

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

**CRIMINAL APPEAL CASE NO. HAA 44 OF 2020**

**BETWEEN:**                      **POATE RADREKUSA**                      **APPELLANT**

**A N D:**                              **THE STATE**                              **RESPONDENT**

**Counsel:**                      Appellant In Person  
   Ms. N. Shankar for Respondent

**Date of Hearing:**              05<sup>th</sup> March 2021

**Date of Judgment:**        25<sup>th</sup> October 2021

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**J U D G M E N T**

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1. The Appellant filed this Appeal against the order made by the learned Magistrate of Suva Magistrate's Court No. 2 pursuant to Section 169 (1) and (2) (b)(ii) of the Criminal Procedure Act. The learned Magistrate had allowed the Prosecution to withdraw the Charge and discharged the Appellant in the said order. The Appellant appeals against this order on the ground that the learned Magistrate had erred in law by discharging him instead of making an order acquitting him.
2. The Appellant had been charged in the Magistrate's Court with one count of Theft, contrary to Section 291 (1) of the Crimes Act. He was first produced in the Magistrate's Court on the 16th of April 2018. Subsequent to several adjournments, the Appellant had pleaded not

guilty to this Charge on the 13th of August 2018. The matter had then been adjourned on several occasions due to various reasons. On the 17th of March 2020, the Prosecution had made an application to withdraw the Charge under Section 169 (2) (b) (ii) of the Criminal Procedure Act. The learned Magistrate had granted the leave and dismissed the proceedings, discharging the Appellant.

3. Section 169 of the Criminal Procedure Act states that:

- 1) *The prosecutor, may with the consent of the court, withdraw a complaint at any time before a final order is made.*
- 2) *On any withdrawal under subsection (1) —*
  - a) *where the withdrawal is made after the accused person is called upon to make his or her defence, the court shall acquit the accused;*
  - b) *where the withdrawal is made before the accused person is called upon to make his or her defence, the court shall make one of the following orders—*
    - (i) *an order acquitting the accused;*
    - (ii) *an order discharging the accused; or*
    - (iii) *any other order permitted under this Act which the court considers appropriate.*
- 3) *An order discharging the accused under subsection (2)(b)(ii) shall not operate as a bar to subsequent proceedings against the accused person on the basis of the same facts.*

4. Section 169 of the Criminal Procedure Act has allowed the Prosecution to withdraw the complaint at any time before the final order is made. However, such withdrawal is only allowed with the consent of the Court. The withdrawal of the complaint under the Section

169 of the Criminal Procedure Act is different from the filing of *nolle prosequi* by the Director of Public Prosecution/The Commissioner of the Fiji Independent Commission Against Corruption. (*vide; Section 49 of the Criminal Procedure Act*). The Director of Public Prosecution or the Commissioner of the Fiji Independent Commission Against Corruption could enter *nolle prosequi* at any stage of the criminal case before the conviction or the judgment. In such an instance, the Court shall discharge the Accused.

5. If the Prosecution is allowed to withdraw the complaint after the accused was called to make his defence, the Magistrate must acquit the accused. (*vide; Section 169 (2) (a) of the Criminal Procedure Act*). However, the Magistrate has been given a discretion to acquit, discharge or make any other order which the Magistrate considers appropriate if the Prosecution seeks to withdraw the complaint before the accused is called to make his defence (*vide; Section 169 (1) and (2) (b)*). The order discharging the accused upon the withdrawal of the complaint under Section 169 (2) (b) of the Criminal Procedure Act shall not prevent the Prosecution from bringing back a new charge based on the same facts. Hence, the legal consequences of the order of discharge are not the same as the order of acquittal.
6. In this case, the Prosecution had withdrawn the complaint before the Appellant was called to make his defence. Hence, the learned Magistrate had the discretion to make any of the three orders as stipulated under Section 169 (2) (b) of the Criminal Procedure Act.
7. Goundar J in Siwan v State [2008] FJHC 189; HAA050.2008L (29 August 2008) has discussed the law pertaining to an appeal against the exercise of discretion, where Goundar J held that:

*“The law in relation to an appeal against the exercise of discretion is settled. The discretion will be reviewed on appeal, if the trial court acts on a wrong principle, or mistakes the facts, or is influenced by extraneous considerations or fails to take account of relevant considerations. In addition, if it should appear that on the facts the order made is unreasonable or plainly unjust, even if the nature of the error is not discoverable, the order will be reviewed*



*(House v The King [1936] HCA 40; (1936) 55 CLR 499, Evans v Bartlam [1937] AC 473). Failure to give weight or sufficient weight to relevant considerations will also vitiate the exercise of a judicial discretion but only if that failure is central to the exercise of the discretion (Charles Osenton & Co. v Johnston [1942] AC 130)."*

8. The main issue in this Appeal is whether the learned Magistrate had exercised his discretion properly in making the order discharging the Appellant. In exercising the above discretion, the learned Magistrate must consider the interest of both parties. In doing that, the learned Magistrate has to take into consideration the legal consequence of the order of discharge and the order of acquittal. The discharge order affects the discharged person's right to personal liberty, as he can be charged again based on the same facts. On the contrary, an order of acquittal assures that the accused shall not be charged again on the same facts.
9. Unlike filing the *nolle prosequi* to discontinue the criminal cases, the Prosecutor must obtain the consent of the Court to withdraw the complaint under Section 169 (1) of the Criminal Procedure Act. Hence, the Prosecutor has to provide the reasons for the withdrawal. Those reasons undoubtedly help the learned Magistrate to exercise his discretion of making an appropriate order properly.
10. According to the record of the proceedings in the Magistrate's Court, the Prosecutor had merely stated that the Prosecution seeks leave to withdraw the Charge under Section 169 (1) (2) (b) (ii) of the Criminal Procedure Act. The Prosecutor had not provided any reasons for the withdrawal. Neither learned Magistrate had asked the Prosecutor the reasons for the withdrawal. The learned Magistrate had merely stated in the record that the leave was granted to withdraw, and the accused was discharged. According to the record of the proceedings in the Magistrate's Court, it appears that the learned Magistrate has not considered the interest of the Appellant in exercising his discretion under Section 169 (2) of the Criminal Procedure Act.

11. During the hearing of this Appeal, the learned Counsel for the Respondent failed to provide the reasons for the withdrawal of the Charge in the Magistrate's Court. Neither, the learned Counsel submitted whether the Director of Public Prosecution contemplates in charging the Appellant again on the same facts. In the absence of that information, I presume that the State is not considering charging the Appellant again based on the same facts. Therefore, it is my view that the Appellant should be acquitted.
12. The orders of the Court:
  - a) The Appeal is allowed,
  - b) The order made by the learned Magistrate, dated 17th of March 2020, discharging the Appellant is set aside,
  - c) The Appellant is acquitted.
13. Thirty (30) days to appeal to the Fiji Court of Appeal.



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Hon. Mr. Justice R.D.R.T. Rajasinghe

**At Suva**

25<sup>th</sup> October 2021

**Solicitors**

Appellant In Person.

Office of the Director of Public Prosecutions for the Respondent.