded.

[17] The Appellant's written submissions raised additional reasons for the delay as follows: In paragraph 8(v), states:

8(v) "As far as the length of time is concerned, our submissions was on time but there was a hand written alteration made by the Court of Appeal Registry and was delayed by two weeks.

(vi) It would be unreasonable to disallow this Appeal over a "two weeks" delay considering the Appellant has compelling grounds of appeal and has a likelihood of succeeding."

[18] These issues were not deposed in the Appellant's Affidavit. Given that the Registry appears to be implicated in causing the delay, it may need recording that, in reading through the Court file, I observed that amongst the documents is a Summon, and an Affidavit in Support, purported to have been filed by the Appellant on 25th October 2023, which are identical to the Summon and Affidavit in Support filed by the Appellant on 29th February, 2024, approximately four months later. However, the said documents had handwritten alterations, presumably made in the Registry. It would appear the alterations was to correct errors and omissions identified by the Registry staff when checking the documents received for filing. There may be other irregularities found. From reading the exchange between the Registry and the firm of Solicitors acting for the Appellant or their City agent on the matter, it appears that there is some confusion, justified or otherwise on the part of the Solicitors. For reasons unknown, the Registry's request for them to collect the altered documents and resubmit a fresh Summons and Affidavit in Support did not receive an immediate response. Presumably the Appellant's Solicitors did respond much later in filing fresh Summons and Affidavit in Support on 29th February 2024, and as earlier stated, after a lapse of approximately four months.

[19] I find the reasons adduced in support of the Appellant's application for enlargement of time are neither satisfactory nor convincing or reasonable: **Kumar v Kumar** (supra); **NLTB Ahamed Khan & Another** (supra), and numerous other cases. The delay in this case is not acceptable.

Whether there is a ground of Merit?

[20] The former President of the Court (Honourable Justice Almeida Guneratne) in **Ghim Li Fashions (Fiji) Ltd** (supra), after discussing various cases on this issue, including: **Giesbrecht v Cross** [2008] FJHC 356, **Maciu Tamani Palu aka Maciu Tamanibola Palu and Australia and New Zealand Bank** [Misc.19 of 2021, 8th February 2013], and **Vimal Construction and Joinery Ltd v Vinod Patel and Company Ltd** [2008] FCA

98, had proposed principles that ought to be followed and applied in out of time leave applications. He states:

> *"[27] Although I have gone on to refer to the criteria for an Appellant's possible chances of success in appeal and prejudice to parties which I felt obliged to do on account of past precedents as cited earlier in this order, I would welcome the day the Full Court or the Supreme Court would adapt the following principle which I proceed to formulate as follows in the form of three propositions; viz:*
>
> *(i) That, even when the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an Appellant is unable to satisfy Court as to his or her chances of success in appeal if the application for extension is to be granted, then the application must be rejected;*
>
> *(ii) That, even if the appellant fails to satisfy Court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted;*
>
> *(iii) Unless the reasons for the delay is owing to a mistake or misconception as to the correct applicable legal position on the part of the lawyers."*

[21] It would appear that the said proposals are yet to be considered by Full Court or the Supreme Court. If they were, no case had been cited by the Appellant on it.

[22] The Appellant, in paragraph 17 of the affidavit in support, stated that he believes, his case has "*great prospect of success*", and the appeal grounds are meritorious. He submits that the grounds of appeal have likelihood of success. Apart from the matters deposed in the Affidavit, the Appellant did not explain and or clearly demonstrate how and why each of the ground of appeal has great prosect for success or attempt to clearly explain the merits of each ground and whether it is arguable. Such would greatly assist the Court in evaluating and assessing each of the grounds, having regard to the judgment and the submissions of the Respondents. The Appellant had quoted generously from the decision in **Ghim Li (supra)** and a related cases (see pages 6 and 7 of written submissions), but had failed to demonstrate how the principles and propositions enunciated in the cases, , apply to this case, and theirs relevance to his circumstances.

[23] At the hearing the Appellants Counsel:

(1) Submits there has been considerable delay in filing the relevant application for leave, and submits that it is to be considered together with the grounds of appeal which he argues are meritorious, and, serious miscarriage of justice would occur if the court were to refuse the Appellant's application for enlargement of time.

(2) Submits that despite the delay, there is an arguable case. Denial would result in miscarriage of justice.

