IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 084 of 2011
[In the High Court at Suva Case No. HAC 138 of 2010]

BETWEEN:

THE STATE

Appellant

AND:

SAKIUSA BASA

Respondent

Coram	**:**	**Almeida Guneratne, AP** **Prematilaka, JA** **Bandara, JA**
Counsel	**:**	**Ms. S. Kiran for the Appellant** **Respondent absent and unrepresented**
Date of Hearing	**:**	**06 April 2021**
Date of Judgment	**:**	**29 April 2021**

JUDGMENT

Almeida Guneratne, AP

[1] I agree with the reasons and orders made by His Lordship, Justice Prematilaka.

Prematilaka, JA

[2] The ruling of the single Judge on 02 June 2014 had succinctly set out the factual scenario leading to this appeal as follows.

> *'[1] The respondent and his co-accused were tried in the High Court at Suva on one count of aggravated robbery. After the main prosecution*

witness did not come up to proof, the prosecution sought a short adjournment to reconsider the evidence. When the Court resumed after the adjournment, the prosecution terminated the proceedings against the co-accused, but not against the respondent. After further evidence from the investigating officer, the prosecution reconsidered its position and terminated the proceedings against the respondent by entering a nolle prosequi. The respondent was discharged. Counsel for the respondent then applied for costs. The State opposed the application for costs. After receiving oral and written submissions from both parties, on 18 August 2011, the learned trial judge ordered the State to pay the respondent costs in a sum of $5120.00. The costs were categorized as: exemplary damages - $5000.00 and loss of earnings - $120.00

[3] The appellant had appealed in a timely manner against the impugned order of cost on 06 September 2011 followed by written submissions on 23 October 2013. The respondent's written submissions had been tendered on 14 March 2014.

[4] The appellant represented by legal counsel had urged the following grounds of appeal at the leave stage.

> '*(1) That the Learned Judge erred in law in entertaining an application for costs brought in the absence of a Notice of Motion and an Affidavit or Affidavits in support of the Motion.*
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> *(2) That the Learned Judge erred in law in determining an application made pursuant to Section 150(4)(a) and (d) of the Criminal Procedure Decree, 2009, as an order for discharge had been made pursuant to Section 49(2) of the Criminal Procedure Decree, 2009;*
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> *(3) That the Learned Judge erred in law and fact by failing to consider that Section 150(2) of the Criminal Procedure Decree, 2009 is operative subject to Section 150(3) of the said Decree;*
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> *(4) That the Learned Judge erred in law and in fact by considering the 'solitary confinement' of the Respondent in Prison in the award of costs; when in fact no evidence had been adduced to show cause why the Appellant ought to be held responsible for either: a decision taken by a public officer not employed at the Office of the Director of Public Prosecutions; or, an act or acts carried out as a result of that decision within the procedures and protocols of a separate and autonomous State entity; and*
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> *(5) That the Learned Judge erred in law in that he allowed irrelevant and extraneous matters to guide him, inter alia*
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> > *(i) a reliance on principles of tort law – and –*
> >
> > *(ii) the outcome of High Court Criminal Case No. 77/2011 and High*

Court Criminal Case HAC 213/11,which, in and of themselves, had no bearing on the considerations and decision taken in respect of High Court Criminal Case No. HAC 138/10.'

[5] The single Judge had permitted the appellant to proceed with the appeal on the basis that section 3(3) of the Court of Appeal Act does not require the appellant to seek leave to appeal as the order granting cost was a final order but left the merits of the appeal to be decided by the full court.

[6] The appellant had attempted to serve notice of hearing of the appeal and a letter by the Court of Appeal registry informing the date of hearing as 06 April 2021 at the respondent's address at Lot 4, Vetau Place, Nadera but the family members had informed the litigation clerk of DPP's office on 24 March 2021 and PC 5369 Viliame Vulaono on 30 March 2021 that the respondent was no longer staying at the address and they did not know when he would be back home. The family members had refused to accept the notice from the litigation clerk and PC 5369 Viliame had left it on the porch with instructions for the family members to hand it over to the respondent.

