

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**MISCELLANEOUS JURISDICTION**

**MISCELLANEOUS CASE NO. HAM 092 OF 2013S**

**STATE**

**vs**

- 1. NITYA RAM**
- 2. UMESH KANT**
- 3. PITA TAMANI**

**Counsels** : **Mr. J. Niudamu for the State**  
**Mr. T. Sharma for Accused No. 1 & 3**  
**Ms. S. Narayan for Accused No. 2**

**Hearings** : **2 August, 2013**

**Judgment** : **7 March, 2014**

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**JUDGMENT**

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1. In Suva Magistrate Court Criminal Case No. 739 of 2011, the accused faced the following charges:

**FIRST COUNT**

**Statement of Offence**

**CRIMINAL TRESPASS:** *Contrary to section 197 (1) (a) of the Penal Code, Act 17.*

**Particulars of Offence**

***NITYA RAM, UMESH KANT and PITA TAMANI, on the 30<sup>th</sup> day of October, 2009 at Nasinu in the Central Division, by day entered the compound***

adjoining the dwelling house of **MAHABIR NARAYAN** without lawful excuse and remained in the property after being warned to leave.

## **SECOND COUNT**

### **Statement of Offence**

**DAMAGING PROPERTY:** *Contrary to section 324 (1) of the Penal Code, Act 17.*

### **Particulars of Offence**

**NITYA RAM, UMESH KANT and PITA TAMANI**, on the 30<sup>th</sup> day of October, 2009 at Nasinu in the Central Division, willfully and unlawfully damaged the gate and a car valued at \$7,600.00 the property of **MAHABIR NARAYAN**.

2. On 7 February 2012, the prosecution and the accuseds agreed to a hearing date on 30 and 31 October 2012.
3. A summary of what occurred thereafter, is best described by quoting paragraphs 4 to 9 of the State's "Petition of Appeal", which were as follows:

“...4. **ON** the day trial date, the prosecutor made an application for the hearing to be adjourned as the complainant had made representations to the Office of the Director of Public Prosecutions requesting that the prosecution be handled by the DPP's Office.

5. **THE** hearing was vacated by the learned Resident Magistrate Mr. Sumudu Premachandra.

6. **COUNSEL** for the defendants made applications for costs.

7. **THE** learned trial Magistrate Mr. Sumudu Premachandra by way of an oral judgment dated 30 October 2012 ordered that the complainant pay costs amounting to \$500.00 in criminal case no. 739/11.

8. **THE** criminal matter CF 739/11 is listed for review of payment on 19<sup>th</sup> April 2013.

9. **BEING** *dis-satisfied with the said decision the appellant wishes to appeal against the said order for costs against Mahabir Narayan on the following grounds:*

i. **THAT** *the learned Magistrate erred in law and in fact in wrongly applying section 150 (4) (b) of the Criminal Procedure Decree 2009 that the complainant, Mahabir Narayan was a party to the criminal proceeding when Mahabir Narayan was only a state witness in the criminal matter CF 739/11 and thereby ordering that Mahabir Narayan pay costs to the defence counsels in the amount of \$500.00;*

ii. **THAT** *the trial Magistrate erred in law and in fact in awarding \$500.00 costs against the said Mahabir Narayan, the complainant, because the state was a party to the proceedings;*

iii. **THAT** *the learned Magistrate erred in law and fact in not conducting a means test, that is, not enquiring whether Mahabir Narayan had the means to pay the costs awarded against him..."*

4. I have perused the court record, and have read the learned Resident Magistrate's notes in the record, to find out whether or not the State's complaint was justified.

5. This case calls into question the meaning and effect of the word "party" in section 150 of the Criminal Procedure Decree 2009, which reads as follows:

*"...150 (1) A judge or magistrate may order any person convicted of an offence or discharged without conviction in accordance with law, to pay to a public or private prosecutor such reasonable costs as the judge or magistrate determines, in addition to any other penalty imposed.*

*(2) A judge or magistrate who acquits or discharges a person accused of an offence, may order the*

*prosecutor, whether public or private, to pay to the accused such reasonable costs as the judge or magistrate determines.*

- (3) An order shall not be made under sub-section (2) unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter.*
- (4) A judge or magistrate may make any other order as to costs as may be required in the circumstances to
  - (a) defray the costs incurred by any party as a result of an adjournment sought by another party;*
  - (b) recompense any party for any costs arising from any conduct by any other party which delays a trial or requires the expenditure of monies as a result of the conduct of that party during a trial;*
  - (c) penalise a lawyer for any improper action during a trial, and in such a case the order may be that the lawyer pay the costs personally; and*
  - (d) otherwise meet the interests of justice in any case.**
- (5) The costs awarded under this section may be awarded in addition to any compensation awarded by the court under this Decree or the Sentencing and Penalties Decree 2009.*
- (6) Payment of costs by the accused shall be enforceable in the same manner as a fine.*
- (7) In this section "private prosecutor" means any prosecutor other than a "public prosecutor"..."*

