IN THE HIGH COURT OF FIJI AT LABASA

In the matter of an appeal under section 246 of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

STATE

Appellant

CASE NO: HAA. 17 of 2019
[MC Labasa Crim. Case No. 391 of 2017] **Vs.**

RAVIN DUTT PRASAD

Respondent

Counsel	**:**	Ms. D. Rao for the Appellant Mr. J. Korotini for the Respondent
Hearing on	**:**	18 September 2019
Judgment on	**:**	20 September 2019

JUDGMENT

1. This appeal is brought by the appellant (State) against an order for cost made by the Learned Magistrate in the case of Magistrate Court Labasa Case No. 391 of 2017. The sole ground of appeal reads thus;

   THAT *the Learned Magistrate erred in law in failing to consider section 150 (3) of the Criminal Procedure Act 2009 when deciding to award costs of $500.00 against the prosecution.*

2. The above named respondent was charged with the offence of ***Fail to Confine Animal by Fence*** and the Act under which the respondent was charged was stated as 'Trespass Act Cap 166'. The charge reads thus;

Statement of Offence

Fail to Confine Animal by Fence: Contrary to section 3 (1) (2) of the Trespass Act Cap 166 and Section 56 of Sentencing and Penalties Decree No. 42 of 2009.

Particulars of Offence

Ravin Dutt Prasad on the 28th day of August, 2016 at Seaqaqa in the Northern Division being the owner of seventy (70) goats and twelve (12) cattle, fail to confine such goats and cattle in a fence, pen, coral, stable or building at all times.

3. After the conclusion of the prosecution case, the Learned Magistrate found that there is a case to answer and called for the defence. Accordingly, one witness (not the respondent) had given evidence for the defence. The matter was initially fixed for judgment on 24/05/19 then on 27/05/19. On 27/05/19 the Learned Magistrate ruled that the entire proceedings is a nullity for the reason that there is no 'Trespass Act Cap 166' and therefore there is no crime before her to determine. The Learned Magistrate went further to award costs against the State in the sum of $500 to be paid to the respondent citing section 150(2) of the Criminal Procedure Act 2009 ("Criminal Procedure Act") and stating that it is in the interests of justice to do so.

4. This appeal is preferred against the said latter decision to award costs against the State. The appellant argues that the Learned Magistrate failed to consider the provisions of section 150(3) of the Criminal Procedure Act in awarding the said costs.

5. Sections 150(2) and 150(3) of the Criminal Procedure Act reads thus;

(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.

6. It is manifestly clear that section 150(3) of the Criminal Procedure Act serves as a proviso to section 150(2). Accordingly, a judge or a magistrate when an accused is acquitted or discharged may award costs in terms of section 150(2), but only in the following two situations;

    a) Where the prosecutor had no reasonable grounds to institute the relevant proceedings; or
    b) Where the prosecutor has unreasonably prolonged the matter.

7. It is plain from the impugned decision that the Learned Magistrate has completely overlooked the provisions of section 150(3) alluded to above and failed to consider whether the prosecutor had instituted the case without any reasonable ground or whether has prolonged the case unreasonably before taking the decision to award the aforementioned costs. In other words, the order for costs in the instant case was not made based on either of the two situations provided in section 150(3) of the Criminal Procedure Act. This is a clear error of law and this appeal should therefore succeed.

8. The discretion provided under section 150 of the Criminal Procedure Code to award costs should be exercised judicially and judiciously. Therefore, when a decision is made to award costs, it is necessary to give the party against whom that order is made, an opportunity to show cause as to why costs should not be awarded irrespective of the fact whether such order is made against the prosecutor (State) or the accused. The need to provide an opportunity to show cause before making an order for costs was stressed in the case of ***Vere v State*** [2017] FJHC 636; HAA17.2017 (30 August 2017) and this was affirmed by Rajasinghe J in the case of ***Autar v State*** [2018] FJHC 348; HAA036.2017 (30 April 2018).

9. Therefore, in deciding to make an order for costs in terms of section 150(2) of the Criminal Procedure Act, a magistrate should;

    a) First make an informed decision on whether the prosecutor had no

reasonable grounds for bringing the proceedings and whether the prosecutor has unreasonably prolonged the matter

b) If the magistrate comes to the conclusion that either the prosecutor had no reasonable grounds for bringing the proceedings or that the prosecutor has unreasonably prolonged the matter, then the magistrate should direct the prosecutor to show cause as to why an order for costs should not be made against the prosecutor

c) If the reasons provided by the prosecutor is not satisfactory, the magistrate should then proceed to determine the appropriate amount to be ordered as costs.

10. Even though the appellant has not raised as a ground of appeal, I consider it appropriate to examine the propriety of the decision of the Learned Magistrate in discharging the respondent.

11. The Learned Magistrate had discharged the respondent for the mere reason that the name of the Act under which the respondent was charged was printed as 'Trespass Act Cap. 166' whereas it should be 'Trespass of Animals Act 1955'.

