

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL MISCELLANEOUS JURISDICTION

Criminal Miscellaneous Case No. HAM 182 of 2016

JAMES ANTHONY NAIDU

[APPLICANT]

vs.

STATE

[RESPONDENT]

Counsels : Mr. K. Tunidau for the Applicant
: Ms. S. Kiran for the Respondent

Date of Hearing : 1st November, 2016

Date of Ruling : 2nd November, 2016

RULING

[MOTION IN ARREST OF JUDGMENT]

[1] On Friday 28th October, 2016 the Applicant was convicted by this court for two counts of rape under the Crimes Decree of 2009.

[2] On the same day the Applicant filed a Notice of Motion with an affidavit of Suluia Lotita seeking the following orders:

“(a) That there be an arrest of Judgment/Sentencing pending the determination of this here application.

(b) *That the Applicant be admitted to bail pending the determination of this here application.*"

- [3] The Notice of Motion is supported by the affidavit of Suluia Lotita sworn on 28th October, 2016. The deponent states at paragraph 4 and paragraph 6 respectively as follows:

Paragraph 4:

*"That it has come to our attention that one of the Assessors namely female assessor **Saroj Kumari Singh** is a very close neighbour of the Complainant Helen Makerata Dunn at Ram Asre Street, Lautoka. I annexe herein a copy of Lautoka High Court Assessors List and mark it as annexure "SL2".*

Paragraph 6:

"That it is apparent that if this information is correct then my husband has not received a fair trial as this particular assessor would have known the complainant which gives rise to the suspicion that her Sympathy would have leaned towards the complainant irrespective of the evidence of the defence."

- [4] This application is made pursuant to section 239 (1) of the Criminal Procedure Decree 2009 and also under the inherent jurisdiction of this court. Section 239 states:

"239. – (1) The accused person may, at any time before sentence, whether on a plea of guilty or otherwise, move in arrest of judgment on the ground that the information does not, after any amendment which the court has made and had power to make, state any offence which the court has power to try.

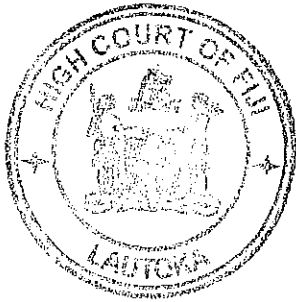
(2) The court may, in its discretion, either hear and determine the matter during the same sitting, or

adjourn the hearing of it to a future time to be fixed for that purpose.

(3) If the court decides in favour of the accused he or she shall be discharged from that information.”

- [5] Counsel for the Applicant argues that the assessor in question although asked by the court at the commencement of the trial had not disclosed to the court that she was a very close neighbour of the complainant accordingly there is a possible propensity on the assessor to favour the complainant which affects fair trial. Counsel further argued that there has been a non-disclosure of information on the part of the assessor concerned. Counsel submits that the court can invoke its inherent powers in determining this application.
- [6] The State does not wish to file any affidavit in reply but relies on the Counsel's submissions. The State Counsel in opposing the application points out that section 239 of the Criminal Procedure Decree only applies to defective information. Counsel submitted that the assessors came back with a unanimous opinion and that the court has accepted the complainant's evidence over that of the accused.
- [7] The discretion given to the court under section 239 of the Criminal Procedure Decree is only applicable where the information filed does not state any offence which the court has power to try. The reason mentioned by the Applicant does not fall under section 239 of the Criminal Procedure Decree hence it is not a ground to arrest judgment. No case authorities have been advanced by the Applicant which enables the court to exercise its discretion in favour of the Applicant.
- [8] After the court delivered its judgment on Friday 28th October, 2016 the only jurisdiction left for the court is to proceed with sentencing. The court is now *functus* from hearing any application except for an application under section 239 of the Criminal Procedure Decree.

[9] Having reached the conclusion that this application does not fall under section 239 of the Criminal Procedure Decree I find that this application has no merits since the court has no jurisdiction to hear it further.



Sunil Sharma
Judge

At Lautoka

2 November, 2016

Solicitors

Kevueli Tunidau Lawyers for the Applicant.

Office of the Director of Public Prosecutions for the State.