6. I have read, with interest, both parties' submissions on the meaning of the word "party" in section 150 of the Criminal Procedure Decree 2009. The prosecution had argued that the word "party", must be restricted to the parties engaged in a criminal proceeding, that is, the prosecution on the one hand, and the defence (or accused), on the other hand. The defence, had however, argued for an extended meaning, that is, the word "party" must include others, who are strictly speaking not the prosecution or the defence. For example, the word "party" could include complainants in criminal cases, witnesses or other people directly or indirectly involved in a criminal proceeding.
7. The Criminal Procedure Decree 2009, in section 2 of its interpretation provisions, does not define the word "party". The Interpretation Act, chapter 7, also appears not to define the word "party". So, we have to examine section 150 of the Criminal Procedure Decree 2009 (CPD 2009) itself to find out the meaning of the word "party".
8. Section 150 (1) of the CPD 2009 refers to "any person convicted of an offence or discharge without conviction" to pay to "a public or private prosecutor" such reasonable cost as the judge or magistrate determines. It is obvious section 150(1) was referring to an accused person, and a prosecutor, as the two parties, involved in the proceeding. Section 150(2) of the CPD 2009 also referred to "A judge or magistrate who acquits or discharge a person" may "order the prosecutor, whether public or private, to pay to the accused" such reasonable cost. Like section 150(1) of the CPD 2009, section 150(2) of the CPD 2009 was also referring to an accused person, and a prosecutor, as the two parties, involved in the proceeding.
9. Section 150(3) of the CPD 2009, referred to section 150(2) of the CPD 2009. What then is the meaning of the word "party" as described in section 150(4) of the CPD 2009. In my view, the word "party" in section 150(4) (a) and (b) of the CPD 2009, must be given its contextual meaning, as used in section 150(1), (2) and (3) of the CPD 2009, that is, the word "party" means either of the parties involved in a criminal proceeding – the prosecution or prosecutor, on the one hand, and the accused or the defence, on the other hand. I will not touch the possible issues raised in section 150(c) and section 150(d) of the CPD 2009, and live that to the future to be argued, if it ever arises.

10. So, for the purpose of this case, the learned Magistrate erred when he imposed the \$500.00 cost on the complainant, because strictly speaking, the complainant was not a party to the proceeding. The party to the proceeding was the prosecution, and the \$500.00 cost, if it was appropriate, should have been imposed on the prosecution, not the complainant.
11. Before I leave this case, it would be worthwhile to comment on what occurred in this case. The power of police prosecutors to prosecute in the Magistrate courts derived from section 51(2) and 53 of the Criminal Procedure Decree 2009, which reads as follows:

*“...51. (2) The Director of Public Prosecutions as he thinks fit may appoint police officers to be police prosecutors for the purposes of conducting prosecutions in the Magistrate Courts. No police prosecutor may appear in the Magistrate Court without such appointment.*

*53. In any trial before a Magistrate Court, if the proceedings have been instituted by a police officer, any police officer having lawful authority to conduct the case may appear and conduct the prosecution notwithstanding the fact that he or she is not the officer who made the complaint or charge...”*

12. The above authorities appear to suggest that, before a police officer could be a police prosecutor in the Magistrate court, he or she must be appointed by the Director of Public Prosecution. It is envisaged that only those who possess the relevant skills would be appointed as police prosecutor in the Magistrate Court. I must say that in my 15 years service as a Resident Magistrate in the Magistrate Courts of Fiji, I have encountered many skilful police prosecutors, who were even better than lawyers.
13. In this case, the police prosecutor should not have allowed the complainant to interfere with his job as a prosecutor. Only if there are conflict of interests or other exceptional circumstance, should the prosecutor not proceed with the matter. The parties, on 7 February 2012 agreed to a hearing on 30 and 31 October 2012. If the parties were ready, the matter should have proceeded to a hearing. Any persons intending to jeopardize judicial proceedings must be forewarned of the “offences relating to judicial proceedings” in section 194 of the Crimes Decree

2009. If an offence is committed, a complaint must be made to the police, for charges to be laid.

14. For the above reasons, I allow the State's appeal and quash and set aside the Magistrate Court's \$500.00 cost against Mahabir Narayan, dated 30 October 2012. I understand the matter is set for trial on 9 September 2014. The matter is to be disposed off as soon as possible.

**Salesi Temo**  
**JUDGE**

**Solicitor for the State** : **Office of the Director of Public Prosecution, Suva.**  
**Solicitor for Accused 1 & 3** : **Tirath Sharma, Barrister and Solicitor, Suva.**  
**Solicitor for Accused 2** : **Diven Prasad, Barrister and Solicitor, Suva.**