(3) Submits that the Police are guilty of malicious prosecution of the Appellant. That the four requirements the Plaintiffs needed to establish to succeed in an action for malicious prosecution were satisfied. These requirements, i.e., the test, is set out in paragraph 44 of the judgment in **A v New South Wales** [2007] HCA 10), as follows*:*

i). that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by *the defendant;*
ii) that the proceedings terminated in favour of the plaintiff;
iii) that the defendant, in initiating or maintaining proceedings acted maliciously; and
iv) that the defendant acted without reasonable and probable cause.

(4) Submits that the Police acted maliciously, as there was no evidence to be prosecuted at the trial.

[24] It is alleged that the Judge did not cast his mind on whether there was malice? Or whether there was '*reasonable cause'*. Counsel for the Appellant submits that malice is proved by the fact that there was no evidence against the Appellant at the trial. The prosecution at the trial stood and said "*There is no evidence*". Counsel asked whether the prosecution acted reasonably?

Consideration of the Appeal Grounds

[25] Whether there is a ground of merit?

Ground 1: The appellant challenges the findings of the learned trial Judge that the 1st Defendant/1st Respondent on behalf of the Police had reasonable suspicion to arrest and

charge the Appellant. He submits that the arrest was unlawful as it was without a warrant. The doctrine of reasonable suspicion was not put to the Appellant in cross examination and was never pleaded. It was framed without a complaint being lodged.

[26] The trial Judge dealt with this issue in paragraphs 8 to 16 of the judgment. The evidence of DW1 (Frederick Bull, Acting Sergeant, Crime Officer at TPS) confirmed that the complaint was made by an unknown caller to the TPS. DW2 (the first defendant) informed him (DW1) that it was recorded. DW1 went with DW2, who he had appointed as Investigation Officer, to the scene and they saw smoke coming out of the vehicle. They found it suspicious and immediately cordoned off the area.DW2 (Investigating Officer), stated in evidence:

> *"…. caution interviews, statements, summary of facts and investigation dairy ……constituted sufficient evidence to arrest the plaintiffs. He referred to "Summary of facts" concerning PW1, which provides that during the investigation, it was revealed that LT403 was insured with LICI Company and PW1 was making payment for the vehicle…The interior of the vehicle, (taxi) was partially burnt. On 28th July 2018, he found that Chandra Wati was the owner of the vehicle.PW1 said in his evidence that the said vehicle was parked in his business premises, PW2 and PW3 said that they were both in the premises when DW1 and DW2 came there on 8th June, 2018."*

[27] The above evidence was reviewed by the learned Judge who accepted the evidence of DW1 and DW2 that the vehicle was burning when they visited the scene. Section 18 of the Criminal Procedure Act 2009 provides that a police officer may arrest a person without a warrant in certain circumstances; the offence was a continuing when DW1 and DW2 visited PW1's premises. Smoke was coming from the vehicle. The arrest was lawful as held by the learned Judge, there being reasonable suspicion for the police to arrest the Plaintiffs.

[28] It appears, that the trial Judge had rightfully reviewed the evidence of the witnesses as highlighted above, and had accepted the evidence of the defendants 'witnesses that lead to the arrest of the Appellant. The Appellant was represented at the trial by a Senior Counsel and any irregularities arising at the pleadings stage, or during the trial, including

the issues on compliance with rules of evidence (including in cross examination of witnesses), ought to normally be raised during the trial.

[29] The trial Judge had after consideration of the evidences adduced in the context of the arrest had, as a matter of fact concluded that, under the circumstances, there was reasonable suspicion that an offence had been committed, in contravention of the Crimes Act 2009.There is no credible submission from the Appellant to support the ground. The Appellants' challenge, is against the decision by the Police to arrest and charge the Appellant.

[30] It would appear that the learned Judge had properly taken into account all the evidence available to him on the circumstances, and had assessed and evaluated and weighed the evidences on both sides, and having done so, had accepted the evidence of the witnesses-for the Defence. The trial Judge concluded (paragraph 16) that *"...there was reasonable suspicion for the Police to arrest the Plaintiff. The arrest was lawful".*

[31] On the allegation that the charge was a nullity and was framed without a complaint being lodged by any persons, a similar allegation was raised in **Fiji Independent Commission Against Corruption (FICAC) v Nikolau Nawaikula** [2022] FJHC 192; HACD005.2022S (3 may 2022). The defence counsel drew Court's attention to the fact that the complaint brought against Nawaikula had been made by an anonymous person and the complainants name remain unknown throughout. Counsel contends that section 56(1) (a) of the Criminal Procedure Act requires a complaint to be made by a person designated as a complainant in the matter, the institution of Criminal Proceedings was unlawful and invalid from the outset. The court stated that:

> *"In relation to the anonymity of the complainant, thought there can be many practical reasons for a complainant to remain anonymous, there can't be any anonymity in the evidence led in Court to prove the case by the Prosecution beyond reasonable doubt. In this regard, though the complainant may not be brought to Court, all the pertinent evidence should be lead in Court in the presence of the accused by the Prosecutor."*

[32] In this case the complainant was an "*unknown caller*". The appellant was acquitted due to the fact that there was no evidence that was led by the prosecution against him. The central question in cases where the complainant is unknown seems to be: Whether harm is caused to the fairness of the trial by such anonymity, since the prosecution is bound to prove the charges beyond reasonable doubt with evidence lead in Court to convict the accused. Ground 1 is not arguable. It has no merit.

