

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 74 OF 2019**

**BETWEEN** : **JOSUA NATAKURU**

**APPELLANT**

**AND** : **THE STATE**

**RESPONDENT**

**Counsel** : Appellant in person.  
Ms. L. Latu for the Respondent.

**Date of Hearing** : 25 November, 2020

**Date of Judgment** : 21 January, 2021

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**JUDGMENT**

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**BACKGROUND INFORMATION**

1. The appellant was charged with one count of Common Nuisance contrary to section 376 (1) (b) of the Crimes Act 2009 (as amended) at the Magistrate's Court, Sigatoka. It was alleged that the appellant on the 9<sup>th</sup> of January, 2014 swore and passed remarks to Corporal 1303 Atunaisa Tiva an act not authorized by law and caused annoyance to the said Corporal 1303 Atunaisa Tiva.
2. The appellant pleaded not guilty and the matter proceeded to trial. The prosecution called one witness in support of the charge. After the

prosecution closed its case the appellant made a no case to answer submission. On 30<sup>th</sup> April, 2019 the learned Magistrate upheld the application for no case to answer and acquitted the appellant. Thereafter the appellant made an application for costs and compensation. After hearing both the parties the learned Magistrate dismissed the application for costs and compensation.

3. The appellant aggrieved by the refusal of the Magistrate's Court filed a timely appeal in this court against the decision of the learned Magistrate. The appellant was represented by the Legal Aid Commission at one stage of the proceedings, however, after sometime the Legal Aid Commission was given leave to withdraw from representing the appellant.

#### **APPEAL**

4. The appellant filed his amended grounds of appeal as follows:
  - (a) *The learned Magistrate had acted upon a wrong principle.*
  - (b) *The learned Magistrate failed to take into account material considerations.*
  - (c) *The learned Magistrate had mistaken the facts.*
  - (d) *The learned Magistrate had allowed extraneous or irrelevant matters to guide and affect him.*
  - (e) *The learned Magistrate had failed to properly exercise his discretion in all the facts and circumstance of the case when dismissing the application.*

#### **LEAVE TO ADDUCE FURTHER EVIDENCE**

5. Before the substantive appeal could be dealt with, the appellant made it known to this court that he is seeking leave to adduce further or

additional evidence on appeal. The appellant filed his affidavit in support sworn on 29<sup>th</sup> July, 2020.

6. The prosecution did not file any affidavit in reply but relied on the submissions of the state counsel. The appellant seeks leave to adduce further evidence on appeal in particular the following documents:
  - a) Ruling of the Magistrate's Court at Lautoka dated 19<sup>th</sup> September, 2013 marked as annexure "JN - 1";
  - b) Letter addressed to the Sigatoka Police Station dated 20<sup>th</sup> January, 2017 marked as annexure "JN - 2"; and
  - c) Copy of the order of Small Claims Tribunal dated 4<sup>th</sup> June, 2019 marked as annexure "JN - 3".

#### SUBMISSIONS MADE BY THE APPELLANT

7. The appellant contended that the bail ruling is important to show that he was granted bail by the Magistrate's Court at Lautoka in an unrelated matter on 19<sup>th</sup> September, 2013. Since it was late Friday afternoon payment could not be made at the Sigatoka Court Registry hence the appellant wanted to give the amount of cash bail of \$500.00 to the police officer who was the escorting officer so that he could be released .
8. This police officer (who was the complainant in the matter before the Magistrate's Court) refused to accept the same. According to the appellant this refusal contributed to the appellant's prolonged detainment in the custody of the state. Furthermore, the bail ruling was not in the possession of the appellant when he had made the application

for costs in the Magistrate's Court since it was confiscated by the Corrections Officers during a prison search.

9. In respect of his letter written to the Sigatoka Police Station seeking further disclosures the appellant says the failure to get the additional disclosures of the names of prisoners he was locked up with at the police station cell and the report number of his complaint he made against the complainant and other police officers also contributed to a delay in the hearing of his substantive matter.
10. The appellant further states that he could not file a copy of this letter with his application for costs because it was misplaced in the prisoners property room at that point in time.
11. In respect of the Small Claims Tribunal order the appellant states that he lost a business venture to supply fruits and vegetables. He had given his business partner \$4,000.00, as a result of his detention by the police in refusing to accept his cash bail of \$500.00 and due to his continued detention he lost that business opportunity and he had to pay the Small Claims Tribunal fees to institute proceedings in recovering his \$4,000.00.
12. The reason for his failure to attach the Small Claims Tribunal order with his application for costs in the Magistrate's Court was because the Small Claims Tribunal order was made on the day he had made his application for costs in the Magistrate's Court.

