IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No.: HAA 75 of 2016

PENI TUILASELASE

vs.

STATE

Counsel	:	Ms N. Sharma [L.A.C] for the Appellant
		Ms R. Uce for the State
Dates of Hearing	:	21 February 2017
Date of Judgment	:	24 February 2017

JUDGMENT

1] On the 29th August 2008 the Appellant was charged along with 4 others in the Magistrates Court at Lautoka with Robbery with Violence contrary to the Penal Code Chapter 17, Laws of Fiji.

2] On the 8th July 2016 the prosecution made application to withdraw the charge against this Appellant, an application acceded to by the learned Magistrate. He withdrew the charge and **discharged** the accused.

3] Aggrieved by this result, the Appellant now appeals to this court on the basis that he should have been **acquitted** rather than **discharged.**

4] Withdrawal of complaint is a matter provided for in the Criminal Procedure Decree 2009 by section 169, which reads:

> *"**169.**-(1) The prosecutor, may with the consent of the Court, withdraw a complaint at any time before a final order is made.*
>
> *(2) On any withdrawal under subsection (1)-*
>
> *(a) where the withdrawal is made after the accused person is called upon to make his or her defence, the Court shall acquit the accused.*
>
> *(b) where the withdrawal is made before the accused person is called upon to make his or her defence, the court shall subject (sic) make one of the following orders-*
>
> *(i) an order acquitting the accused;*
>
> *(ii) an order discharging the accused; or*
>
> *(iii) any other order permitted under this Decree which the Court considers appropriate."*

5] It is obvious from a reading of that section that the Magistrate is given the discretion to choose which course to follow given the circumstances of the withdrawal; whether to **acquit** or **discharge**.

6] This is a discretion discussed by Goundar J. in ***Sada Siwan*** *HAA050.2008 Ltk* when he said:

> *"The law in relation to an appeal against the exercise of discretion is settled. The discretion will be reviewed on appeal, if the trial court acts on a wrong principal, or mistakes the facts, or is influenced by extraneous considerations or fails to take account of relevant considerations. In addition, if it should appear that on the facts the order made is unreasonable or plainly unjust, even if the nature of the error is not discoverable, the order will be reviewed."*

7] Goundar J went on to observe that in exercising the discretion the Court must not only take into account the interests of the prosecution but those of the accused as well.

8] The tribunal in finding a balance between the parties must review the record of proceedings in its entirety to determine the background to the charge being withdrawn. As tempting though it might be, it is not a fault finding exercise to see who was most at fault, but an exercise to see whose interests are better protected by the judicial exercise of the discretion.

9] The home made grounds of appeal submitted by the Appellant are:

- **The learned Magistrate ought to acquit the accused from the charge and order the prosecution to compensate the accused.**
- **The failure to do so is a violation of the right to fair and impartial proceedings.**

10] In the Supreme Court Case case of ***Mototabua (Review)*** *CAV0005.2009*, in reviewing a very similar dichotomy, Gates P. stressed the need for the full record of proceedings to determine whether there had been a correct exercise of the discretion. The Chief Justice observed that if the record shows that a prosecutor forced to go to trial but is unable to offer any evidence, then judgment would follow that there was no case to answer against the accused. In such circumstances the result would be **acquittal** and not **discharge.**

11] This Court now turns to the record before applying the aforesaid principles to what are said to be the facts:-

- First appearance of the appellant was with his co-accused on 29 August 2008. The case was mentioned 3 times over the next few months with little progress, except for the fact that the appellant was given bail.
- From the 30th December 2008 until 29 November 2010 the appellant had absconded. During that period, a month short of two years the matter was called 27 times awaiting arrest of this appellant. On the 17th January 2011 a trial date was set for 2nd June 2011 but on that date the

trial was vacated by the Magistrate with no reason given. It is noted that the prosecution was ready at that time to go to trial.

- On the 16th June 2011, the appellant asked for time to prepare grounds of objection to his cautioned interview, and on 6 October he was again released on bail. Perhaps unsurprisingly he again absconded until he was produced on the 10th February 2014 as a serving prisoner.

- On the 4th July 2016 the prosecutor informed the Court that the file was missing and could not be found. Also on that day the appellant was asked (nearly 8 years after first appearance) to plead to the charge. He entered a plea of not guilty and filed his grounds of objection to the admission in evidence of his cautioned interview. He told the Court that he wished to apply for legal aid.

- On the 8th July he told the Court that he had decided not to apply for legal aid but that he would represent himself.

- Later that day (8 July) the Police prosecutor applied to withdraw the charge under section 169 (2) (b) (ii) of the Criminal Procedure Decree.

- The application was then allowed and this appellant discharged.

12] This brief encapsulation of proceedings shows a very sorry process. The appellant absented himself for nearly 5 years of the 8 years that the case proceeded through the court below. More surprisingly after being at large for nearly 2 years from December 2008 until November 2010, he was again admitted to bail in October 2011.

13] The one time that the case was fixed for hearing and the prosecution was ready to proceed the hearing was vacated with no reason given.

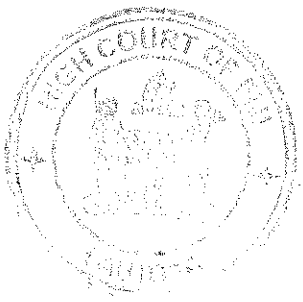
14] When the appellant was not at large he was regularly asking for adjournments for various reasons and it would not be surprising if an interested observer would suspect he was "playing the system".

15] Be that as it may, this court must examine the true reason that the trial did not proceed. The reason given on the 8th July 2016 was that the file was missing and couldn't be found.

16] The question before the Court now is, should the Magistrate in those circumstances have used his discretion to discharge or **acquit** the accused?

17] It is clearly to the advantage of the accused to be **acquitted** because he then cannot be charged again in respect of the same allegation. A **discharge** certainly gives the prosecution an opportunity to bring fresh charges should they so wish. With that knowledge it is most tempting to reward the prosecution and punish the accused for their respective conduct in these proceedings but that it not the point established by the authorities. The relevant question is; if the prosecution were forced to trial within days would they be able to bring a provable case against the accused? It would appear not, the Police seemingly being "at sea" without their file. That being so, then the discretion of the Magistrate should have been to **acquit** the accused despite his conduct over the years.

18] It is for this reason that the appeal succeeds and the order for **discharge** is quashed and an order for **acquittal** is substituted.



P. Madigan
JUDGE

At Lautoka
24th February 2017