

- [3] On 22 June 2017, the respondents pleaded not guilty to the charge.
- [4] On 26 January 2018, the prosecution applied for the alleged stolen vehicle that was in police custody to be released to the complainant, Mr Reddy. The third respondent objected to that application on the ground that she was the owner of the vehicle. The learned magistrate did not grant an order for the release of the vehicle.
- [5] On 29 November 2018, the case was fixed for trial on 21 October 2019.
- [6] On 18 June 2019, the State represented by the Director of Public Prosecutions filed a motion supported by an affidavit from the investigating officer for the release of the alleged stolen vehicle to the complainant. The motion was called in court on 20 June 2019. Thereafter the motion was adjourned on numerous occasions but not heard until the respondents were acquitted by the court.
- [7] On the day of the trial (21 October 2019), the prosecutor applied for an adjournment on the ground that he had inadvertently overlooked to summon his witnesses. The respondents informed the court that they were ready for their trial. The learned magistrate refused an adjournment and directed the prosecution to call evidence.
- [8] The prosecutor offered no evidence. The learned magistrate exercised her powers pursuant to section 178 of the Criminal Procedure Act and found that there was no evidence on the charge for the respondents to answer. She made an order acquitting the respondents of the charge and adjourned the application for restoration of the alleged stolen vehicle for ruling on 4 November 2019.
- [9] On 4 November 2019, the ruling for restoration of the vehicle was further adjourned to 7 November 2019.
- [10] On 7 November 2019, the learned magistrate in a written ruling made an order that the vehicle be restored to the third respondent.

- [11] On 23 December 2019, the State filed a motion to seek an enlargement of time to appeal. The delay was one month. Counsel for the State informed the Court that they had not served the first and the second respondents with the motion.
- [12] On 23 January 2020, I granted an enlargement of time to appeal and directed the State to serve the respondents with a copy of the Petition of Appeal. The State served the Petition on the third respondent but not on the first and the second respondents.
- [13] On 11 December 2020, I struck out the appeals against the first and the second respondents for lack of service of the Petition of Appeal on them by the State. The appeal proceeded against the third respondent only.
- [14] The grounds of appeal are:
- i. The learned Magistrate erred when she failed to exercise her discretion judiciously in refusing the prosecutor's application for an adjournment.
 - ii. That the learned Magistrate erred when she made a determination on the ownership of the property knowing that she did not have all the information available before her to make such determination hence her decision was based on incomplete information and therefore incorrect.

Adjournment

- [15] I set out the proceedings that led to the acquittal of the respondents:

21st October 2019

Prosecution	:	Mr Shah
Accused 1	:	Present
Accused 2	:	Present
Accused 3	:	Present
Court Clerks	:	Vinith/Apisai

Notice of Motion and affidavit to vacate hearing filed on Friday.

Mr Shah:

I was recently allocated HAC 181/18. I was allocated it 2 weeks ago.

Court:

This trial date was fixed on 29/11/18. Why did you accept the High Court brief?

Mr Shah

I forgot I had this trial and so I accepted the allocation. I forgot the date and it was not until 2 weeks ago when I realized. It was too late to summon my witnesses.

I have not summoned my witnesses

First adjournment sought

This was an oversight on my part, I am very sorry. I did not check my diary. As an officer of the Court I must indicate that the High Court trial will not start until tomorrow.

Court

Thank you for your candor. So in essence, had you undertaken your due diligence we could have finished today.

Mr Shah

Yes

The outstanding application was a restoration of property allocation?

State

Yes

Court

Which could have been dealt with before or after trial?

