IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 219 OF 2013S

BETWEEN YASIN ALI

APPLICANT

AND THE STATE

RESPONDENT

Counsels : Applicant in Person

Mr. Y. Prasad and Ms. A. Vavadakua for Respondent

Hearing : 25 March, 2015

Judgment : 10 July, 2015

JUDGMENT

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1. To understand the history of this case, it would be best to quote His Lordship Mr. Justice Paul Madigan, when he said the following in **Yasin Ali v The State**, Criminal Miscellaneous Case No. HAM 25 of 2012:

> "...The applicant was charged with rape of a minor in 2005. It went to trial hearing in 2007 when he was acquitted. The State appealed the acquittal. Winter J allowed the appeal but in doing so reduced the charge of rape to one of defilement. He adjourned sentence for the defilement conviction but left the bench before handing down sentence. In January 2008 Shameem J sentenced the applicant to three years imprisonment for defilement. The applicant appealed the conviction and sentence to the Fiji Court of Appeal. In June 2008 the Court of Appeal allowed the appeal but sent the case back to the Magistrate's Court for the applicant to be tried for rape, de novo. On the date of hearing for the retrial (22 October 2008) the State asked that the hearing to be vacated because the victim was in examination. A new hearing date was set for 24 November 2008. On that day the State asked for a new hearing date, they saying that they had lost the exhibits. The retrial proceeded to hearing on 11 February 2009, and continued on 3 March 2009. The abrogation of the

Constitution (on 9 April 2009) intervened between trial and judgment. The Magistrate then left the bench. The matter came before the lower court again in November 2011 for trial de novo before the Chief Magistrate..."

2. In **Yasin Ali v The State** (supra), the applicant made an application to the High Court to stay the trial de novo in the Magistrate Court on the ground of delay. In paragraph 9 of his judgment, His Lordship Mr. Justice Paul Madigan denied the applicant's stay application on 24 August 2012, and made the following orders:

> "...(i) **the case of 1651/2005 be called in the Magistrate's Court at Suva on 31 August next and a trial date fixed with the utmost priority;**
>
> (ii) **the State to make full disclosure of materials for this applicant;**
>
> (iii) **that all due expedition be given to having this trial completed;**
>
> (iv) **that a production order be issued to bring up the applicant/accused on 31 August next..."**

3. The matter then came before the Learned Resident Magistrate Mr. Charles Ratakele for the de novo hearing. The prosecution was in difficulty. Witnesses statements and exhibits had gone missing. This was probably due to the history of this case going from the Magistrate Court, to the High Court then to the Court of Appeal, and then back to the Magistrate Court. And not only that, I take judicial notice of the fact that this case was caught up in the legal and political turmoil of the country from 2005, when the case started to the trial de novo in 2013.

4. So, it was not unexpected for the prosecution to apply under Section 169(1) and 169(2)(b)(ii) of the Criminal Procedure Decree 2009 to withdraw the rape charge against the applicant, and ask for his discharge. The applicant made an application for an acquittal. Both parties were asked to submit written submissions. The court considered the same. The court granted the prosecution's application and withdrew the rape charge against the applicant, and discharged him accordingly, pursuant to section 169(1) and 169(2)(b)(ii) of the Criminal Procedure Decree 2009. He also denied cost to the applicant. The Learned Resident Magistrate gave a 10 pages written ruling on why he did the above on 16 July 2013. He gave the applicant 28 days to appeal if he was not satisfied.

5. On 19 September 2013, the applicant appealed against the Learned Resident Magistrate's above decision. His appeal grounds were as follows:

> "...1) **THAT the Learned Trial Magistrates erred in law by failed to give cogent reason behind his decision to discharge and not acquit the case.**

2) **THAT the Learned Trial Magistrate erred in law by fail to consider the unreasonable delay in having the matter proceed to trial as a matter of priority ordered by the High Court.**

3) **THAT the balancing of the Appellant case against the States Cases erroneous.**

6. Before I deal with the above appeal grounds, I need to make some preliminary observations. The decision appealed against was made on 16 July 2013. The applicant's petition of appeal was received by the High Court on 19 September 2013. He was required to appeal within 28 days, if dissatisfied with the Learned Magistrate's decision. However, he did not appeal within 28 days, and was out of time by 2 months 6 days. Technically therefore, the applicant had no right to appeal against the Learned Magistrate's decision, because he was well out of time. If he wants to appeal out of time, he must show "good cause" to get permission to do so. "Good cause" could be the merits of his appeal.

Appeal Ground No. 1

7. I have carefully read the Learned Magistrate's 16 July 2013 decision to find out whether or not the applicant's complaint was justified. In my view, the Learned Magistrate gave his reasons on why he accepted the prosecution's application under Section 169(1) and 169(2)(b)(ii) of the Criminal Procedure Decree 2009. Please, refer to paragraphs 5 to 9 of his ruling. In my view, this ground fails and I dismiss it accordingly.

Appeal Ground No. 2

8. In this case, the Learned Magistrate proceeded to trial without delay. The prosecution was in difficulty. All their witnesses statements and exhibits appeared missing. They did what was proper, given their evidential difficulties. They applied for a discharged of the accused by withdrawing the charge under Sections 169(1) and 169(2)(b)(ii) of the Criminal Procedure Decree 2009. The case was then closed. In my view, this ground fails and I dismiss it accordingly.

Appeal Ground No. 3

9. I can't understand what the applicant is complaining about under this head. If it was on the Learned Magistrate's decision on cost under Section 150 of the Criminal Procedure Decree 2009, in my view, the Learned Magistrate had not erred on his "cost" decision. He cited the

relevant Section, gave his reasons from paragraphs 11 to 26, and refused cost to the applicant. In my view, he was right in deciding against the applicant on the cost issue. If he wanted to claim $217,000.00, he should do so in the Civil Courts, not in the Criminal Courts. For the above reasons, Appeal Ground No. 3 fails, and I dismiss it accordingly.

Conclusion

10. Given the above, the applicant had shown no "good cause" for permission to be given to him, to appeal out of time. Consequently, the applicant's application to appeal out of time is dismissed.

Salesi Temo
JUDGE

Solicitor for Applicant : **In Person**
Solicitor for Respondent : **Office of the Director of Public Prosecution, Suva.**