

**STATE v MOHAMMED ALFAAZ (HAC0124 of 2012L)**

HIGH COURT — CRIMINAL JURISDICTION

5 THURAIRAJA J

8 November 2012

10 **Criminal law — criminal procedure — application for discharge — failure to file information and disclosure in time — rape of school girl — whether accused should be discharged — applications for leave — material to consider charges — best interests of child — costs — Criminal Procedure Decree ss 150, 150(4), 198, 202.**

15 The accused was alleged to have raped a seven year old school girl. The State failed to file information and disclosure within 21 days and twice obtained enlargements of time. The State again failed to file the information and disclosure and did not obtain leave as per s 198 of Criminal Procedure Decree to file them on another date. The accused moved an application for a discharge and costs.

**Held –**

20 (1) The law is clear that the State shall file the information and disclosure within 21 days unless they obtain leave from the High Court. Whenever a statute declares that anything “shall be” done, the natural and proper meaning is that a pre-emptory mandate is enjoined.

25 (2) If the State is seeking leave, it should make a formal application stating the reason for the leave. Once the notice is received, the Court can consider and may grant further time to the prosecution to file information and disclosure. When granting leave in criminal cases, the Court has to balance the right of the accused and the welfare of society at large.

(3) In this case, there were two enlargements of time granted to the prosecution, but the third date was taken by the State without any approval of the Court which is an absolute violation of s198 of the Criminal Procedure Decree.

30 (4) There is material to consider the charge of rape on accused, and discharging the accused will not be in the best interests of the child.

Accused not discharged and prosecution granted one week to file full disclosure and information

35 *L. Sovau* with *S. Puamau* instructed by *Office of the Director of Public Prosecution* for the State.

*Maopa* instructed by *Babu Singh & Associates* for the Accused.

**Thurairaja J.**

40 **(Non-compliance with s 198 of the Criminal Procedure Decree – Filing of information and disclosures)**

**Background**

45 [1] The Accused above named alleged to have committed an offence of rape. Initially he was produced before the Magistrate of Nadi on the 21st September 2012. On that date the learned Magistrate transferred the case to High Court with a mention date of 3rd October 2012. The Accused was remanded and ordered to be produced at the High Court.

50 [2] On the 3rd October 2012 the Accused was produced before the Court. State was represented by Mr Livai Saukuru Sovau and the Accused was represented by Mr Maopa. State Counsel moved for 21 days to file information and disclosure. The State was given 21 days and the Accused was remanded.

[3] On the 24th October 2012 the State Counsel moved time till Friday (26th October 2012) to file information and disclosure. Reluctantly Court granted a final date till 26th October 2012 and ordered to be mentioned on 29th October 2012.

5 [4] On the 29th October 2012 State did not file the information and disclosure. Another State Counsel appeared on behalf of Mr Sovau and informed that the file was sent to Suva and they are unable to file the information and disclosure hence he wanted further time to file information and disclosure.

10 [5] Mr Maopa the Counsel for the Accused objected the application and submitted that under s 198 of the Criminal Procedure Decree there is no proper application to leave to extend the time to file information and disclosure, further he submitted that there is no information in Court therefore he moved the Accused to be discharged. In addition he moved cost under s 150 of the Criminal Procedure Decree.

15 [6] The State Counsel was granted time till the following day to respond to the above application and the case was adjourned to the 30th instant.

[7] The defence Counsel filed written submission and moved the Court to accept. The State did not file any written submission but State Counsel Ms Puamau made oral submission.

20 [8] According to the written submission filed by the Counsel for the Accused submits that the State had not complied with the mandatory provisions of the law hence he move the discharge of the Accused. Further he urged Court that the Prosecution had wasted the time of Court and the defence and he seeks cost from the State.

