IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.HAA 133 of 2017
[Criminal Case No. 5409 of 2011]

BETWEEN	:	**STATE**
		APPELLANT
AND	:	**AMIT PRASAD**
		RESPONDENT
Counsel	:	**Ms S Kiran for the Appellant** **Ms K Chand for the Respondent**
Date of Hearing	:	**27 June 2018**
Date of Judgment	:	**17 August 2018**

JUDGMENT

[1] The State seeks an enlargement of time to appeal against the respondent's acquittal in the Magistrates' Court at Nadi.

[2] On 17 June 2011, the respondent was charged with aggravated dangerous driving contrary to sections 97(1) (2) (c) and 114 of the Land Transport Act 1998. The charge alleged that the respondent on 16 June 2011 at Nadi drove a motor vehicle in a manner dangerous to the public having regards to all the circumstances of the case and caused the death of Avinesh Kumar Singh (the victim). Although the respondent was charged with aggravated dangerous driving, the particulars of the charge did not disclose the circumstances of the aggravation. The respondent was produced in the

Magistrates' Court on the same date and released on bail. Thereafter the case was adjourned on eleven occasions by a different magistrate.

[3] The respondent was never asked to take his plea until 31 October 2013 when there was a change of magistrate. On this date the charge was amended. The amended charge was dangerous driving occasioning death contrary to sections 97(2) (c) (5) (d) (8) and 114 of the Land Transport Act 1998. The respondent pleaded not guilty to the amended charge. Thereafter the case was adjourned on eight occasions until 12 June 2015 when the matter was called before a different magistrate.

[4] The new magistrate adjourned the case on eight occasions until 1 August 2017 when he refused an adjournment sought by the prosecution and acquitted the respondent after the prosecution offered not to call any evidence.

[5] Section 246 of the Criminal Procedure Act gives the Director of Public Prosecutions a right of appeal against an acquittal. Section 248(1) of the Criminal Procedure Act requires every appeal to be filed within 28 days of the date of the decision appealed against. Section 248(2) of the Criminal Procedure Act gives the High Court discretion to enlarge the statutory appeal period for good cause. Good cause may include among other things the inability to obtain a written copy of the decision appealed against.

[6] Other relevant factors to be considered are:

(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 Courts 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?
Kumar v State; *Sinu v State* [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012)

[7] The application for an enlargement of time was filed on 13 December 2017. The appeal is late by three months. The main reason offered by the State for the delay is that a written ruling refusing the State an adjournment was not made available to the Director of Public Prosecutions to consider an appeal. The sole ground of appeal relates to the refusal of an adjournment. The ground states that the learned magistrate erred when he failed to exercise his discretion judiciously in refusing the prosecutor's application for an adjournment.

[8] The respondent opposes the State's application for an enlargement of time to appeal. Counsel for the respondent submits that the adjournment was correctly refused and that the respondent is prejudiced by the unreasonable delay in bringing the case to finality.

[9] The decision to grant or refuse an adjournment involves exercise of discretion by a judicial officer. The statutory requirement is that an adjournment should be granted for good cause. The guiding common law principle is that the discretion should be exercised judiciously so that the rights of the parties are not defeated and no injustice is done to one or other of the parties (*Maxwell v Keun* (1928) 1 KB 645, 653; *Macahill v R* [1980] FJCA 1; Criminal Appeal No 43 of 1980 (30 September 1980)).

[10] For the State to succeed with this application and the substantive appeal, the State must show that the learned magistrate made an error of law or fact or was unreasonable or unjust in refusing the prosecution an adjournment (*Siwan v State* [2008] FJHC 189; HAA 050.2008L (29 August 2008)).

[11] The learned magistrate gave the following reasons for refusing an adjournment to the State:

(1) In total, 8th hearings have being vacated and this is the 9th hearing. For most part, the application for adjournments was made by the prosecution.
(2) I agree that the charges (sic) are serious but at this stage the accused is presumed to be innocent until proven guilty by this Court.
(3) The Court has to consider too the rights of the accused and has being waiting for 6 years to defend him as required under the law.
(4) It is pretty clear that DPP were not ready from 3 years ago and still is today.
(5) In view of the law and the narration of the delay of this case, Court cannot and must not ascribe to the administrative issues of the DPP.
(6) In the interests of justice, the Court has duty that his case is disposed of in a reasonable manner and prosecution was not ready for hearing. In doing so, it greatly prejudice the constitutional right of the Accused to have the trial begin and conclude without reasonable delay.
(7) Six (6) years has lapsed from the filing of the case and still there is no determination by the Court on his quilt (sic) or otherwise.
(8) Altogether, there were 9 adjournments and 4 of which attributed to the prosecuting authority witnesses summoned to Court.
(9) I fully concur with objections of the Defence lawyer Mr. Koya and I find there is no good cause to grant adjournment.
(10) The State's application for adjournment is refused.
(11) I order State to proceed.