## **LAW**

13. In the case of *Inoke Cumutanavanua v The State (2002) FLR 181, HAA 86 of 2001 (28 March, 2002)* Shameem J. had stated the principles that

must be considered in an application to adduce further or additional evidence on appeal:

- a) Whether the evidence is relevant to the appeal;
  - b) Whether the evidence is credible and admissible; and
  - c) Whether there was a good reason for the failure to adduce the evidence at the lower court.
14. After perusing the three annexures mentioned by the appellant, in my considered view all these documents are not relevant to the appeal filed by the appellant for the following reasons:
15. i).The bail ruling by the Magistrate's Court at Lautoka had mentioned the terms and conditions of the appellant's bail. The conditions were the payment of \$500.00 cash bail and to provide two sureties having a fixed address and monthly income of \$500.00.
16. The police officer had correctly refused to accept the \$500.00. He had no authority whatsoever to accept the cash bail on behalf of the court and then to release the appellant. There were other conditions to be met by the appellant which the police officer would not have been aware of.
17. The appellant was obviously trying his level best to be released from custody. In his pursuit to seek release from the police the allegation of common nuisance came about. The order was made by the court and it was incumbent upon the appellant to pay the sum of \$500.00 at the court registry unless otherwise directed by the court which is not mentioned in the ruling of the Magistrate's Court.

18. The appellant submitted that the payment was received late on Friday afternoon, this means the appellant had the earliest opportunity to attend to payment on Monday which he should have taken advantage of.
19. ii) In respect of the letter written to the Sigatoka Police Station there was no need for the appellant to write to the Sigatoka Police Station when his matter was pending in court. The appellant could have written to the police prosecutions or made it known to the court so that an order could have been made for the release of disclosures. The appellant misdirected his inquiry at his own peril.
20. iii) In respect of the order of the Small Claims Tribunal it is not known through independent evidence the facts of this case that led to the order being made. In any event the order made is favourable to the appellant. It was for the appellant to argue the award of costs to be paid to him at the Small Claims Tribunal when he was before the Tribunal since the Tribunal was aware of the facts of the matter and better placed to make a determination on costs.
21. In my view the above documents are not relevant to the grounds of appeal which is more about the exercise of the court's discretion in dismissing his application for costs. The annexures do not provide any support to the appeal when compared with the grounds advanced. Even if the documents had been presented to the learned Magistrate in my view the decision made would not have been any different considering the copy record.
22. In any event there is no doubt that the documents are credible and admissible. However, the reason given by the appellant for his failure to adduce the documentary evidence at the lower court is unbelievable. There is no independent evidence before this court to substantiate the

reasons why these documents were not put before the Magistrate's Court. If the appellant wished to rely on these documents he could have informed the Magistrate's Court and sought time to attach the same to his application or he could have sought an order from the court for the Corrections Services to release his documents or for the Small Claims Tribunal to release the order to him which would have been exhibited in the Magistrate's Court.

23. It is obvious to me that the above application is an afterthought of the appellant. After considering the application to adduce further evidence and the submissions made this court is not able to grant the orders sought.

#### **SUBSTANTIVE APPEAL**

24. After numerous adjournments for one reason or the other the substantive appeal was heard. The appellant relied on the following amended grounds of appeal during the hearing.

- b) The learned Magistrate had failed to take into account material considerations;*
- d) The learned Magistrate had allowed extraneous or irrelevant matters to guide and affect him;*
- e) That learned Magistrate had failed to properly exercise his discretion in all the facts and circumstances of the case when dismissing the application for costs.*

25. All the grounds of appeal can be dealt with together.
26. The appellant submits that the learned Magistrate had not taken into consideration that the police statement of the complainant was with the

prosecution which did not state that as a result of the appellant's conduct the complainant was ashamed.

27. According to the appellant the prosecution ought to have properly analyzed the statement of the complainant whether there was sufficient evidence against him to proceed with the charge. On 25<sup>th</sup> May, 2015 his duty solicitor from the Legal Aid Commission informed the court that the charge was not supported by the disclosures. This resulted in amended charges filed on 13 November, 2017.
28. The appellant also stated that he was charged in 2014 the charge was amended on 19<sup>th</sup> August, 2016 after 2 years and also that it was the prosecution that was prolonging the matter. The appellant also submits that the learned Magistrate had allowed extraneous or irrelevant matters to guide and affect him when he dismissed his application for costs and compensation.