25 [9] To have a clear understanding of what happened in Court, proceedings of the 30th October 2012 is re-produced as follows:-

30 *“State Counsel Ms Puamau: I seek time to file information since the matter is serious in nature. I seek indulgence under 198 of the Criminal Procedure Decree to file the information. Further I submit the State Counsel is at fault. I wish to submit this as officer in charge and I take responsibility.*

35 *State Counsel: I admit that we have delayed in filing the information on time but we seek adjournment to file the information. This is a serious case. The Accused had raped his close relative who is 7 years old. Discharge will send a wrong message to the society. We are willing to accept the consequences but we plead with the Court to grant us final chance to file the information.*

*Court: State Counsel, – Do you admit that your Counsel had not sought an adjournment to file information.*

*State Counsel: No, we have made an application.*

40 *Court: According to the record and my recollection you only sought an adjournment on the 24th October 2012 for two days that was an application from the bar table. You were given final adjournment. Do you accept?*

*State Counsel: Yes, I accept we didn't make formal application. That is not the practice.*

45 *Court: State Counsel do you accept there is no application made after Friday (due date).*

*State Counsel: Yes, I am sorry but I appeal Court not to discharge that will create severe problem.*

*Court: Counsel what do you say about the application for cost.*

*State Counsel: I admit we are at fault, we have to pay the cost, we are ready.*

*Court: Mr Maopa how much are you claiming.*

50 *Mr Maopa: I have already submitted in my written submission. State had wasted almost 4 days and the Accused is in remand, I move \$2,000.*

**State Counsel:** We are ready to pay, we accept the liability.

**Court:** Counsel are you willing to pay \$2,000.00.

**State Counsel:** yes, if he claims, we are at fault. I hope he has proper calculation of that amount.

5 **Mr Maopa:** That is my calculation, 4 days appearance.

**State Counsel:** I wish he gives me the breakdown on the next date. I formerly object to the cost.

**Court:** Ruling will be on 01/11/2012 at 9.30am.”

## 10 Issues

[10] The issue before the court is that the State had not filed the information on time. Counsel for the Accused moves for a discharge and cost.

## Law

15 [11] I take the 1st issue of filing of information, s 198 of the Criminal Procedure Decree (CPD) states as follows:

20 “198. — (1) An information charging an accused person and drawn up in accordance with s 202 “**shall be**” filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption with the Chief Registrar of the High Court “**within 21 days**” of the order for transfer except that the “**High Court may grant leave**” to extend the 21 days. The power of the Director of Public Prosecutions to file information may be delegated by him to a public prosecutor in writing.

25 (2) In the information, the Director of Public Prosecutions or Commissioner of the Independent Commission Against Corruption may charge the accused person with any offence, either in addition to or in substitution for the offence in respect of which the accused person has been transferred to the High Court for trial.”  
[emphasis added]

30 [12] According to s 198 it is very clear that the information should be filed within 21 days from the order of the transfer. In this case the Magistrate of Nadi ordered the transfer on 25th September 2012. Accordingly the due date of filing the information is on the 16th October 2012. When the case was mentioned at the High Court on 3rd October 2012. State Counsel Mr Sovau who appeared on that date made an application to have 21 days from that date to file information and disclosures, time granted till 24th October 2012. That is 8 days more than the 21 days.

[13] On the 23rd late afternoon the State Counsel filed a request with the Senior Court Officer that he had compiled full disclosure and he wants one week to file the information.

40 [14] The case was mentioned on the 24th October 2012. State Counsel Mr Sovau appeared in Court and informed that the papers were sent to Suva and he wants time till Friday (26th October 2012) to file the same. Since the Accused is in remand the Court reluctantly granted a final date till Friday and listed the case to be mentioned on the 29th October 2012, following Monday.

45 [15] The State did not file the information and disclosure on the 26th October 2012 and did not obtain leave as per s 198 of Criminal Procedure Decree to file the information and disclosure on another date.

50 [16] On the 29th October 2012 when the case was mentioned another State Counsel who appeared on behalf of the Counsel in carriage informed the Court that the file was sent to Suva and the state is unable to file information on that date. The defence objected to this application.

[17] Analyzing s 198 it is very clear that the information should be filed within 21 days. If to be filed after that date it is only with the leave of the High Court.

[18] Whenever a statute declares that anything “**shall be**” done, the natural and proper meaning is that a pre-emptory mandate is enjoined.