[33] **Ground 2 -** It is alleged that the trial Judge erred in not holding that the Appellant had never committed a crime, and he should not have been charged. That the Respondents owed a duty to carry on a thorough investigation, and obtain statements as necessary, before the filing of formal charges.

[34] The circumstances of the arrest and laying of charges are as explained above in relation to Ground 1. The Appellant had not provided a clear explanation or demonstrate that the ground has prospect for success, or that it is arguable and has merit. Paragraphs 9 to 11 of the Judgment are relevant, and, it appears that the Respondents were acting within the law. Based on the facts and the charges laid, it was held that they had correctly acted in line with the law. The Appellant and his colleagues were investigated and the Police had reasonable suspicion, a crime had committed, under section 369(1) of the Crimes Decree 2009, which states- "*A person commits a summary offence if he or she wilfully and unlawfully destroys or damage any property."…….*

[35] Paragraphs 10 and 11 of the judgement states:

> *"DW2 said that the caution interviews, statements, summary of facts and investigation diary of the Investigation officer constituted sufficient evidence to arrest the plaintiffs. He referred to the "Statement of Facts" concerning PW1, which provides that during the investigation, it was revealed that LT403 was insured with LICI Company and PW1 was making payment for the vehicle. The interior of the vehicle, (taxi) was partially burnt. On 28thJuly, 2018, he found that Chandra Wati was the owner of the vehicle." [11] PW1, in his evidence said that the vehicle was parked in his business premises.PW2 and P3 said they were both in the premises when DW1 and DW2 came on 8th June, 2018."*

DW2 is the Investigating Officer, and PW1 is the Appellant.PW 2 and PW3 are the second and third plaintiffs.

[36] Section 18 (a) of the Criminal Procedure Act 2009 empowers a police officer, who, without an order from a magistrate and without a warrant, to arrest any person, whom the officer suspects on reasonable grounds of having committed an indictable offence (whether or not the offence is triable summarily). The Appellant was arrested due to the fact that the Police had reasonable suspicion that he had committed an offence under section 369 (1) of the Crimes Decree. This ground is not arguable. It has no merit.

[37] **Ground 3** - The Appellant contends that the learned Judge erred in failing to make correct inferences, which should have been drawn from the fact there were no charges in law that could be filed as no crime was committed. The Appellant has not clearly explained or demonstrate the merits of the ground, or why or how it has prospect for success and why it is arguable. This ground is adequately answered in the responses to grounds 1 and 2 above. Also, the charge is not concerned with who is owner of the property that was set on fire and is destroyed and damaged. As to ownership of the motor vehicle, there are conflicting evidence. The appellant says that he owns the car. However, it could be inferred from paragraphs 10 and 11 of the judgment-see above, that the ownership of the car was only established after 28th July 2018, and it belongs to someone else.

[38] At the hearing (paragraph 5 of judgment), the Appellant had given conflicting accounts, as follows: *"In evidence in chief, PW1 said that he was charged for damaging his motor vehicle. The vehicle did not belong to him. It was parked in his premises……. In his cross examination, he said he did not own the vehicle, (a taxi). He did not say the vehicle belong to him. It was parked in his premises.* The ground is not arguable. It has no merit.

[39] **Ground 4-** It is alleged that the learned trial Judge erred in failing to analyse the evidence of the witnesses, especially the evidence of the witnesses who had testified of the assault against the appellant etc.