State

Yes

Mr Gosai

I am ready for trial 2nd and 3rd

Accused 1

I am ready for trial today

Court Ruling

The Accused persons are entitled to have their trials commence and end without unreasonable delay. Pursuant to section 170 of the Criminal Procedure Act 2009, a party seeking an adjournment must satisfy the Court on the balance of probabilities that there is good cause for an adjournment, i.e. some legally meritorious reason for an adjournment or some reasonable excusable reason for their witnesses' absence. State Counsel in accordance with his ethical obligations has been straight with the Court. I appreciate that but the legal test remains as the preeminent (sic) consideration. On any consideration of the matter there is no good cause, no reasonably excusable reasonable for his witnesses' absence. In short, counsel forgot this trial was coming up and he failed to summon his witnesses. That is what the base grounds for this application amounts to. I have some sympathy for that but on an objective

assessment, I must give greater weight to the rights of the Accused persons here. There being no good cause for an adjournment, any further delay would be nothing short of unreasonable and as such, an impermissible violation of their constitutional right to a speedy trial. I can't in good conscience permit that. The application for an adjournment is denied. Call your evidence.

State

The State offers no evidence.

Defence

No Case to Answer applied for.

Court

Pursuant to section 178 of the Criminal Procedure Act there being no relevant and admissible evidence going to each element of the offence, I dismiss the cases against each Defendant and acquit them forthwith.
28 days to appeal.

Mr Shah

Restoration can be dealt with separately from a substantive case.

Court

Adjourned for Ruling on the restoration application.

Mr Gosai

Agrees that restoration can be dealt with absent a substantial matter being afoot.

Court

3pm
4/11/19

(sgd):

Resident Magistrate

- [16] Whether or not to grant an adjournment was within the discretion of the learned magistrate. The question is whether the learned magistrate exercised her discretion judiciously when she refused to adjourn the trial upon the State's application for an adjournment.
- [17] In exercising her discretion the learned magistrate took into account that there was no reasonable excuse for the absence of witnesses. She took into account that the prosecution had reasonable notice of the trial date and the failure of the prosecutor to summon his witnesses constituted a lack of diligence. She further took into account that any further delay would be nothing short of unreasonable and a violation of the respondents' right to a speedy trial.

[18] It is clear that the learned magistrate exercised her discretion judiciously in refusing to adjourn the trial. Lack of due diligence on behalf of the prosecutor to summon his witnesses is not a good cause for an adjournment of the trial. In *Republic of the Marshall Islands v Lemark* [2006] MHSC 1; 3 MILR 19 (14 June 2006), the Supreme Court of the Marshall Islands held that the trial court acted within its discretion in denying the prosecutor's request for an adjournment and dismissing the criminal proceedings for want of prosecution because the prosecutor's failure to subpoena essential witnesses constituted a lack of diligence. The Court said at [3]:

"Due diligence" in the context of requests for continuances (adjournments) has been defined as follows:

It must affirmatively appear that [counsel] exercised due diligence in procuring process for witnesses to appear at trial and delay showing lack of diligence may preclude his securing a continuance because of their absence. If, however, the delay is due to the negligence of the sheriff or other officer, accused will not be affected thereby. Due diligence requires that [counsel] should have subpoenas issued in ample time to procure service, or to take depositions if attendance cannot be had, and delay for varying periods after indictment has been held, under the circumstances of the particular case to show lack of diligence. . . . It has been held that diligence is not shown where [counsel] waits to secure issuance of process for absent witnesses until the date the case is called for trial, or until the trial has actually begun, or until an unreasonably short time before the trial is scheduled to begin. *Elam v. State*, 50 Wis.2d 383, 390, 184 N.W.2d 176 (1971) (quoting 22A C.J.S. Criminal Law, Sec. 503b(2) (1971)).

[19] After refusing an adjournment the learned magistrate called upon the prosecution to lead evidence. When the prosecution offered no evidence the learned magistrate acquitted the respondent pursuant to section 178 of the Criminal Procedure Act. The discretion to acquit was exercised in accordance with the law.

[20] There is no error in the exercise of the discretion to refuse an adjournment and to acquit the respondent.