5 [19] The law is clear that the State shall file the information and disclosure within 21 days unless they obtain leave from the High Court.

[20] Obtaining leave is described in many civil matters and criminal cases. When granting leave in criminal cases the Court has to balance between the right of the Accused and the welfare of the society at large.

10 [21] In my view, if the State is seeking for leave it should make a proper and formal application. That application should state the reason for the leave is sought. Copy should be served on the Accused and his Counsel in advance. Once the notice is received the Court can consider and **may** grant further time to the  
15 Prosecution to file information and disclosure.

[22] According to s 198 it is very clear that the legislators were making the prosecuting authorities such as DPP and FICAC to be transparent and accountable, hence they cannot arbitrarily enhance the time to themselves to file information and disclosures.

20 [23] Considering the present case there are two enlargement of time granted to the Prosecution but the 3rd date was taken by the State without any approval of the Court which is an absolute violation of s 198 of the Criminal Procedure Decree.

25 [24] The Counsel for the Accused moves discharge of the Accused. In the interest of justice I peruse the particulars of the case available in the court record. I find the virtual complainant is 7 years old school girl had complained to the Police that her uncle, the Accused had sexual intercourse with her. The child was examined by a medical practitioner and found her hymen was not intact. Further  
30 there is an eyewitness to corroborate a part of her evidence. Considering the details I can safely presume that there are materials to consider charges against the Accused.

[25] While considering the violation of the legal provisions of the Criminal Procedure Decree by the Prosecution I am compelled to consider the interest of  
35 the complainant who is a child. Fiji is a signatory of the United Nations Child Rights Charter (CRC) according to the Charter this Court is bound to consider the best interest of the child in its all decisions. According to article 3 the best interest of the child is paramount, hence I am compelled to consider the best interest of the complainant. Accordingly I find discharging the Accused will not be best  
40 interest of the child hence I decide not to discharge the Accused on failure of filing information on time.

[26] It is a very small brief, I cannot understand why the Prosecution had taken such long period to make their determination.

45 [27] The Counsel for the Accused move for cost from the Prosecution. Details of the application and response is stated in previous paragraphs especially in the 9th paragraph.

[28] The Counsel for the Accused moves \$2,000.00 as cost for 4 dates of  
50 appearance. That means \$500.00 per day. Perusing the proceedings I find on the 1st date the State moved time for 21 days the defence did not object for granting 8 days more than the 21 days. On the 2nd date the defence Counsel said he has no instructions. On the 3rd and 4th days the Counsel objected for granting any

adjournment. The State Counsel responding to cost application formerly objected and admitted their responsibility of paying the cost. I find the Counsel for the Accused may not be qualified to get cost on all 4 days but for two days.

5 [29] Regarding the quantum of the cost the counsel for the Accused submits that he summarily assess as \$2,000.00, in his oral submission he said it \$500.00 per day and \$2,000.00 is for 4 days appearance. The State Counsel did not challenge the quantum and agreed to pay the cost.

10 [30] As discussed above I find the defence will be entitled to cost for two days, I decide \$1,000 as cost. The said amount to be paid by the Prosecution to the defence, before the 6th December 2012 (the day before the last day of legal vacation.)

15 [31] Reluctantly, I have to place it on record the conduct of State Counsel Mr Livai Saukuru Sovau, he had obtained dates in many cases and not complied with, this is not the first case. Further he had arbitrarily violated s 198 of the Criminal Procedure Decree hence I find he comes under the pervue of s 150(4) of Criminal Procedure Decree:

20 [32] Conduct of the State Counsel Livai Saukuru Sovau is unacceptable hence I impose Ten dollars (\$10.00) as nominal cost payable by him personally. It should be paid before the 6th December 2012. If he continues in the same manner the Court will be compelled to take serious action.

[33] If both cost not paid on or before the due date the case will be mentioned on the 7th December 2012 (last day before the legal vacation) to consider the default sentence.

25 [34] The Prosecution is granted one week finally to file full disclosure and information.

[35] So ordered.

*Accused not discharged.*

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