[40] The Appellant had not clearly explained why and how the ground has prospect for success, and or is arguable and has merit. The learned Judge had considered the evidence of PW4 and PW5 on the alleged assaults on the Appellant and the other plaintiffs. He

viewed the Evidence of PW4 and PW5 with scepticism – they have their own issues with the Police. They were arrested and locked up in the cell with the plaintiffs. They were not viewed as reliable or independent witnesses by the learned Judge. According to the account of the Appellant's examination in chief (paragraph 5 of judgment):

> "*On 8th June 2018, at 7pm he went to TPS to ask the reason the second (his father-in-law) and third plaintiff (his worker) were locked up. The first defendant growled at him and handcuffed his hands. He handcuffed his left hand to a louvre frame. He could not sit and stood from 7pm till midnight……The next morning the handcuffs were removed……It was put to him that he was lying that he was handcuffed to a louvre and he broke the metal louvre blade."*

[41] The learned Judge has made findings of facts which he had carefully considered and analysed in paragraphs 30 to 40 of the judgment. At paragraph 41, the learned Judge stated:

> *"In the circumstances I do not accept the contentions that PW1 was handcuffed to a louvre frame and broke the metallic frame nor that PW2 and PW3 were assaulted.*"

The ground is not arguable. It has no merit.

[42] **Ground 5 -** The ground alleges that the constitutional rights of the Appellant was violated. When taken into custody without any complaint, incarcerated and their freedoms curtailed, as the charges against them could not be framed and which is a nullity.

[43] The Appellant had not provided any clear explanation on why and how this ground has merit or is arguable or has prospect for success**.** From the responses / discussions connected to paragraphs 1-4 above, it will be evident that, according to the well-considered assessment, evaluation of the evidence by the trail judge, it can be accepted that the arrest was lawful, as the police were reasonably suspicious that an offence was committed, and that the Appellant was confused on the issue of ownership of the vehicle, and lied or contradicted himself in the claim that he was tied to a louvre, and he broke through. The trial judge had addressed this ground in paragraphs 17 to 29 of the Judgment. The learned Judge had made findings of facts, and no reason has been advanced why, the

findings is being challenged or faulted. Arguments relating to the arrest and laying of charges are covered in response to ground 1.

[44] On the allegation of breach/ violation of section 13 (1) (f) of the Constitution, it is clear, as explained in paragraph 23 of judgment that *"it was reasonably not possible to produce the plaintiffs before 12th June, 2018 for the reasons set out in the preceding paragraph."* The reason is that the plaintiffs were arrested on a Friday. They had to be transported from Taveuni to Savusavu and then to Labasa, as there is no permanent Magistrate neither in Taveuni nor Savusavu. The question to be asked is: Whether the reasons accepted and held by the trial Judge is consistent with the requirements of section 13 (1)(f) of the Constitution? A breach of section 13(1) (f) of the Constitution would be regarded as a serious matter, as it violates the rights of an arrested and detained person. Section 13 (1) (f) states:

> *"Every person who is arrested or detained has the right-…*
>
> *(f)to be brought before a court as soon as reasonably possible, but in any case, not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter…"*
> (Underlining is for emphasis)

[45] The Bill of Rights of which section 13 is a part, binds the legislative, executive and judicial branches at all levels, and every person performing the functions of any public office- section 6 of the Constitution. On my reading of the provision, in the context of the judgment, I am convinced the it was not reasonably possible to bring the plaintiffs before a court not later than 48 hours after the time of arrest, and the plaintiffs, under the circumstances were brought before a court *"as soon as possible thereafter".* As such, there is no breach of section 13 (1) (f) of the Constitution. On the complaints regarding the conditions of the cell and the overcrowding, these are adequately explained in paragraphs 25 to 28 of the judgment. The Appellant, could also take the initiative to seek constitutional redress under sections 44 (Enforcement) and 45 (Human Rights and Anti-Discrimination Commission) of the Constitution, which, it seems he has not done. The ground is not arguable. It has no merit.

[46] **Ground 6 -** This ground alleges that the learned Judge had acted against the body of evidence produced in Court by the Plaintiffs, which were not contested through credible evidence by the Respondents. The Appellant had not specified or explained what the body of evidence are or what constitutes the body of evidence referred to. Nor has the Appellant clearly explained why and how, the ground has prospect for success, or is arguable, or has merit. It is a vague assertion that has not been adequately explained by the Appellant. It lacks specifics. However, the learned trail Judge had carefully considered, evaluated and weighed all the evidences of the parties, as demonstrated in the following passages of the judgment:

Paragraph 7- where the Issues are set out.

Paragraphs 12-16 in relation to Arrest.

Paragraph 17 to 29 in relation to Constitutional rights.

Paragraphs 30 to 42 in relation to Assault.

Paragraphs 43 to 55 in relation to Malicious Prosecution.

Paragraphs 65 to 69 in relation to False Imprisonment.