### **DETERMINATION**

29. The learned Magistrate had correctly taken into account the test required pursuant to section 150 of the Criminal Procedure Act that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter.
30. Section 150 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) penalise 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 [Act] or the Sentencing and Penalties [Act] 2009.*

*(6) Payment of costs by the accused shall be enforceable in the same manner as a fine...”*

## **UNREASONABLE DELAY IN PROSECUTION**

31. Under this heading the learned Magistrate had mentioned the following from paragraph 9 to paragraph 13 of his ruling:

### Paragraph 9

*Upon perusal of the record the court notes that the matter was called for mention on thirty three (33) occasions including the first call of the matter on 7<sup>th</sup> July, 2014.*

### Paragraph 10

*Out of those mention dates the Applicant was present on sixteen (16) occasions whilst he was absent for seventeen (17).*

### Paragraph 11

*This was due mainly to the fact that he was remanded in custody for other matters from other courts.*

### Paragraph 12

*His plea was finally taken on 30<sup>th</sup> January, 2017 wherein the Applicant sought a fresh set of disclosures and the trial conducted on 23<sup>rd</sup> April, 2019.*

### Paragraph 13

*Looking at the record alone the court finds that the delay can[not] be attributed to Prosecution alone as a significant amount of delay was as a result of the absence of the accused.*

## **UNREASONABLE PROSECUTION**

32. Under the above heading the learned Magistrate had mentioned the following from paragraphs 15 to 17:

### Paragraph 15

*In Jone Di Atulaga v State [2013] HAM 240 of 2012 Ruling on Cost 26 June 2013 at [18] the High Court noted that when the applicant in that matter had been acquitted after voir dire hearing, the proceedings were not brought unreasonably as Prosecution could not predict whether a court will accept the evidence of any witness.*

### Paragraph 16

*This court shares those sentiments after finding in favour of the Applicant as a result of there being No Case to Answer.*

### Paragraph 17

*It was open to Prosecution to bring charges against the accused and no adverse finding can be made against them as a result.*

33. I have perused the copy record and also the above mentioned paragraphs, there is nothing to suggest that the learned Magistrate had erred in the exercise of his discretion. The ruling on costs is based on the evidence adduced by the appellant and the law.
34. The learned Magistrate had correctly exercised his discretion to refuse the application for costs. There is nothing in the copy record or in the ruling delivered by the learned Magistrate that the discretion exercised was manifestly wrong and/or not judicially exercised. All the grounds of appeal are dismissed due to lack of merits.

35. Before I leave the state counsel had raised in her written and oral submissions that this court did not have the jurisdiction to hear this appeal because when the appellant had filed his application for costs he had not put the prosecution on notice that he will be filing a cost application and also the Magistrate's Court had become *functus* after the appellant was acquitted.

36. This submission of the state counsel is misconceived. Section 150 (2) of the Criminal Procedure Act states:

*"A judge or magistrate who acquits or discharges a person accused of an offence, may order the prosecution, whether public or private, to pay the accused such reasonable costs as the judge or magistrate determines."*

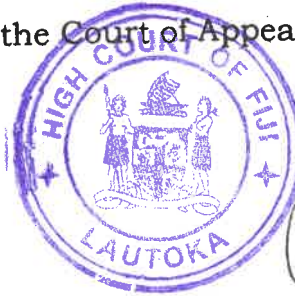
37. The above provision of the law gives the court that acquitted or discharged an accused the discretion to order costs against the prosecution. When an application for costs is made by a party to the proceedings it is preferred that a formal application be made to allow the court to look at the amount of costs incurred and sought. Upon service of such an application the prosecution will be put on notice about what to respond to which shall be sufficient notice to the prosecution. In this case the prosecution was duly served but they had failed to file any response in the Magistrate's Court.

38. Based on the above, the court that makes the decision to acquit or discharge an accused still has the jurisdiction to hear a cost application. The court may treat such an application as an administrative issue for determination after the substantive charge has been dealt with. On this basis any dismissal of the application for costs and compensation gives the aggrieved party the right to appeal.

39. Upon considering the submissions filed and upon hearing the appellant and the state counsel this court rules that leave to adduce further or additional evidence be refused together with the amended grounds of appeal due to lack of merits.

### **ORDERS**

- 1) Leave to adduce further or additional evidence is refused.
- 2) The appeal against costs and compensation is dismissed due to lack of merits.
- 3) 30 days to appeal to the Court of Appeal.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

21 January, 2021

**Solicitors**

**Appellant in person.**

**Office of the Director of Public Prosecutions for the Respondent.**