Is the order granting cost against the appellant appealable?

[7] Section 150 (1), (2) and (3) of the Criminal Procedure Act, 2009 are 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 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.

[8] Section 3(3) of the Court of Appeal states

'Appeals lie to the Court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court.

[9] In **Southwick v State** [2002] FJCA 51; AAU0061U.99S (1 March 2002) the Court of Appeal established the following propositions of law.

(i) The refusal or award of cost in terms of section 158(2) of the Criminal Procedure Code [similar to section 150(2) of the Criminal Procedure Act, 2009] is made in the original jurisdiction of the High Court Judge or the Magistrate.

(ii) Such orders are not interlocutory but dipositive of the issue namely the statutory application for cost and in that sense they are final.

(iii) Section 3(3) of the Court of Appeal Act ('Act') independent of the sections of the Act about rights of appeal against convictions and sentence would confer a right of appeal against an order refusing or granting cost in terms of section 158(2) of the Criminal Procedure Code.

[10] In **State v Patel** [2002] FJCA 13; AAU0002U.2002S (15 November 2002) the Court of Appeal accepted the correctness of ***Southwick*** and held that an order for payment of cost is a final judgment given in the exercise of the original jurisdiction of the High Court and therefore, an appeal to the Court of Appeal lies as of right pursuant to section 3(3) of the Court of Appeal Act. It further held that such an appeal must be filed within time as prescribed in section 26(1) of the Court of Appeal Act and if not the appellant requires leave to appeal out of time. ***Patel*** also established the proposition that in Fiji there is no inherent jurisdiction to award cost in the course of criminal proceedings against or in favour of the state except where the jurisdiction to do so is expressly conferred by statute.

[11] In **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014) Goundar, J sitting in the Court of Appeal held that

> '*[8] The Court of Appeal Act provides for three avenues to bring criminal appeals. Section 21(1) of the Court of Appeal Act applies to an appellant convicted on a trial held before the High Court…..*
>
> *[9] Section 22(1) of the Court of Appeal Act concerns appeals from the High Court in its appellate jurisdiction…….*

[10] Section 3(3) of the Court of Appeal Act provides for a right of appeal from the final judgments of the High Court given in the exercise of its original jurisdiction.'

[12] Calanchini, P in **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) sitting as the single judge held that criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act effectively ruling out the general jurisdiction under section 3(3). The full court in **State v Chand** [2015] FJCA 64; AAU0085.2012 (28 May 2015) had also taken the view that the interpretation of Calanchini, P was the correct interpretation. However, I respectfully disagree and refrain from adopting that view for the reasons already given.

[13] As far as the question whether an order or refusal of cost in criminal proceedings is a 'final judgment' or not within the meaning of section 3(3) of the Court of Appeal Act, I would adopt '*the order approach'* as articulated in **Nata v The State** [2002] FJCA 75; AAU0015U.2002S (31 May 2002) and affirmed in **Takiveikata v State** [2004] FJCA 39; AAU0030.2004S (16 July 2004) as being preferable in criminal proceedings to *'the application approach'*. The *'order approach'* requires the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. In other words, the order was treated as final only if the entire cause or matter would be finally determined whichever way the court decided the application. The *'application approach'* looked to the application rather than the order actually made as giving identity to the order.

[14] In my view, as far as the impugned order of cost made by the trial judge is concerned when '*the order approach'* is taken it becomes clear that it is a final order having the effect of a final judgment. Even if *'the application approach'* is taken it still appears that the order of cost made has to be treated as final.

[15] Therefore, it would now stand established that in terms of section 3(3) of the Court of Appeal Act an appeal lies to the Court of Appeal as of right from an order of cost

made in terms of section 150(2) of the Criminal Procedure Act, 2009. I may also add that there is no reason as to why the same principle should not apply to section 150(1) as well.

Is the order granting cost against the appellant justified?

