

IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 38 OF 2023

BETWEEN: STATE **APPELLANT**

A N D: JOSEFA NIURUA **RESPONDENT**

Counsel: Ms. J. Fatiaki for Appellant
 Ms. R. Lal for Respondent

Date of Hearing: 08th April 2024

Date of Judgment: 07th June 2024

J U D G M E N T

[Order made under Section 150 (4) (a) of the Criminal Procedure Act]

I. The Acting Director of Public Prosecution filed this appeal on the following two grounds:

Ground 1:

THAT the learned Magistrate erred in law and fact when she failed to allow the Appellant to show cause as to why cost should not be allowed.

Ground 2:

That the learned Magistrate erred in law and in fact when she awarded cost against the Appellant despite the direction from the High Court Judge, Justice Bulamainivalu to prioritize the trial in HAC 122/22 over TR 225/19.

2. The Acting Director of Public Prosecution has charged the Respondent at the Magistrate's Court at Suva with one count of Dangerous Driving Occasioning Death, contrary to Sections 97 (2) (c) and 5 (d) (c) and 114 of the Land Transport Act. The trial of this matter commenced before the learned Magistrate on the 21st of August, 2023. During the trial, the Prosecution had called six witnesses. When the Prosecution's last witness was giving evidence, the Defence raised an objection stating that the Defence wished to challenge the admissibility of the admission made in the Respondent's caution interview in evidence. Hence, the learned Magistrate adjourned the proceeding to the 29th of September 2023 to conduct a *voire dire* hearing and continue the trial proper.
3. The learned Counsel for the Prosecution in the Magistrate's Court trial was Mr. Joshua Vinal Singh. He was also the Counsel for the Prosecution in the High Court case HAC 121/22, pending before Hon Mr. Justice Bulamainivalu. On the 7th of September 2023, Justice Bulamainivalu fixed the HAC 121/22 hearing from the 25th of September 2023 to the 28th of September 2023. The trial of HAC 121/22 commenced on the 25th of September 2023 as scheduled but failed to conclude on the 28th of September 2023. On the 28th of September 2023, Hon. Mr. Justice Bulamainivalu informed the parties that His Lordship wished to continue the hearing to the following day, that was, the 29th of September 2023.
4. According to the affidavit filed by Mr. Joshua Vinal Singh in this appeal, he informed the learned Judge about his commitment to appear in this matter before the learned Magistrate on the 29th of September, 2023. However, the learned Judge advised him that the High Court matter takes priority; hence, the Counsel should make other arrangements for the matter in the Magistrate's Court.
5. On the 29th of September 2023, Mr. Singh appeared before the learned Magistrate for this matter and sought an adjournment stating his commitment before the High Court. However, though she strongly expressed her disapproval and disappointment for the Prosecution for asking for such an adjournment, the learned Magistrate granted an adjournment. Further, the learned Magistrate imposed costs of \$500 on the Prosecution pursuant to Section 150 (4) (a) of the Criminal Procedure Act. Aggrieved with the said order of costs, the State filed this appeal.

6. Section 150 of the Criminal Procedure Act states that:

(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.

(4) A Judge or Magistrate may make any other order as to costs as may be required in the circumstances to—

- a) defray the costs incurred by any party as a result of an adjournment sought by another party;*
- b) recompense any party for any costs arising from any conduct by any other party which delays a trial or requires the expenditure of monies as a result of the conduct of that party during a trial;*
- c) penalise a lawyer for any improper action during a trial, and in such a case the order may be that the lawyer pay the costs personally; and*
- d) otherwise meet the interests of justice in any case.*

(5) The costs awarded under this section may be awarded in addition to any compensation awarded by the court under this Act or the Sentencing and Penalties Act 2009.

(6) Payment of costs by the accused shall be enforceable in the same manner as a fine.

(7) In this section "private prosecutor" means any prosecutor other than a "public prosecutor".

7. The learned Magistrate, in this matter, made this order for costs pursuant to Section 150 (4) (a) of the Criminal Procedure Act; hence, the focus will be only on Section 150 (4) (a) of the Act. It is a judicial discretion given to the Court to make an order of costs if it contemplates that such an order is required under the circumstances.
8. I shall first discuss the circumstances that the Court is required to consider in order to exercise its discretion under Section 150 (4) (a) of the Act if an adjournment was sought by a party to the proceedings.
9. An adjournment of the proceedings is not a prohibited and unwelcome procedural step in criminal litigation. Section 170 of the Criminal Procedure Act stipulates the circumstances under which the Magistrate's Court could allow an adjournment of the hearing, while Section 223 of the Criminal Procedure Act deals with the adjournment of the hearing in the High Court proceedings. Hence, granting an adjournment on the application of a party to the proceedings does not automatically follow an order of costs against the said party.
10. I am now drawing attention to the circumstances that are required to be considered if the Court contemplates imposing an order of costs under section 150 (4) (a) of the Act. Reading the phrase "as may be required in the circumstances to" in conjunction with the words "the adjournment sought by other party" in paragraph (a), it appears that the circumstances referred to under Section 150 (4) (a) focus on the circumstances of the adjournment sought by the party. Hence, the Court should consider the circumstances of seeking an adjournment if the Court contemplates imposing an order of costs on the party who sought an adjournment.

