

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL ACTION NO. HBM 01 OF 2015

BETWEEN: **GUSTON FREDRICK KEAN**

APPLICANT

AND: **STATE**

RESPONDENT

Counsel : **Applicant in Person**
 Mr J. Mainavolau for Respondent

Date of Hearing: **20th September, 2017**

Date of Ruling: **12th October, 2017**

RULING

1. The Applicant has made this application purportedly under Section 150 of the Criminal Procedure Act seeking costs from the State.
2. In his undated Notice of Motion supported by an affidavit dated 12th December, 2014, the Applicant says that he was convicted and sentenced by Govind J in a criminal matter by this Court on 7th February, 2008 and ever since he has been serving his prison term.

3. Applicant has not provided any information about a case where he has been acquitted of.
4. When this matter was taken up for hearing, in response to the submission made by the Counsel for Respondent, the Applicant stated:

"... it is not that judgment of Justice Govind that I am seeking compensation as you say in the affidavit, it's not that, I am saying compensation in respect to Criminal Case 600 which then became HAM 222 of 2014 which Justice De Silva acquitted me off. There is nowhere in the affidavit that I had stated that I seek compensation on that criminal case which I have been convicted of".

5. However, Applicant has failed to provide any information about the case HAM 222 of 2014 in his affidavit.
6. It appears from the oral submission made by the Applicant that he has been acquitted by this court in a criminal proceeding that had been pending in the Magistracy on the basis that the Magistrate had failed to dispose of the case within the time frame fixed by this Court.
7. Section 150 of the Criminal Procedure Act states:

"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) penalize 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".*

8. According to Section 150 (2) of the Criminal Procedure Act, a judge or magistrate who acquits or discharges a person accused of an offence, in his

discretion can order the prosecutor, whether public or private, to pay to the accused such reasonable costs as he or she determines.

9. It is clear that the discretion to award costs under this Section is vested in the judge or the magistrate who acquits or discharges a person, in this case Justice De Silva.
10. If Justice De Silva had not exercised his discretion to award costs, then the Applicant has no *locus standi* to bring a fresh application under Section 150 of the Criminal Procedure Act seeking costs after the discharge order (as a result of an acquittal) has been made.
11. When a Court discharges an Accused person, it become *functus officio* to make an order in respect of costs when no application for costs has been made and no date has been sought to seek costs before the discharge order was made.
12. In *Fosse v DPP* (1989) 16 NZWLR 540 at 546 Smart J looked at the question of when a cost application can be made.

“Three questions arise. The first question is whether the administrative ‘proceedings’ can be said to be still on foot for consequential purposes when no application for costs has been made and no date has been sought to seek costs.

The answer to this question must be in the negative. Administrative ‘proceedings cannot still be on foot even for consequential purposes when there is no outstanding application and no date has been sought on which to seek costs. Once may never be done.

The second question is whether the power to make an order for costs then in and by the order to discharge means that a substantive application for costs

can be made on a date subsequent to the order or process of discharge. I do not think that there is such a power because under (the Act) the power is limited to the process of discharge – "when making an order discharging a defendant".

The third question, is what is the purpose of allowing the order for costs to be made by other than the order discharging the defendant...However, whenever the order is made it must form part of the process of discharging a defendant. Such process is not complete if there is an outstanding application for costs. If there is no application and no date has been sought on which to make an application there is nothing on foot and the process of discharge must be regarded as complete."

13. In light of Section 150 of the Criminal Procedure Act, this court has no jurisdiction to entertain this application.
14. Application for costs is dismissed.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge

Judge

At Lautoka

12th October, 2017

Counsel: Applicant in Person
Office of the Attorney General for the Respondent