

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**MISCELLANEOUS JURISDICTION**  
**CRIMINAL MISCELLANEOUS CASE NO.: HAM 222 OF 2014**  
**(MAGISTRATE COURT LAUTOKA CASE NO.:601/05)**

**BETWEEN:** GUSTON FREDRICK KEAN

*Applicant*

**AND:** STATE

*Respondent*

**Counsels:** Applicant in person  
Mr. Semi Babitua for the Respondent

**Date of Judgment:** 12.12.2014

## **JUDGMENT**

1. This is an appeal against a discharge order entered against the appellant by the Lautoka Magistrate Court.
2. The applicant was charged before the Lautoka Magistrate Court with count of Burglary contrary to section 299 of the Penal Code and second count of Larceny in dwelling house of properties to a value of not less than ten dollars contrary to section 270 of the Penal Code. Date of offence was 29.9.2005.
3. On 11.8.2010 prosecution moved to withdraw the charges. The application for the withdrawal was allowed and the applicant was discharged.
4. This application was filed on 18.9.2014 seeking leave to appeal against the discharge order. The grounds are:
  - (i) That the learned Magistrate erred in law when he failed to impose an acquittal order instead of a discharge order.

- (ii) That the learned magistrate erred in law in not exercising his judicial discretion properly resulting in the withdrawal order wrongly imposed.
- (iii) That the prosecution has failed to proceed or recharge applicant within the time frame of 12 months and thereby applicant's right to a fair trial to have this matter determine within reasonable time has been violated and infringed.

5. The section 169 of the Criminal Procedure Decree is as follows:

- (1) The prosecutor may with the consent of the court, withdraws a complaint at any time before the 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 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.

6. The Section 201 of the Criminal Procedure Code is as follows:

- (1) The Prosecutor may with the consent of the court at any time before the final order is passed in any case under this Part withdraw the complaint.
- (2) On any withdrawal as aforesaid–
  - (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 to make his or her defence, the court shall subject **to provisions of section 210, in its discretion** make one **or other** 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.

7. Therefore the Section 169 of the present Criminal Procedure Decree is almost identical to Section 201 of the Criminal Procedure Code.
8. State had filed written submissions. State had stated that the complainant in this matter had withdrawn the charges and the conceded that the proper order would have been an acquittal.
9. In **Siwan v State** [2008] FJHC 189; HAA 050.2008L (29 August 2008) Hon. Mr. Justice Daniel Goundar held that an order made pursuant to Section 201 (2) (b) of the Criminal Procedure Code is clearly discretionary. He further held:

*“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 wrong principle, or mistakes the facts, or is influenced by extraneous considerations or fails to take into 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, **Evans v Bartlam** [1937] AC 437). Failure to give weight or sufficient to relevant considerations 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).*

*In exercising the discretion pursuant to section 201 (2) (b), the court must not only take into account the interests of the prosecution but that of the accused as well. The section expressly provides that regard must be made to section 210 if withdrawal is made before the accused is called upon to make his defence. Section 210 provides for an acquittal of accused person where there is no case to answer. The test under section 210 was stated by Shameem J in **Abdul Gani Sahib** [2005] HAA 0022/05S (28 April 2005) as follows:*

*Whether there is relevant and admissible evidence implicating the accused in respect of each element of offence, and whether on the prosecution case and its highest, a reasonable tribunal could convict. Where the evidence is entirely discredited, from no matter which angle one looks at it, a court can uphold a*

*submission of no case. Where a possible view of the evidence might lead the court to convict, the case should proceed to the defence.*

*...And in **Barton** [1980] HCA48; (1980) 147 CLR 75 at 94-95, Gibbs ACJ and Mason J said:*

*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... though it may be that in exercising its power to prevent an abuse of process the court will on rare occasions be required to consider whether a prosecution should be permitted to continue."*

10. The Supreme Court of Fiji in **Mototabua v State** [2011] FJHC 10; CAV 0005.09 (12 August 2011) considered this legal position in respect of Section 201 (2) (b) of the Criminal Procedure Code which is almost identical to section 169 (2) (b) of the Criminal Procedure Decree. It was held that:

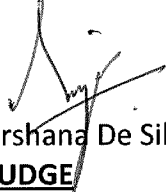
*"On a careful perusal of the provisions contained in subsection (2) (b) of section 201 it appears that there has been some injustice caused to the petitioner due to the failure on the part of the learned Magistrate and the High Court to consider the applicable legal provisions as to whether the petitioner should have been acquitted when exercising the discretionary power vested in the learned Magistrate under the above section of the Criminal Procedure Code.*

*Having considered the submissions made by the petitioner and the State Counsel who conceded the fact that there is a discretion conferred on the Magistrate under section 201 (2) (b) either to acquit the accused or discharge, we are of the view that special leave to appeal should be granted to the petitioner.*

*...Obviously, when the State Counsel informed court that the police had been advised that the accused cannot be recharged for the same offence the High Court should have acquitted the petitioner in the circumstances of the case and to prevent any injustice being caused to the accused. The High Court has failed to act in terms of the law and apply its mind correctly.*

*Upon the withdrawal of the charge by the prosecutor, question is whether the learned Magistrate exercised the judicial discretion properly and did the High Court exercise the judicial power properly in appeal whereas the accused (the petitioner) should have been acquitted on the material placed before the court."*

11. Applying above principles to this case the following factors could be taken in to consideration.
- (i) The date of offence is 29.9.2005
  - (ii) The nature of the allegation
  - (iii) The application to withdrawal was on 11.8.2010
  - (iv) The complainant had had withdrawn the charges
  - (v) The interests of the applicant
  - (vi) Constitutional Right of the applicant to have the trial begin and conclude without unreasonable delay
12. Considering all above this Court is of the view that this is fit case to exercise the discretion given in Section 169 (2) (b) (ii) of the Criminal Procedure Decree and to acquit the applicant.
13. Appeal is allowed. Applicant is acquitted.

  
Sudharshana De Silva  
**JUDGE**

At Lautoka  
12<sup>th</sup> December, 2014

Solicitors: Applicant In person  
Office of the Director of Public Prosecutions