

IN THE HIGH COURT OF FIJI AT LAUTOKA
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL APPEAL NO: HAA: 44 OF 2022
BA MAGISTRATES COURT CASE NO: 136 OF 2009

BETWEEN : **ROPATE NAISUA**
APPELLANT

AND
STATE
RESPONDENT

Counsel: Appellant in Person
Mr R. Muhammed for Respondent

Date of Hearing: 17 August 2023

Date of Judgment: 31 August 2023

JUDGMENT

(On Costs)

1. The Appellant was charged with one count of Sacrilege contrary to section 298 of the Penal Code Cap 17; one count of Unlawful Use of Motor Vehicle contrary to section 292 of the Penal Code Cap 17; and one count of Driving a Motor Vehicle without a Valid Driver's Licence' contrary to section 56 (3) [a] and 114 of the Land Transport Act, 1998 in Criminal Case Number 136 of 2009 at the Ba Magistrate's Court.
2. The charges were filed on 22 April 2009, three days after the date of the alleged offending. The Appellant pleaded 'not guilty'. After a *voir dire* hearing, the matter proceeded to trial proper. The matter was heard on 17 October 2014 and the Judgment (dated 29 October 2014??) was delivered on 19 January 2016, whereby the Learned Resident Magistrate Mr. Mosese Naivalu acquitted the Appellant.

3. After being acquitted, the Appellant, on 26 July 2016, made an application before the Trial Magistrate seeking cost or compensation from the State. In the meantime, the Trial Magistrate was transferred to Lautoka Magistrate's Court and his successor in office, Mr Samuela Qica, first dismissed the Appellant's application and then reinstated it. After reinstating the Appellant's application, the matter was referred to Mr Naivalu, the Trial Magistrate. The matter was heard by Mr. Naivalu at Lautoka Magistrates Court on 29 May 2018 and reserved the Ruling for 06 July 2018. Before the Ruling was delivered, Mr Naivalu appears to have ceased to hold office.
4. Mr Samuela Qica, who began presiding over the matter, struck out the Appellant's cost application on 25 September 2018 for want of Jurisdiction, in the absence of the Appellant. Learned Magistrate cited *Guston Kean v State HMB 01 of 2015* (12 October 2017) to support his decision.
5. The Appellant, who is currently serving a prison term, filed this application through OC Maximum CC on 28 March 2023, nearly five years after the said Ruling.
6. Any person who is dissatisfied with any judgment, sentence or order of a Magistrates' Court in any criminal cause or trial to which he or she is a party is at liberty to appeal to the High Court against the judgment, sentence or order of the Magistrates' Court, (subject to any provision of that Part to the contrary) within 28 days of the date of the decision appealed against, by way of a petition [Ss 246(1) 248(1) of the CPA]
7. The delay is substantial and no petition of appeal is filed. In view that the Appellant is self-represented, the State has no objection to the belated appeal being granted leave despite his failure to follow the requirements under Section 248 mentioned above.
8. Having considered the fact that the appeal involves questions of law, the leave to appeal out of time is granted.

The Grounds of Appeal

9. The Appellant has preferred the following grounds:

- (i). That the learned Magistrate erred in law and in fact by misinterpreting section 150 of the Criminal Procedure Act (CPA).
- (ii). That the learned Magistrate erred in law and in fact when he prejudiced the Appellant by acting bias when striking out the matter twice without giving a written ruling.
- (iii). That the learned Magistrate erred in law and in fact when he failed to safeguard the right of the Appellant (Applicant) under section 15 (2) of the Constitution.

The Law on Orders as to Costs in a Criminal Matter

10. The Section 150 of the CPC provides as follows:

- 150 (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 subsection (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 Decree or the Sentencing and Penalties Decree 2009. (Cap 17B)
- (6) Payment of costs by the accused shall be enforceable in the same manner as a fine.
- (7) In this section "private prosecutor" means any prosecutor other than a "public prosecutor"

11. Section 151 of the CPC deals with an Appeal against an order to pay costs:
- (1) **An appeal shall lie to the High Court from any order awarding costs made by a magistrate.**
 - (2) The appellate court shall have power to give such costs of the appeal as it determines.

Ground (i)

12. It does not appear from the Court Record that the learned Magistrate has interpreted Section 150 of the CPC as such. It can however be assumed that the impugned order was made under Section 150 of the CPC as it dealt with the Appellant's application for cost. The Learned Magistrate struck out the Appellant's cost application by saying that he did not have jurisdiction to hear that application. He relied on the Ruling in *Guston Kean (supra)* which was self-explanatory.
13. It may be argued, as the State did in this appeal, that the learned Magistrate was correct to say that he lacked jurisdiction to hear the application because he was not the Trial Magistrate who recorded the acquittal. Section 150 (2) of the CPC clearly specifies that the "Judge or the Magistrate who acquits..." may issue costs against the prosecutor. The lawmaker's intention appears to be to narrow down the jurisdiction of hearing a cost application to the Trial Judge or the Trial Magistrate who dealt with the trial and entered an acquittal or discharge. The section does not say "any court that acquits", rather it specifically empowers the individual Trial Magistrate, at his or her discretion, to award costs. The Magistrate who had powers to entertain the cost application was the Trial Magistrate who had recorded the acquittal (or discharge). In that sense, the Learned Magistrate who struck out the application lacked jurisdiction to award costs to the Appellant. In view of that, I take the view that the Learned Magistrate was not incorrect when he said that he had no jurisdiction to make an order for costs.
14. Under Section 151(3) of the CPC, an appeal jurisdiction of the High Court can be invoked only when an order awarding costs has been made by a magistrate. The section clearly says that [A]n appeal shall lie to the High Court from any order awarding costs made by a magistrate.

