

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAM NO. 100 OF 2016

BETWEEN : GUSTON FREDRICK KEAN

Appellant

AND : THE STATE

Respondent

**Counsel : Mr. M. Fesaitu for Appellant
Mr. A. Singh for Respondent**

Date of Ruling : 2nd of November, 2016

RULING

Introduction

1. This is an application for enlargement of prescribed time to file an appeal pursuant to Section 248 (1) and (2) of the Criminal Procedure Decree.
2. Pursuant to the serviced of the notice of motion, the Appellant and the Respondent appeared in court on the 3rd of June 2016. The learned counsel for the Appellant and the Respondent informed the court that the hearing of this leave application can be conducted by way of written submissions. I accordingly directed them to file their respective written submissions, which they filed as per the directions. Having carefully considered the notice of motion and the respective written submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

3. The Appellant had been charged in the Magistrates court of Nadi for one count of Robbery with Violence, contrary to Section 293 (1) (a) of the Penal Code. He was first produced before the Magistrates court on the 6th of February 2006. Subsequent to series of prolonged adjournments over the period between 2006 to 2012, the prosecution filed *Nolle Prosequi* in order to discontinue the proceedings against the Appellant on the 23rd of February 2012. Accordingly, the learned Magistrate discontinued the proceedings and discharged the Appellant.
4. The Appellant now wishes to appeal against the order of discharged made by the learned Magistrate on 23rd of February 2012 on the following grounds, which I reproduce in verbatim as follows;
 - i) *The prosecution has not resisted this matter since the discharge order was imposed,*
 - ii) *Prosecution has erred in law in not recharging me within one year time limitation,*
 - iii) *My rights to be tried within reasonable time without undue delay has been violated an denied by abuse of process,*
 - iv) *My rights to a fair trial has been denied and deprived of by prosecutorial misconduct,*
 - v) *The discharge was wrongly imposed,*
 - vi) *The learned Magistrates exercised a wrong discretion in not acquitting me of the said matter,*

vii) The prosecution has no interest in the matter anymore,

5. Having discussed the background of this application, I now draw my attention to discuss the laws pertaining to leave to appeal out of time.

The Law and Analysis

6. According to Section 248 (1) (a) of the Criminal Procedure Decree as amended by the Criminal Procedure (Amendment) Decree 2014, any petition of appeal against any Judgment, sentence or order of the Magistrates' court must be filed at the Registry of the High Court within 28 days of such decision. Section 248 (2) of the Criminal Procedure Decree has conferred the High Court with discretionary power to enlarge the limitation of the time of appeal on the ground of any good cause. Section 248 (3) has provided some of the factors that the court could consider in order to determine the good cause as stated under Section 248 (2). Section 248 (2) and (3) of the Criminal Procedure Decree states that,
- i. The High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.*
 - ii. For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include —*
 - a) A case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*
 - b) Any case in which a question of law of unusual difficulty is involved;*

c) *A case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;*

d) *The inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.*

7. Justice Shameem in **Buka v The State (2002) FJHC 110, HAA0013D.2002S (14 May 2002)** while dealing under the Section 310 (1) of the Criminal Procedure Code (equivalent to Section 248 of the Criminal Procedure Decree) held that;

"Under Section 310 (1) of the Criminal Procedure Code, the High Court may enlarge the 28 days appeal period for a good cause. Good causes includes a case where a question of law of unusual difficulty is involved, and where the Appellant has been unable to obtain a copy of the court record.

In considering an application for leave to appeal out of time, a court generally considers the length of delay, the reasons for the delay, whether the appeal has any prospects of success and whether an injustice will arise if leave is refused"

8. The Supreme Court of Fiji in **Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012)** has discussed the factors that the court should consider in an application of this nature, where it was held that;

i) *The reason for the failure to file within time.*

ii) *The length of the delay.*

iii) *Whether there is a ground of merit justifying the appellate court's consideration.*

iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed,*

v) *If time is enlarged, will the Respondent be unfairly prejudiced?*

9. Having reaffirmed the above grounds as stipulated in **Kumar v State, Sinu v State (Supra)**, the Supreme Court of Fiji in **Rasaku v State [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)** held that;

“These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court”

10. In view of the observation made by the Supreme Court of Fiji in **Rasaku (supra)**, the court must always exercise the discretionary power given under Section 248 (2) of the Criminal Procedure Decree in order to ensure the fairness and justice to the proceedings and to the parties involved.
11. The Appellant did not submit any reasons for the delay. His argument is mainly founded on the ground that his appeal will probably succeed. Therefore, I now draw my attention to determine whether the grounds of appeal will probably be succeed if the leave is granted.
12. Having carefully considered the notice of motion and the submissions of the parties, I find that the Appellant's grounds of appeal are founded on the

contention that the learned Magistrate erred in law by allowing the prosecution to tender *Nolle Prosequi*. The Appellant argues that the Learned Magistrate failed to exercise his discretion in refusing the *Nolle Prosequi* filed by the prosecution or the learned Magistrate should have acquitted the Appellant instead of discharging him. Having submitted such, the Appellant seeks to set aside the order of discharged given by the learned Magistrate and invites the court to issue an order of acquittal.