[47] The learned trial Judge had considered and analysed the evidence, and discussed the relevant authorities. The judgment demonstrates otherwise, that is, the judge had considered equally the evidence of the Appellant and the evidence of the respondents. The trial Judge had also discussed the applicable law and legal principles pertaining to the allegations of Arrest, Rights of arrested and detained persons, Assault, Malicious Prosecution and False Imprisonment. In dealing with these issues, the trial Judge in my view, had to make decisions on which evidence to accept and which to reject in accordance with the Rules of Evidence, including the burden of proof in civil cases. The trial Judge's decisions taken after assessment evaluation and weighing of the evidences, is consistent with the process and procedure applicable in the adjudication of disputes in an adversarial system of justice as adopted, and adapted for this jurisdiction from the English System of Justice. The ground is not arguable. It has no merit.

[48] **Ground 7 -** The ground alleges the learned Judge erred in failing to take into consideration the overall conduct of the Respondents and in particular failed to analyse

the contradictions, especially in the evidence of Divisional Prosecution Officer Northern. The learned Judge had addressed the inconsistencies/contradictions in evidence particularly that of Divisional Prosecution Officer's testimony. In the final, the learned trial Judge found the evidence of the respondent, including the police officers, to be credible and consistent with the facts. The Court's evaluation of a witness's credibility is a matter of fact, and there is no legal basis of overturning it such a finding unless there is a clear error. The ground has no reasonable prospect of success.

Degree of Prejudice

[49] In paragraph 17, of his Affidavit the Appellant deposed: *"I believe that I have great prospect of success and meritorious grounds of appeal."* In his written submissions, he stated (paragraph 12) that *".... the Appellant would suffer irreparable harm and damage s if he is not granted leave for enlargement of time. In view of the cases cited, this Court has the discretion to enlarge time. The Appellant has great likelihood of succeeding in his appeal as the decisions of the High Court cannot stand on the basis of decided authorities."* There was no further clear explanation to support the Appellants contentions, noting that the Appellant's Claims were rejected in the High Court. The Respondents' state that the Appellant has failed to demonstrate how irreparable loss and damage would be suffered, and submits that the Appellant will not suffer any loss or damage.

[50] For its part the Respondents submits that they would face significant prejudice if leave is granted. The appeal should not be allowed as the Respondents would be unfairly prejudiced by unnecessary expenditure of Government fund and resources. This is due to:

(i) Additional costs associated with setting up a Police tribunal to investigate the conduct of the officers involved;

(ii) There may be significant challenges in calling witnesses as this matter dates back to 2019;

(iii) Witnesses may no longer be available or may have left the Police force;

(iv) Even if witnesses were available, they may not recall the events that transpired in 2019, rendering any investigation ineffective;

(iv) The learned Judge's findings clearly indicate that the Appellant was not unlawfully arrested and the Appellant failed to meet the test of malicious prosecution, it is only reasonable to conclude there are no merits to the appeal.

It submits that under the above circumstances, the appeal should not be granted.

Irreparable Serious Injustice

[51] In **Datt v Datt** Civil Misc. Action No.33 of 2011: 07 June 2013[2013] FJCA 58, which considered several decisions and set out a few additional grounds. Whether the appeal raises, issues of general importance; Important questions of law, and Issues that in the interest of justice should be considered by the Full Court The parties have not raised issues that may be deemed within the scope of these additional grounds.

Conclusion

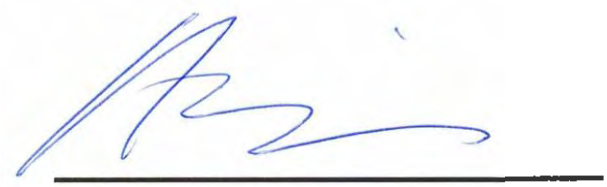
[52] I have considered and carefully assessed the materials available to the Court at this stage, and the grounds of appeal and the respective submissions of the parties, and the Judgment under scrutiny. I have paid attention to the approach proposed in the Appellant's submissions at page 8 thereof in association with **Mishri Prasad Jas v Sant Ram & Shiu Ram** Civil Appeal No. ABU 112 of 2018**,** and **Energy Clark v. Zip Fiji [2014] FJCA 189**, and **Ghim Li Fashions.** It stated:

> *"[25] The bottom line here is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected."*

[53] In consideration of the foregoing, the Appellant's application for enlargement of time for leave to appeal the decision of the High Court is refused.

Orders of Court:

1. *The Appellant's application for enlargement of time is refused.*
2. *The Appellant to pay $1500.00 Costs to the Respondents within 21 days from the Ruling.*



Hon. Justice Alipate Qetaki

RESIDENT JUSTICE OF APPEAL