[12] Between 17 June 2011 and 1 August 2017, there were twenty seven adjournments. After the disclosures had been served, the case was set for trial on 20 September 2012. On this date, the prosecution witnesses were present but the respondent turned up late in court. The trial was vacated and the case was adjourned.

[13] After numerous adjournments, the case was listed for trial on 8 July 2013. However, the trial did not proceed on 8 July 2013 because the respondent turned up late in court and the case was adjourned. According to the court record, the prosecution witnesses were present in court on 8 July 2013, but by the time the respondent turned up, they had left the court because the trial was adjourned to 31 October 2013.

[14] On 31 October 2013, the respondent appeared in person and applied to vacate the trial on the ground to engage a new counsel as his existing counsel's office was closed without any notice. The trial was vacated and the case was adjourned over a strong

objection from the prosecution on the ground that their witnesses were present and one witness had even travelled from Suva. The case was adjourned to 9 December 2013 to fix a trial date. On 9 December 2013, the case was fixed for trial on 3 July 2014.

[15] On 3 July 2014, the respondent appeared with his new counsel who advised the court that he had been instructed recently. The trial did not proceed. After numerous adjournments the case was listed for a voir dire hearing before a new magistrate on 12 June 2015.

[16] On 12 June 2015, the new magistrate adjourned the case to 19 August 2015 for hearing. However, on 19 August 2015, the hearing did not proceed for reason not clearly stated in the court record.

[17] After two further adjournments, the case were listed for a voir dire hearing on 12 September 2016. The voir dire did not commence on 12 September 2016 because the interviewing officer had been transferred to Muaniweni and was not present in court.

[18] After three further adjournments, the case were listed for voir dire and trial on 1 August 2017, when counsel from the Office of the Director of Public Prosecutions appeared and applied for an adjournment. According to the affidavit filed on behalf of the Director of Public Prosecutions, the victim's family had written to him complaining about the delay in the hearing of the case and the manner in which the police prosecutor was handling the case. By the time the Director of Public Prosecutions made a decision to take over the prosecution, the State was not ready to proceed with the trial on 1 August 2017. For that reason, the State did not summon the witnesses.

[19] Counsel for the State submits that the learned magistrate made an error in attributing the delay largely on the prosecution. Counsel further submits that the learned magistrate only considered the interests of the respondent and not the victim or the public interest in the prosecution of serious offences.

[20] In his ruling, the learned magistrate quite rightly referred to the respondent's constitutional right to be tried without unreasonable delay. He concluded that the delay of six years was unreasonable and he attributed the delay largely on the prosecution.

[21] While six years is a long delay to conclude a criminal case, the delay cannot be attributed solely on the prosecution. In fact, the respondent and his counsel of choice were responsible for the adjournment of the trial on four earlier occasions. In other words, the respondent himself significantly contributed to the delay.

[22] The magistrates dealing with the case also contributed to the delay. Adjournments were granted on thin grounds. A man had lost his life allegedly at the hands of the respondent. On one occasion, the prosecution witnesses (presumably the victim's family) sought a hearing of the trial from the court. Little empathy was shown to the victim's family by the court.

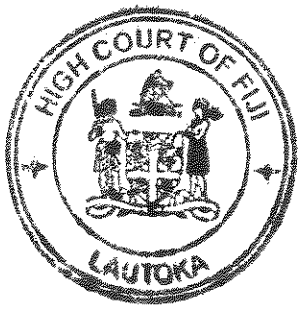
[23] The Director of Public Prosecutions quite rightly intervened and took over the prosecution. The Director was not responsible for the delay that had already occurred. The police prosecutor was ready to proceed with the trial on four earlier occasions and on one occasion even strongly objected to an adjournment applied by counsel for the respondent.

[24] In my judgment, the learned magistrate mistook the facts by attributing the delay largely on the prosecution and he failed to take into account the victim's interest and the public interest in the prosecution of serious crimes. The discretion was not exercised judiciously in refusing the Director of Public Prosecutions an adjournment to take over the prosecution. An adjournment should have been granted and the prosecution should not have been directed to call evidence knowing that the witnesses were not summoned.

[25] For these reasons, an enlargement of time to appeal is granted and the appeal is allowed.

[26] The acquittal is set aside and the case is remitted to another magistrate for a trial.

[27] The respondent is directed to appear in the Magistrates' Court at Nadi on 17 August 2018 at 9.30 am for mention and for the learned magistrate to set bail conditions. The trial should be heard expeditiously. The respondent is put on notice that if he contributes to the delay by turning late in court on the trial day, he will risk cancellation of his bail.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Director of Public Prosecutions for the Appellant
Siddiq Koya Lawyers for the Respondent