12. There is no Act by the name of 'Trespass Act Cap. 166'. However, Cap. 166 or chapter 166 of the Laws of Fiji contains the 'Trespass of Animals Act'. It is abundantly clear that this is a typographical error. After the consolidation of Fiji Laws in 2016 the relevant Act is now known as 'Trespass of Animals Act 1955'. The court record does not bear evidence of any possible prejudice to the respondent as a result of this typographical error. Moreover, given the fact that the respondent had not raised any objection in this regard, it is clear that he was not prejudiced by this error.

13. It is pertinent to note that a charge sheet filed in the Magistrate Court is signed by the relevant magistrate in addition to the relevant police prosecutor. In fact, in terms of section 56(6) of the Criminal Procedure Act, a magistrate is required to draw up the formal charge when a case is instituted by a private complainant (a

person other than a police officer or other officer acting in the course of a lawful duty).

14. Therefore, a magistrate is required to ensure that the charge filed before him/her is valid in law. It follows that a magistrate cannot simply dismiss a case and discharge an accused for the reason that the said magistrate finds the charge to be defective.

15. The provisions of section 182 of the Criminal Procedure Act reinforces this position. In terms of section 182 of the Criminal Procedure Act if it appears to a magistrate before the close of the case for the prosecution that the charge is defective, the magistrate should make an order for the alteration of the charge.

16. Section 182 of the Criminal Procedure Act reads thus;

> *182. — (1) Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is defective (either in substance or in form), the court may make such order for the alteration of the charge, either by —*
> *(a) amendment of the charge; or*
> *(b) by the substitution or addition of a new charge —*
>
> *as the court thinks necessary to meet the circumstances of the case*

17. In the case at hand, the Learned Magistrate had held that there is a case to answer and called for the defence. Calling for the defense at the close of the prosecution case is not automatic. The rationale of the following dictum of Prematilaka J in the case of ***Walili v State*** [2017] FJCA 55; AAU0055.2013 (26 May 2017) in relation to making the decision to call for the defence in trials conducted before the High Court also applies to the magistrate court;

> *The fact that there is no application by the defense of no case to answer under section 231(1) does not absolve the trial judge from applying the threshold test ex mero motu and come to a decision before acting under section 213 (1) or (2) as the case may be. Similarly, the trial Judge cannot escape from this obligation even when, for reasons best known to them, the accused on their own elect to give evidence. Calling for the defense at the close of the prosecution case is not automatic. It is not a mechanical decision either. The judicial mind of the trial judge should be directed on the lines formulated in the aforesaid decisions before calling*

for the defense.

18. Section 178 of the Criminal Procedure Code reads thus;

> *178. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.*

19. In deciding whether 'a case is not made out against the accused person sufficiently to require him or her to make a defence', a magistrate is required to consider whether there is credible and reliable evidence on each element of the offence and, whether the evidence presented by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal would safely convict the accused on that evidence. [***Moidean v Reginam*** (1976) 22 FLR 206]

20. Coming back to the case at hand, the Learned Magistrate in deciding that there is a case to answer was therefore required to consider the charge and its elements. By calling for the defence, the Learned Magistrate had at that stage endorsed that the charge is valid. Therefore, by declaring on 27/05/19 that the charge is invalid the Learned Magistrate had contradicted the said position previously taken in relation to the charge.

21. However, in this case, the defect identified by the Learned Magistrate as I have already stated has not caused any prejudice to the respondent. In fact the said defect as it had materialized in the instant case can be regarded as insignificant and it is not capable of making the proceedings a nullity. I am reminded of the legal maxim *de minimis non curat lex* ("The law does not concern itself with trifles").

22. In the light of the foregoing, I consider this a fit case to invoke the revisionary jurisdiction of this court under section 262(1) of the Criminal Procedure Act to set aside the order made by the Learned Magistrate on 27/05/19 (but dated 25/05/19) dismissing the case and discharging respondent. Accordingly, the relevant order for costs against the appellant is rendered invalid automatically.

23. Taking into account the fact that the statement of offence refers to Cap. 166 which is the chapter which contains the Trespass of Animals Act and the fact that there is no indication of the respondent being prejudiced due to the typographical error where the 'Trespass of Animals Act' is cited as 'Trespass Act' in the said statement of offence, I do not consider it necessary to amend the charge to correct the said typographical error at this stage of the trial where both the prosecution case and the defence case have been closed and the judgment is pending.

24. In the circumstances, I would send the relevant case back to the Learned Magistrate who is currently serving in Suva to continue with the proceedings where the next step is to deliver the judgment. For the purposes of the relevant case the Learned Magistrate should regard the words 'Trespass Act' in the statement of offence of the charge as a reference to the 'Trespass of Animals Act 1995'.

Orders;

a) Appeal allowed;
b) The decision of the Learned Magistrate in Magistrate Court of Labasa Crim. Case No. 391 of 2017 (dated 25/05/19) delivered on 27/05/19 is set aside;
c) The said case should be sent to the aforementioned Learned Magistrate who heard the evidence and who is currently serving in Suva for the continuation of the proceedings;
d) Accordingly, once the judgment is ready, it should be delivered on notice in the Magistrate Court at Labasa and thereafter the sentence in the event the respondent is found guilty and is convicted;
e) The said case to be concluded within 03 months from today; and
f) The relevant case record should be sent to the Learned Magistrate forthwith.

Vinsent S. Perera
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the appellant
Legal Aid Commission for the Respondent