Restoration of vehicle

- [21] The State made the application to restore the alleged stolen vehicle to the complainant, Mr Reddy pursuant to section 155(1)(c) of the Criminal Procedure Act. Section 155(1)(c) states:

155. — (1) It shall be lawful for any court in any criminal proceedings to make orders for—

(c) the restoration or awarding of possession of any such property or thing to the person appearing to the court to be entitled to possession of it, without prejudice to any civil proceedings which may be taken in relation to it;

- [22] In support of the application the State relied upon the affidavit of the investigating officer. The investigating officer claimed that the rightful owner of the vehicle was the complainant, Mr Reddy. He said that the first respondent who was an employee of the complainant stole the vehicle from him and gave it to the second respondent. He said that the vehicle was then modified to conceal its original identity and then registered under the name of the third respondent using a new registration number. He said that the third respondent was the spouse of the second respondent. The prosecution case was that all three respondents colluded to permanently deprive the complainant of his property.
- [23] The investigating officer also provided a motor vehicle examination report from the Land Transport Authority (LTA), the examiner's statement and photographs of the vehicle.
- [24] According to the examiner's report the vehicle that he examined was LR 3753. The report stated that LR 3753 was a Silver Toyota Fielder with an engine number 1NZC390751 and chassis number NZE1419004141. The report also stated that at the time of examination LR 3753 was registered as LT 2918 with engine number and chassis number belonging to another vehicle FZ 153 owned by one Laitia Tuitubou. The vehicle FZ 153 was a wrecked vehicle at a private yard and an inspection of that vehicle by the LTA examiner revealed the chassis number panel was missing.

- [25] The third respondent in her affidavit stated that she was the legal owner of the vehicle LT 2918 since 23 November 2016. She stated that LT 2918 was a private vehicle with the registration number FZ 153 before it was converted to be operated as a taxi on 7 February (year not disclosed). She did not disclose from whom she had acquired the vehicle FZ 153/LT 2918. However, the vehicle owner's history showed that the original owner of the vehicle FZ 153 was one Saimoni Tasere Naruma. The history report also showed that the third respondent acquired the vehicle on 23 November 2016. On 7 February 2017, the ownership and the status of the vehicle changed from private to public service vehicle to one Laitia Tuitubou with the registration number LT 2918. It appears that the third respondent retained an equitable interest on the vehicle although the legal owner was Tuitubou.
- [26] In her ruling the learned magistrate said that the State had not been able to establish on the balance of probabilities that the vehicle in question had been stolen from the complainant, Mr Reddy. She said that the nexus between the registration numbers LR 2039, FZ 153 and LT 2918 was not canvassed in the State's Affidavit. She said that the State's Affidavit only sets out the allegations as it relates to the vehicle in question but makes no assertions of fact as to whether a theft did in fact occur or not, and whether the vehicle impounded by the police was stolen from the complainant.
- [27] According to the official records of LTA the vehicle FZ 153 was acquired by the third respondent on 23 November 2016 from one Saimoni Naruma. The official records also revealed that on 7 February 2017, the ownership changed to Tuitubou and the vehicle was being operated as a public service vehicle with the registration number LT 2918 at the time it was impounded by the police as a stolen vehicle.
- [28] The charge alleged that the vehicle that was stolen from the complainant, Mr Reddy was registered as LR 2039. The LTA examiner in his report stated that he examined a vehicle with the registration number LT 3753 whose engine and chassis numbers had been altered. The State offered no evidence to explain the

link between LR 2039 that was allegedly stolen from the complainant and LT 3753 that was allegedly modified according to the LTA vehicle examiner. There was no proof that the vehicle LT 2918 that the police impounded as the alleged stolen vehicle belonged to the complainant, Mr Reddy.

[29] For these reasons, there is no error in the learned magistrate's exercise of discretion, refusing to restore the impounded vehicle LT 2918 to the complainant, Mr Reddy.

[30] The State's appeal is dismissed.



A handwritten signature in blue ink, appearing to read "Daniel Goundar", is written above a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecution for the State
Lanyon Lawyers for the 3rd Respondent