13. Section 117 (8) of the Constitution of the Republic of Fiji Islands has stipulated the powers of the Director of Public Prosecution, where it states that;

The Director of Public Prosecutions may—

- a) institute and conduct criminal proceedings;*
- b) take over criminal proceedings that have been instituted by another person or authority (except proceedings instituted by the Fiji Independent Commission Against Corruption);*
- c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions or another person or authority (except proceedings instituted or conducted by the Fiji Independent Commission Against Corruption); and*
- d) intervene in proceedings that raise a question of public interest that may affect the conduct of criminal proceedings or criminal investigations.*

14. Accordingly, the Director of Public Prosecution has been given an authority to institute, conduct and discontinue any criminal proceedings, which is known as “persecutional discretion”.

15. Section 117 (10) of the Constitution states that;

“In the exercise of the powers conferred under this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority, except by a court of law or as otherwise prescribed by this Constitution or a written law”.

16. Section 49 of the Criminal Procedure Decree has provided the procedural framework to exercise the power given to the Director of Public Prosecution under Section 117 (8) (c) to discontinue any criminal proceedings. Section 49 (1) of the Criminal Procedure Decree states that;

“In any criminal case and at any stage of the case before conviction or judgment, the Director of Public Prosecutions or the Commissioner of the Fiji Independent Commission Against Corruption may enter a nolle prosequi, either by counsel instructed by him or her stating in court or by informing the court in writing that the State intends that the proceedings shall not continue”

17. Section 49 (2) of the Criminal Procedure Decree has provided the procedure that is required to be followed upon the entry of *nolle prosequi*. Section 49 (2) of the Decree states that;

“Upon the entry of a nolle prosequi under sub-section (1), the accused person shall be

—


a) at once discharged in respect of the charge for which the *nolle prosequi* is entered;
and

b) if the accused person has been committed to prison he or she shall be released; or

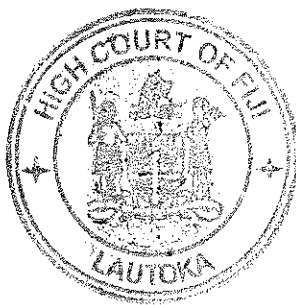
c) if the accused person is on bail his or her recognisances shall be discharged.

18. In view of Section 49 (2) (a) of the Decree, the court shall discharged the accused in respect of the charge for which the *nolle prosequi* is entered. The court has no discretionary power to accept or refuse the entry of *nolle prosequi*.
19. The power of the Director of Public Prosecution to discontinue any criminal proceedings falls with the persecutorial discretion conferred on him pursuant to Section 117 of the Constitution. The decision of the Director of Public Prosecution to discontinue the criminal proceedings can only be reviewed by the court in judicial review proceedings. However, the court must exercise such power of review sparingly. (**Matalulu v Director of Public Prosecutions (2003) FJSC 2; (2003) 4 LRC 712 (17 April 2003).**)
20. The Appellant does not challenge the decision of Director of Public Prosecution in entering of the *nolle prosequi*. He contends that the learned magistrate erred in discharging him, instead of an order of acquittal.
21. As discussed above, Section 49 (2) (a) of the Criminal Procedure Decree has not conferred the court with a discretionary power to discharge or to acquit the accused upon the entry of *nolle prosequi*. Hence, the order of discharged given by the learned Magistrate on the 23rd of February 2012 is correct in law.

22. Moreover, the Appellant submits that the failure of the prosecution to recharge him within one year of the discontinuation of the proceedings has violated his right to be tried within reasonable time. The entry of nolle prosequi is not a suspension or a pausing of the criminal proceedings. It is a discontinuation of the proceedings. Hence, there is no pending criminal charge or criminal proceedings against the Appellant in respect of the charge for which the nolle prosequi is entered. Therefore, I do not find any merits in the contention of the Appellant that his right to be tried within reasonable time and right of a fair trial are being violated.
23. In view of the reasons discussed above, I do not find the proposed ground of appeal by the Appellant has any probability of success if leave is granted.
24. In conclusion, I refuse this application and dismiss it accordingly.


R. D. R. Thushara Rajasinghe
Judge

At Lautoka
2nd November 2016



Solicitors : Office of Legal Aid Commission
Office of Director of Public Prosecution