IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 29 OF 2023

LAUTOKA MAGISTRATES COURT CASE NO. CF 383 OF 2019

BETWEEN **THE STATE**

Appellant

AND

RICHARD SUDHIR PRAKASH

Respondent

Counsel: Ms S. Swastika for Appellant
Mr S.A.Koya for Respondent

Date of Hearing: 21 September 2023
Date of Judgment: 26 October 2023

JUDGMENT

(Withdrawal of a complaint -Section 169 of the Criminal Procedure Act)

1. The Respondent was charged with one count of Theft contrary to Section 291(1) of the Crimes Act 2009 at the Magistrates Court at Lautoka. The matter was first called on 6 May 2019 and, after several adjournments, the matter was finally fixed for trial on 22 November 2022 for two days. On the date fixed for trial, the State Counsel made an application to withdraw the complaint and to have the proceedings terminated under Section 169(2) (b) (ii) of the Criminal Procedure Act.

2. The Counsel for the Respondent in response to the State's application sought an acquittal under section 169(2)(b)(i) of the Criminal Procedure Act. The court ordered the parties to file their submissions. Having considered the submissions, the Learned

Magistrate acquitted the Respondent and ordered the State to pay the Respondent cost in the sum of $300.00. Being dissatisfied with the Learned Magistrate's decision, the State filed this timely appeal seeking to have the said orders set aside.

The Grounds of Appeal

3. The Appellants filed the following grounds of the appeal:

   I. That the Learned Magistrate erred in law and in facts when he misdirected himself by acquitting the accused of the charge on the pretext that the State has failed to justify the reasons for termination of proceedings against the accused.

   II. That the Learned Magistrate erred in law in entertaining an application for costs brought in the absence of a notice of motion and an affidavit in support of the Motion.

   III. That the Learned Magistrate erred in law and facts when he made an order for cost against the ODPP to be paid to the accused by relying on the subject that the State has unreasonably delayed the matter against the accused.

4. At the hearing, the State Counsel informed the Court that the State would not intend to recharge the Respondent and it would not challenge the acquittal but only the reasons given for the acquittal. However, according to the prayer of the Petition of Appeal and the submission filed by the State Counsel, the Appellant requires this Court to allow the appeal which means to have the acquittal and order for costs set aside.

5. I agree with the Counsel for Respondent that if the reasons given for acquittal are wrong, the acquittal itself is wrong and it cannot stand. In the event a discharge is entered in lieu of acquittal, the risk of the Respondent being recharged persists despite the oral submission made by the State Counsel in this Court, particularly in the light of Paragraph (h) of the written submission filed in the Magistrates Court where it is stated that *'the State cannot conclusively say whether or not there is a prospect to recharge the accused in the event a discharge is entered against the accused'*.

6. Further, the Supreme Court in **Eliki Mototabua** [2011] FJSC 10 (12 August 2023) observed that neither the High Court nor the Court of Appeal had considered the issue

of whether or not the learned Magistrate had properly exercised discretion under Section 201(2) (b) of the Criminal Procedure Code [identically-worded predecessor to Section 169 (2) (b) CPA] and both courts had simply acted on the DPP's letter that Mototabua would not be recharged. While acquitting Mototabua the Supreme Court approved the approach explained in Siwan v State [2008] FJHC 189 (29 August 2008).

7. Therefore, for the sake of finality, I would deal with this appeal on the basis that the reliefs sought in the prayer of the Petition of Appeal remain intact.

Ground 1

8. The Learned Magistrate's decision to acquit the accused is based on the stated reason that the prosecution had not provided any reasons for terminating the proceedings.

9. The Appellant contends that the prosecutor, in this case the Director of Public Prosecution (DPP), is not bound to give reasons for his decision to withdraw a complaint under Section 169(1) of the Criminal Procedure Act (CPA) and therefore, the reasoning given for acquittal by the Learned Magistrate is erroneous.

10. The law relating to the withdrawal of complaints is stated in Section 169 of the APA as follows:

> 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 sub-section (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 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 Act which the court considers appropriate.
>
> (3) An order discharging the accused under sub-section (2)*(b)*(ii) shall not operate as a bar to subsequent proceedings against the accused person on the basis of the same facts.

11. According to this section, the prosecutor is at liberty to withdraw a complaint at any time before a final order is made subject of course to the consent of the court. However, it will be on very rare occasions that a court would intervene to prevent a discontinuation of proceedings unless the proposed discontinuation, in the court's view, will lead to an abuse of process. The ultimate function of the courts is to determine the accused's guilt or innocence whereas prosecutorial discretion is squarely left to the prosecutor (DPP), and it is not for the courts to question the basis upon which the proceedings have been initiated.

12. In **Barton** [1980] HCA 48; (1980) 147 CLR 75 at 94-95, Gibbs ACJ and Mason J said:

> It has generally been considered to be undesirable that the court, whose ultimate function is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced ... though it may be that in exercising its power to prevent an abuse of process the court will on rare occasions be required to consider whether a prosecution should be permitted to continue.

13. In **Humphrys** [1977] AC 1 at 26, Viscount Dilhorne said in reference to a supposed judicial power to intervene in the institution of a prosecution:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

14. However, once the proceedings have been instituted and the defendant is already in court, the presiding judicial officer is expected to play a proactive role and, perhaps after giving a hearing to the defendant, drive his / her judicial mind in determining whether to allow the application to terminate the proceedings or not. That decision is squarely in the hands of the judicial officer and not on the prosecutor.

15. Once the Magistrates Court has decided to allow an application to withdraw a criminal complaint, the nature of the order that it is supposed to make will depend on at which stage the proceedings are. If the application to withdraw is made after the accused

person is called upon to make his or her defence, the court has no option but to acquit the accused. However, if it is made before the accused person is called upon to make his/her defence, the court is left with the three options prescribed in Section 169(2) (b) of the CPA.

16. How to pick the best option out of the three is again a matter of discretion squarely left to the presiding Magistrate. A discharge should generally be ordered where there is clear indication that the prospects for the accused to be recharged is high and when there are justifiable reasons that prevent the Prosecution for the time being from continuing with the prosecution into a successful completion. There is no guidance provided in the CPA as to how that discretion should be exercised. Therefore, the legality of the decision made by the Learned Magistrate has to be tested against the general principles applicable in Fiji on how to exercise judicial discretion.

17. The power to enter a discharge or acquittal under Section 169 (2) (b) is clearly discretionary (**Siwan v State** [2008] FJHC 189; HAA050.2008L (29 August 2008). 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 principle, 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 (**House v The King** (1936) 55 CLR 499, **Evans v Bartlam** [1937] AC 473). Failure to give weight or sufficient weight to relevant considerations will also vitiate the exercise of judicial discretion but only if that failure is central to the exercise of the discretion (**Charles Osenton & Co. v Johnston** [1942] AC 130).

18. In relation to the identically-worded predecessor to 169(2)(b) [Section 201(2)(b)] of the Criminal Procedure Code] Goundar J in **Siwan** emphasised that in exercising the discretion pursuant to section 201(2)(b), the court must not only consider the interests of the prosecution but that of the accused as well. This view was endorsed by the Supreme Court in **Eliki Mototabua** [2011] FJSC 10 (12 August 2023)

19. A useful guidance as to how the discretion under Section 169(2)(b) should be exercised is included in paragraphs (j) and (i) of the written submission filed by the State in the

Magistrates Court. The State indeed expected those guidelines to be applied by the Learned Magistrate in arriving at his determination on whether to acquit or discharge the accused. would reproduce those guidelines as follows: (i)_

- The date of offence
- The nature of the allegation
- The date of application to withdraw
- No meaningful steps had been taken by the prosecution to recharge the appellant
- **No reasons given by prosecution to withdraw the charges**
- The interests of the appellant
- Constitutional Right of the appellant to have the trial begin and conclude without unreasonable delay.

> (j) While attendant circumstances may vary from one case to another, it is always prudent on the part of the Magistrates (i) to consider the lapse of time since the accused was charged to the date of withdrawal application, (ii) the reason for the delay in non-prosecution of the case till the date of withdrawal ie whether the delay is due to lack of due diligence on the part of the prosecution and/or whether the accused himself had contributed to the delay, (i**) the reason why the application for withdrawal is made** and (iv) the future prospect of and time likely to be taken in re-charging the accused, before exercising the judicial discretion either to discharge or acquit an accused under 169(2)(b) of the Criminal Procedure Act 2009. Needless to say, that the above considerations are not in an all-inclusive list. There must be a healthy consideration of the interests of the prosecution ie the public as well as the accused. The learned Magistrate needs to follow the guidelines as highlighted above in dealing with the issue in question. (Emphasis added)

20. The Learned Magistrate having considered the submissions filed by the State held in his Ruling as follows: (page 3).

> In this case the prosecutions have provided no reasons for terminating the proceedings against the accused. The charge was filed on the 6th of May 2019 and on the 22nd of November 2022 the prosecution made an application for withdrawal of the charge under section 169 (b)(ii) from the Court. The failure of prosecution provide reasons for the withdrawal is fatal and would leave this Court in applying its discretion and make a decision whether to discharge or acquit the accused. Given the charge was hanging over the accused for almost 3 and half years and no reasons were given to explain why the prosecution is taking such step. This Court will order section 169(2) (b) (i) and acquit the accused accordingly.

21. Having submitted in the Magistrates Court that the failure to give reasons to withdraw the complaint as one of the grounds to be considered in entering an acquittal, the State Counsel in my opinion is now estopped in this appeal from challenging the decision of the Learned Magistrate.

22. The State Counsel contends that the Office of the Director of Public Prosecutions (ODPP) is not bound to give reasons for its decision to withdraw a complaint. In support of this argument, she has cited Section 117(10) of the Constitution and the High Court decision in **State v Director of Public Prosecution, ex parte Matalulu** [1998] FJLaw Rp 4; 44FLR 149 (16 July 1998). Let me now check how tenable this argument is.

23. The powers of the Director of Public Prosecutions are set out in Section 117(8) of the Constitution as follows:

> The Director of Public Prosecutions may—
>
> (a) institute and conduct criminal proceedings;
>
> (b) take over criminal proceedings that have been instituted by another person or authority (except proceedings instituted by the Fiji Independent Commission Against Corruption);
>
> (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions or another person or authority (except proceedings instituted or conducted by the Fiji Independent Commission Against Corruption); and
>
> (d) intervene in proceedings that raise a question of public interest that may affect the conduct of criminal proceedings or criminal investigations.

24. There can be no doubt that the DPP is at liberty to discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the ODPP. The State Counsel contended that the courts are not obligated and cannot question nor compel the DPP to give reasons for a withdrawal and the repository of that power is within the Supreme Law of the country, the Constitution. She relied on Section 117 (10) of the Constitution which provides as follows:

> In the exercise of the powers conferred under this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority, except by a court of law or as otherwise prescribed by this Constitution or written law.

25. Could Section 117(10) be interpreted the way the Learned State Counsel has suggested it to be? I have strong doubts and the tenet of the section suggests otherwise. The Section indirectly states that the powers conferred by Section 117(8)

may be subject to the direction or control of a court of law. Therefore, if required by a court of law, the ODPP is bound to give reasons for its decision to withdraw a complaint.

26. Although the case, Director of Public Prosecutions, ex parte Matalulu (1998] FILawRp 4; [1998] 44 FLR 149 (16 July 1998] cited by the State has no relevance to the issue at hand as it was decided in a matter of judicial review when 1990 Constitution was in existence, it nevertheless provides useful insights into the scope of the power conferred on the DPP by the then Constitution. It is noteworthy that in Section 96(7), the privative clause of similar nature contained in the 1990 Constitution, did not have an exclusion clause to the effect 'except by a court of law or as otherwise prescribed by this Constitution or written law'. Still, the High Court in that case found that the power of the DPP to withdraw a criminal case (by entering a nolle prosequi) could be reviewed by the High Court. The finding of the High Court in that case in any event does not support the argument raised by the Appellant that the DPP shall not be subject to the direction or control of the courts.

27. In **ex parte Matalulu,** the State relied on Section 96(7) of the 1990 Constitution as a cornerstone for his submission that the exercise by the DPP of her constitutional powers is not reviewable by the High Court. Having disagreed with the State's submission, the Court cited with approval **A.G. v. D.P.P.** *[1982)] FLR 20* where the Privy Council did not disagree or disapprove of the Fiji Court of Appeal's observation that the constitutional guarantee does not:

> "... say that the DPP is not accountable to anyone. He is accountable to the Courts in the performance or non-performance of his functions (Section 136), he is accountable to the J.L.S.C. in respect of his professional conduct (Section 102) and he is accountable to the Auditor-General for his financial administration (Section 126)."

28. Accountability in terms of providing reasons for the decisions taken by a public office such as ODPP is extremely important whether it exercises judicial, quasi-judicial or purely administrative functions. It is more so when the decisions affect the rights of the citizens.

29. In this case, the Respondent was charged with Theft for dishonestly appropriating public funds (FNPF) amounting to $ 9669. The alleged offence is dated 2016 and the

complaint and the disclosures were filed in court on 06 May 2019, approximately three years after the alleged offence. Having conceded that fraud-related investigations are time-consuming, a period of three years cannot be said to be too insufficient to conclude the investigation.

30. The Respondent had been arrested and bailed on 6 May 2019 when he pleaded not guilty to the charge. After that, the counsel for the Respondent had written to the ODPP and the State sought several adjournments to inform the court of its position. On 12 January 2021, the State sought an adjournment to conduct further investigations. When the matter was to be fixed for trial on 4 April 2021, the COVID outbreak prevented the matter from being fixed for trial until 17 January 2022 on which date, the hearing was fixed from 28 March 2022 for two days. On 14 March 2022, for an unknown reason, the hearing was vacated, and a fresh hearing date was fixed for 8 August 2022 for two days. On the trial date, the State was not ready despite the witnesses being present and it sought an adjournment, the stated reasons being that, being a fraud trial, it involved a volume of documents, and exhibits not released from Totogo police for the witnesses to go through. The trial was vacated without any objection from the defence for it to be re-fixed from 22 August 2022. On 22 August 2022, the Resident Magistrate was on leave and the matter was rescheduled for hearing on 21 November 2022 for three days. On the day fixed for trial, the State made an application for the matter to be withdrawn.

31. The State had taken approximately three and a half years to inform the Court that it was not prosecuting the matter while providing no reasons as to why the charge was being withdrawn and why an acquittal was not justified. By giving no reasons, the ODPP deprived the court of the opportunity to make an informed decision under Section 169(2) (b) of the CPA.

32. Giving reasons enables the people affected by the decision to understand why a particular decision was made and it enhances the public confidence in the decision and consistency, transparency, objectivity and fairness of the decision-making process. It is more so when the decision concerns a misappropriation of a public fund whose beneficiaries are the working class of the country.

33. When a withdrawal application is made, the Magistrate must choose between the options prescribed in Section 169 (2) (b) of the CPA whether to acquit the accused or discharge and exercise his /her discretion based on the facts before the court. The Magistrate would want to know whether there is a reasonable prospect for recharging the accused.

34. For instance, if the reason for withdrawal is that a crucial witness is dead and the court finds that, without that witness's evidence, the charge cannot be maintained, then the acquittal would be the best option available to the Magistrate. On the other hand, if the important witness cannot be located or is not available for the time being, the preferred choice would be a discharge. However, the relevant information must come from the prosecutor so that an informed decision can be made. Having kept the Learned Magistrate in the dark by giving no reasons for the withdrawal, the ODPP failed in its duty owed not only to the Court and the accused but also to the public whose interest is to see that the offenders are punished.

35. Assuming that the State's position that the DPP is not bound to give reasons for withdrawal is correct, I cannot help but say that, by failing to provide reasons for withdrawal, the ODPP is exposing itself to the risk of being ordered to pay costs under Section 150 (3) of the CPA. This section provides that an order for costs 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. It stands to reason that if the magistrate considers that the prosecutor had no reasonable grounds for bringing the proceedings, he/she is entitled to order reasonable costs payable to the accused.

36. The Learned Magistrate in his Ruling observed as follows:

> Prosecution in responding to the submission for costs by the accused had stated that (they) do not have to give reasons for withdrawing the charge against the accused. This certainly is in conflict with section 150 (3) of the CPA where the law is clear that prosecution is bound to provide reasonable grounds of (sic) bringing the proceedings.

37. Although the Learned Magistrate's statement that the prosecution is bound to provide reasonable grounds for bringing the proceedings may not be correct in view of the observations made in **Barton** and **Humphrys** cited above, the Learned Magistrate in

the circumstances which I elaborate in the following paragraphs was entitled to believe that the State failed to give reasons for termination of proceedings because it did not have reasonable ground to prosecute in the first place.

38. The basis upon which some of the adjournments have been sought by the State justifies a finding that the charge was brought when the investigation was incomplete. According to the copy record, the State on 12 January 2021, had sought an adjournment to conduct 'further investigations'. This application had been made approximately one and a half years from the date of institution of proceedings. Coupled with the requests for adjournments to consider the representations made by the Respondent, the State's conduct of bringing the charge to court without the investigation being exhausted and the sudden withdrawal after three and a half years with no reasons being adduced give rise to the inference that the State had had no reasonable grounds for bringing the proceedings in the first place. It is reasonable to assume that it was after further investigations pending court proceedings that the decision that the Respondent ought not to have been charged was made and that is why the charge was being withdrawn without giving reasons.

39. For the aforesaid reasons, I find that the Learned Magistrate had not erred by acquitting the Respondent on the basis that the State had failed to justify the reasons for terminating the proceedings. The reason given by the Learned Magistrate to acquit the appellant is valid and sound. Ground (1) has no merit hence it should be dismissed.

Ground (ii)

40. The State submits that the application for costs against the State was made orally and by the submission dated 28 November 2022 and that in the absence of a formal application with a Notice of Motion and supporting affidavits/documents, the application for costs cannot be maintained in a criminal matter. To support its argument, the State relies on the Court of Appeal decision in **State v Basa** [2021] FJCA 179; AAU084.2011 (29 April 2021).

41. In **Basa,** the appellant State filed an appeal against orders made by the trial judge to pay the respondent cost in the sum of $5120.00, the costs were categorized as

exemplary damages- $5000.00 and loss of earnings- $120.00. One of the grounds for appeal was 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.

42. The Court of Appeal observed at [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.

43. It appears from the copy record that that the Appellant in this case too had acquiesced in proceeding with the inquiry into the oral application for costs despite the Respondent not having filed a separate notice of motion and supporting affidavits. Therefore, the appellant is estopped from appealing the decision of the Learned Magistrate on that basis.

44. Furthermore, the Court of Appeal in Basa only observed 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. However, the Court of Appeal has not said that a cost application made orally cannot be granted summarily.

45. There is no written law in Fiji that states that a formal application is needed when it comes to making an application for costs. In Basa's case, the application for costs was in respect of exemplary damages and loss of earnings. When costs are being sought for exemplary damages and loss of earnings, it is prudent to file a Notice of Motion supported by an affidavit so that the damages suffered, and earnings lost can be disclosed to the court thus enabling the respondent to dispute the claim. However, in this case, the cost was summarily assessed and not for exemplary damages or loss of earnings. Therefore, the cost the Learned Magistrate summarily assessed at $300.00 (Three Hundred Dollars) is clearly distinguishable. Ground (ii) has no merit.

Ground (iii)

46. The State contends that the Learned Magistrate erred in law and fact when he made an order for costs against the ODPP to be paid to the accused by relying on the subject that the State has unreasonably prolonged the matter against the accused.

47. Section 150 of the CPA deals with costs as follows:

> (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.

48. I have already discussed in my discussion on Ground (ii) how the Learned Magistrate was justified in concluding that the prosecutor had no reasonable ground for bringing the action. As to whether the prosecutor has unreasonably prolonged the matter, the Learned Magistrate in his Ruling observed as follows:

> The accused has applied for costs against the prosecution. Section 150 (3) of the Criminal Procedure Act is relevant and that is;
>
> An order shall not be made under subsection 2 unless judge or magistrate considers whether prosecution that no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter.
>
> Prosecution in responding to the submission for costs by the accused had stated that (they) do not have to give reasons for withdrawing the charge against the accused. This certainly is in conflict with section 150 (3) of the CPA where the law is clear that prosecution is bound to provide reasonable grounds of bringing the proceedings.
>
> Looking at the Court notes on file which has transpired in this proceeding; Counsel for the accused has written to the DPP on the 5th of August 2019 in relation to the charge. On the 4th of February 2020 Mr Chand appeared for DPP and was ordered by the Court to advise on the status of the file. On the 1st of September 2020. Police Prosecution CPL Seavula appeared on instructions from DPP informing the Court that DPP is seeking a month to respond to the representation by Counsel. On the 12th of January 2021. A counsel from the DPP's office appeared and stated that they will be seeking further investigation. On 16th of February 2021 Police prosecution appeared and the matter was set for mention to fix a trial date. On 3rd December 2021 the matter was adjourned to

> the 17th of January 2022 for mention to fix a trial date. On 17.01.22 a Trial date was fixed on 28th and the 29th of March 2022. On the 14th of March 2022 the trial date on the 28th and 29th was vacated on prosecutions application. On the 8th of August 2022 Mr Singh of DPP's Office appeared and seek vacation of the trial date as they are not ready trial was vacated and re fixed on the 21st and 23rd of November 2022. On that said date Ms Swastika Counsel for DPP appeared and made an application for matter to be withdrawn under section 169(2)(b)(ii) of the CPA. Counsel for the accused made an application during its submission that his client to be acquitted under section 169(2)(1).

49. It appears that the Respondent through his Counsel had to prepare for the trial on two separate occasions. After writing to the ODPP and making representations, the Counsel for Respondent put the ODPP on notice of costs through a letter dated 8 November 2022.

50. The Respondent and his Counsel had been appearing in court without fail and it was not the Respondent's fault that the Appellant did not have its evidence ready to proceed with trial on the 8 August 2022 and 21 November 2022. The charge had been hanging over the accused like the 'Sword of Damocles' for three years and five months. Although the pandemic has somewhat contributed to the delay, the State can't hide behind the pandemic because it had considerable pandemic free time to decide whether to withdraw the charges. Every person charged with an offence has the right to have the trial begin and conclude without unreasonable delay [Section 14(2)(g) of the Constitution] and to be presumed innocent until proven guilty according to law [Section 14 (2)(g) of the Constitution]. Each court of this country is bound to uphold the Constitution.

51. The matter had been called 19 times before the Magistrates Court from 2019 till 2022 until the matter was withdrawn. During that period, this matter was fixed for trial three times. The State submits that the adjournments were conceded to by the defence hence filing for cost after conceding to adjournment is not justified. Lawyers are lawyers, and the adjournments mean money for them. Without evidence we can't' say if the adjournments were conceded to with the approval of the Respondent. The constitutional rights are guaranteed to the accused, and it is for the State and the courts to uphold them irrespective of what the counsel's wish would be.

52. Practice Note (Costs: Successful Defendants) (1973] 2 All ER 592 where Lord Widgery CJ stated as follows:

> Although the award of costs must always remain a matter for the court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that when the court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order.

53. In Fiji, Section 150 (2) of the CPA clearly gives that power to the courts. In exercising his discretion, the Learned Magistrate has acted lawfully. He has given sound reasons for his decision. This Court should not interfere with the decision of the Learned Magistrate.

54. The following orders are made:

(i) The appeal is dismissed.

(ii) The Ruling of the Learned Magistrate at Lautoka dated 9 May 2023 is affirmed.

Aruna Aluthge

Judge

At Lautoka

26 October 2023

Solicitors:

Office of the Director of Public Prosecutions for Appellent

Siddiq Koya Lawyers for Respondent