15. In this case, no order awarding costs has been made by the Learned Magistrate. The intention of the Legislature appears to be to provide a remedy by way of an appeal to the party aggrieved by an order awarding unreasonable costs. Under Section 151(3), this Court does not have jurisdiction to entertain this appeal. However, in view of section 246 (6) of the CPC, I decided to entertain this appeal.

Ground (ii)

16. Notwithstanding that, as far as the striking out order is concerned, the State concedes that the order was unfair because it was made when the Appellant was not present in the Court and that no written ruling (with reasons) was given. The Appellant seems to argue that the Learned Magistrate has not followed the rules of natural justice which required him to give a proper hearing to both sides and give reasons for whatever the decision he has made [Section 142 of the CPC and Order 32 of the Magistrates Rules 32].
17. The Learned Magistrate had struck out the application for costs in the absence of the Appellant after the matter was fixed for hearing. The Magistrate should have afforded both parties a hearing on the issue, before making a final determination. In considering a costs application, a court should ask both parties to make submissions, and should specify the ground on which costs are awarded [See: State v Ravuvu [2004] FJHC 105; HAA0065J.20035 (4 June 2004) per Shameen J.
18. However, the striking out order has been made by the Learned Magistrate on the basis that he had no jurisdiction, and that reason is manifested on the Court Record. Therefore, no prejudice was caused to the Appellant.
19. Section 150(3) of the CPC (cited above) limits the discretion given to award costs when the judge or magistrate considers that the prosecutor either had reasonable grounds for bringing the proceedings or has not unreasonably prolonged the matter.

20. In the case of State v Ravuvu [2004] FJHC 105; HAA0065J.20035 (4 June 2004) Justice Shameen observed:

In considering a costs application, a court should ask both parties to make submissions, and should specify the ground on which costs are awarded. There are no other grounds on which costs may be awarded (Graham Southwick v. State CAV0001 of 2003S) and a ruling on costs should specify whether the prosecution was unreasonably brought, or unreasonably prolonged. (Emphasis added)

21. The above authority sets out a two tier test in determining if the costs should be awarded. Even if the contention of the Appellant that the Learned Magistrate fell in to error in not affording him an opportunity of being heard and in not giving (written) reasons were accepted, the appeal should not be allowed unless this Court is satisfied that a substantial prejudice was caused to the Appellant by the order of the Court below.
22. It does not appear from the Court Record that neither test passed in this case. The first test is whether prosecution was brought unreasonably. The Appellant had been acquitted after trial which preceded a *voir dire* proceeding at which his caution interview was held to be inadmissible. It can be assumed that the challenge to the caution interview was mounted because it contained admissions or confessions made by the Appellant. Admissions / confessions made by a suspect provides a reasonable evidential basis for institution of criminal proceedings and prosecution.
23. The prosecution had disclosed the admissions in the record of caution interview, being one of the key pieces of evidence, which was disclosed and tendered in Court during Trial. If the learned Magistrate had accepted the evidence of the Prosecution, he would have convicted the Appellant. No prosecutor can predict whether a court will accept the evidence of a witness or not, when the statement of the witness appears to the prosecutor to be credible. Therefore, the prosecution had every right to proceed with the charges where they had sufficient evidentiary material to initiate proceedings. It would have been against the public interest not to proceed when there was reasonable evidential basis for prosecution. The first test fails.
24. The second test is whether the prosecution had unreasonably prolonged the matter. The charges were filed by the State Prosecutor on 22 April 2009, just three days after the date

of the alleged offending. The prosecution had summoned witness for the two *voir dire* inquiries and these proceedings had taken place over a considerable period in which this case was on foot at the Magistrate's Court.

24. According to the Copy Record, it is clear that prosecution had managed to have two *voir dire* hearings conducted in a matter of less than 6 years, and the delay had been largely due to the change in the Trial Magistrates and not on the deliberate inaction or delaying tack-ticks of the prosecutor. Four years after the charges were filed, a total of four Magistrates had presided over the matter thus substantially contributing to the delay.
25. Apart from the intermittent change in presiding Magistrates, the Appellant's applications within the proceedings had equally contributed to the delay in concluding the substantive matter. After the changes in the presiding Magistrates, the Appellant, in May 2015, had made an application to recall the investigating officer as a witness because he forgot to tender some documentary evidence. This application was allowed and the witness was recalled even after conclusion of the *voir dire* hearing.
26. In the circumstances, the timeframe in which this matter was handled was not unreasonable compared to numerous cases before the Magistrates' Courts.

Ground (iii)

27. The Appellant contends that his rights under sections 15(2) of the Constitution of Fiji were jeopardized. This section gives the right to have the matter determined by a court of law or if appropriate by an independent and impartial tribunal.
28. The Appellant has not shown how this right was violated by the State. The Magistrate and Prosecution had collectively afforded the Appellant a right to fair trial and provided him with every opportunity to present his case at the trial.

Conclusion

29. The cost application of the Appellant is misconceived. As stated earlier, under section 150 (3) of the Criminal Procedure Act 2009, costs should not be awarded unless the

prosecution had no reasonable grounds to bring proceedings against the accused or the State was unreasonably prolonging the matter. There is no evidence that the State had brought proceedings against the Appellant maliciously or without reasonable basis, or that the matter was unreasonably prolonged.

31. The Appeal is dismissed.



Aruna Aluthge
Judge

31 August 2023

At Lautoka

Solicitors:

Office of the Director of Public Prosecution for Respondent