11. It is incumbent upon the Court to strike a balance between the procedural rights afforded to the parties under Section 170 or 223 of the Act, which allow for adjournments on good cause, and the rights of the other party to the proceedings. This ensures a fair and equitable legal process.
12. It is now prudent to discuss the proper ambit and meaning of paragraph (a), with particular attention to the phrase "costs incurred by any party as a result of an adjournment". The connector of "as a result of" has created a causal link between the costs incurred and the adjournment sought by the other party. Adjournment sought by the other party must be the cause of the costs incurred by the party. Hence, the costs referred to under Section 154 (4) (a) must be the costs incurred by the party due to the adjournment sought. There must be a factual causal connection between the costs incurred and the adjournment sought.
13. In determining whether a party's costs resulted from the adjournment sought, the Court may employ the 'but-for test'. Denning J articulated this test in **Cork v Kirby Maclean Ltd (1952) 2 ALL ER 402 at 407.**

".....causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage....."

14. The but-for test is commonly used in tort and criminal law to determine the actual causation. Accordingly, the Court should inquire whether the costs would only have been incurred with the adjournment sought by the other party. If the answer is yes, that means the costs were incurred as a result of the adjournment.
15. Suppose multiple causes, including the adjournment sought, contributed to the causation of the incurred costs. In that case, the Court then should move to a further step to determine whether the adjournment sought had materially and mainly contributed to the incurred costs. If the Court is satisfied that the adjournment sought has materially and mainly

contributed, it could conclude that the other party has incurred the costs as a result of the adjournment sought.

16. In recapitulating the above discussion, I find the ambit of the costs referred to under section 150 (4) (a) is the costs incurred as a result of the adjournment sought and not any other cost incurred by the party in the proceedings. The purpose of Section 150 (4) (a) is not to compensate the party for the waste of their time, resources or the money spent in attending the Court but to defray or contribute to the costs incurred as a result of the adjournment sought by other party.
17. In view of the reasons discussed above, the Court could follow two main steps in order to invoke its discretionary jurisdiction under section 150 (4) (a) of the Act, they are:
 - i) To determine whether there are circumstances under which the adjournment was sought, requiring the court to exercise its discretionary power under Section 150 (4) (a) of the Act.
 - ii) Whether any other party to the proceeding had incurred any costs as a result of the adjournment sought by the other party.
18. Turning to the present appeal, it appears that the learned Magistrate had not properly directed her mind whether the circumstances of seeking an adjournment by the State required her to exercise her discretion under Section 150 (4) (a) of the Act.
19. It is obviously visible that the reason for the adjournment was beyond the control of Mr. Singh. He was directed by a Judge of the High Court to advise the learned Magistrate that the High Court trial would continue on the 29th of September 2023. Making the situation more difficult for Mr. Singh, he came to know about this unexpected impasse on the 28th of September 2023, not giving him enough time to make any suitable arrangement to continue the hearing before the learned Magistrate without any disturbance. Hence, in my opinion, Mr. Singh had no control of the situation, leaving him without any options but asking for an adjournment of the hearing in the Magistrate's Court.

20. It is understandable that the learned Magistrate, in her commitment to fulfilling her judicial duty of concluding the matter within a reasonable time, would be frustrated and disappointed by the Prosecution's request for an adjournment. However, given the sudden and unforeseen circumstances that arose, it was not open for the learned Magistrate to conclude that the circumstances of seeking the adjournment required to exercise the Court's discretion under Section 150 (4) (a) of the Act.
21. Even if the circumstances of seeking the adjournment justified invoking Section 150 (4) (a) of the Act, I still find that the learned Magistrate erred in law and fact by imposing \$500 costs against the State.
22. According to the Magistrate's Court proceedings on the 29th of September 2023, the learned Counsel for the Accused in the Magistrate Court had not applied for costs under Section 150 (4) (a) of the Act. It was the learned Magistrate on *ex mero motu* moved to inquire about the costs incurred by the Defence. I will reproduce the relevant part of the proceedings below:

Magistrate: ...How much money does it cost you to be here? I mean just today?

Ms Lal: Five hundred dollars. For mention of hearing or for the trial?

Magistrate: Yes, How much for today?

Ms Lal: For today \$500,

Magistrate: \$500, Okay,

Prosecution:

Magistrate: Well, Mr. Singh, adjournment granted with cost pursuant to Section 150 (4) (a) of the Criminal Procedure Act 2009.....

23. Accordingly, it appears that the learned Magistrate had granted this order of \$500 to compensate for the expenses incurred by the Defence in attending the Court. The learned Magistrate had failed to consider whether those costs would have been incurred irrespective of the adjournment. Hence, I find that the learned Magistrate had not directed

her mind whether the said cost was incurred as a result of the adjournment as stipulated under Section 150 (4) (a) of the Act.

24. I, accordingly, find the learned Magistrate erred in law and fact in making this order pursuant to Section 150 (4) (a) of the Criminal Procedure Act.
25. In conclusion, I make the following orders:
 - i) The Appeal is allowed.
 - ii) The order made by the learned Magistrate on the 29th of September 2023, ordering the Appellant to pay \$500 costs to the Defence, is set aside.
26. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to read 'R. D. R. T. Rajasinghe', is written over a horizontal dotted line.

Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

07th June 2024

Solicitors.

Office of the Director of Public Prosecutions for the Appellant.

Lal Patel Bale Lawyers for Respondent.