[16] An order for cost under paragraph 150(2) of the Criminal Procedure Act, 2009 shall not be made unless the judge or magistrate considers that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter [vide section 150(3)].

[17] The sequence of events at the trial can be described in the following order. The respondent along with 04 others had appeared before the High Court for the first time on 06 August 2010 and remanded by court. On 17 September 2010 one of the co-accused, Aca Koroi had pleaded guilty and the court had fixed the trial in respect of others on 28 March 2011. In the meantime the respondent had been remanded in solitary confinement in December 2010 apparently on the directions of the Commissioner of Prisons. Due to this situation the trial had been brought forward with the consent of the prosecuting counsel to 07 February 2011 and therefore, the respondent had withdrawn his bail pending trial application. The trial had commenced on 07 February 2011 and continued on 08 February where the witness who had been granted immunity by the prosecution had failed to come up to proof. The investigating officer who had taken the stand thereafter had testified that a mobile phone belonging to the complainant had been uplifted from the possession of the respondent. At the request of court the prosecution had considered the case against the accused over the luncheon break and when the proceedings recommenced after the adjournment the prosecutor had entered a *nolle prosequi* in favour of three of the accused but not against the respondent due to the evidence of the investigating officer on possession of stolen property. The matter had been adjourned overnight and before the adjournment the respondent had sought summons on Aca Koroi to be called as a defence witness. Apparently, Aca Koroi was expected to claim that the mobile phone was taken from his possession. The trial judge had requested the prosecutor to reconsider whether to proceed or not against the respondent. The prosecutor had overnight taken permission from the Director of Public Prosecutions and on 09

February 2011 entered *nolle prosequi* in favour of the respondent as well. The trial judge had discharged the respondent.

[18] On 09 March 2011 the respondent's counsel had orally made an application for cost pursuant to section 150 of the Criminal Procedure Act, 2009 and after entertaining both oral and written submissions from both parties the trial judge had made the impugned order for cost of $5120.00 to be paid to the respondent by the state on 18 August 2011.

[19] Therefore, I see no material to find that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter. Neither can I find any evidence that the prosecutor or the state had been responsible for the solitary confinement of the respondent. I do agree with the appellant that even if the solitary confinement of the respondent was wrong it should not have been held against the prosecutor as a ground for cost to be awarded. Therefore, the decision to order cost against the state is erroneous in view of section 150(3) of the Criminal Procedure Act, 2009.

[20] As for the other ground urged by the appellant it appears that it had acquiesced in proceeding with the inquiry into the oral application for cost despite the appellant not having filed a separate notice of motion and supporting affidavits. Therefore, the appellant is estopped from joining issue with the manner in which the trial judge had proceeded with the cost inquiry though I would add that a more formal application accompanied by supporting affidavits and documents is preferred instead of an oral application in the matter of applying for cost in criminal proceedings.

[21] As to whether a High Court Judge or a Magistrate is barred from making an order for cost under section 150(2) against the prosecutor in the case of a *nolle prosequi* being entered against the accused under section 49 of the Criminal Procedure Act, 2009, my view is that there is no such absolute prohibition written into section 150 or 49 of the Criminal Procedure Act, 2009 as it is still a discharge that should be entered in favour of the accused in whose favour a *nolle prosequi* is entered [vide section 49(2)].

[22] I do agree with the appellant's contention that the trial judge's application of principles in law of delict *in extenso* in arriving at the quantum may constitute an error of law as the principle relating to cost in criminal cases under section 150(2) is that it should be reasonable in the sense that it is not unreasonable and arbitrary. The discretion under section 150(2) of the Criminal Procedure Code must be exercised judicially.

Bandara, JA

[23] I have read the draft judgment of Prematilaka, JA and agree with reasons and conclusions.

Orders

1. Appeal is allowed.
2. Order of cost by the High Court judge dated 18 August 2011 is set aside.

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Hon. Justice Almeida Guneratne
ACTING PRESIDENT COURT OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice Chandana Prematilaka
JUSTICE OF APPEAL

.....
Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL