

In the Central Magistrates Court
Criminal Jurisdiction
Criminal Case number 373 of 2024



Rex

V

Frank Firimolea

*Before: Emma Garo Chief Magistrate
Ms. Irene Mae for Director Public Prosecutions.
Miss Roschelle Palmer Public Solicitors Office for the defendant*

Date of hearing: 22 July 2025

Date of Ruling: 29 July 2025

Ruling 190(2) (b) (ii) Criminal Procedure Code application

1. The defendant is charged with burglary contrary to section 299(b) (ii) of the Penal Code. Section 299(b) (ii) of the Penal Code reads:

“Any person who in the night

(a)...; or

(b) (i)...; or

(ii) committed any felony in the said dwelling – house, is guilty of the felony called burglary, and shall be liable to imprisonment for life.”¹

2. The defendant was charged as a principal offender with Joe Malau and Mathew Malau. The prosecution allege that the defendants committed the offence on 10 June 2024. The charge was filed on 28 July 2024.² The defendant was in custody from 28 August 2024, to 28 November 2024. On 28 November 2024, the court released the defendant on bail with strict conditions.³
3. Identification of the defendant is the issue in this case. The prosecution agrees that there is no evidence placing the defendant at the scene.
4. On 22 July 2025, Ms. Mae for the prosecution applied to have the warrant of arrest issued against the defendant withdrawn, to enable the prosecution to apply to have the charge

¹ Section 299(b) (ii) of the Penal Code.

² Refer to charge filed with the Court on 28 August 2024.

³ Refer to bail papers signed on 28 November 2024 and record of court proceedings 28 November 2024.

against the defendant withdrawn under section 190(2)(b)(ii) of the Criminal Procedure Code [Cap 7] "CPC". Based on the authority in R v Solo Sade⁴, the court recalled and withdrew the warrant of arrest issued against the defendant on 7 April 2025.

5. Ms. Mae now applies to have the charge against the defendant withdrawn under section 190(2) (b) (ii) of the CPC. The reason given is that there is insufficient evidence to sustain the charge. Ms. Mae further submits that the withdrawal of the charge against the defendant under 190(2) (b) (ii) of the CPC, will not be prejudicial to the defendant. Ms. Mae argues that once enough evidence is gathered then the police will re-charge the defendant. Ms. Mae also argues that once the charge is withdrawn, the defendant will retain the full presumption of innocence and such a withdrawal will not affect the defendant's right under section 10 of the constitution. Ms. Mae further argues that the withdrawal of the charge under section 190(2) (b) (ii) of the CPC will not prejudice the defendant and it will also give police the time to execute the warrant of arrest against the defendant. Ms. Mae argues that the withdrawal of the charge against the defendant will save the courts time and resources.
6. The submission, by Ms. Mae, ignores the fact, that, once a warrant of arrest is recalled, and cancelled, as, was done; in this case, there would be no warrant of arrest, in existence, against the defendant, in this matter. The argument pressed by the prosecution fails.
7. Ms. Palmer in support of her submissions, cited the case of *Director of Public Prosecution v Clement Tom [1998]*⁵ Where Chief Justice Gordon Ward emphasized that whenever a prosecutor seeks to withdraw a charge under section 189(now 190) of the CPC, the prosecutor requires the court's consent, typically granted after the enquires into the reasons for withdrawal. Once the Magistrate is satisfied that there should be a withdrawal and it is before the accused is called upon to make his defence, the Magistrate must decide the appropriate order under sub-section 2(b).⁶
8. Ms. Palmer submits that a case with applicable principles of law to the present case is the case of R v Solo Sade⁷
9. The facts of Solo Sade case is that the defendant was charged with unlawful wounding contrary to section 229 of the Penal Code [Cap 26]. He was arraigned on 11 May 2001 and entered a not guilty plea. A trial date was then fixed for 8th June 2001. The defendant was bailed on his own recognition for \$800, but failed to appear. A warrant of arrest was issued and the case was adjourned for mention on 2nd July 2001. On the said date, the Police Prosecutor Sgt Ora applied to have the charge withdrawn under section 190(2)(b)(ii) of the CPC. Two reasons were given for the application; (i) lack of transport; (ii) uncooperativeness of the defendant and evasive. The presiding Magistrate accepted the application and discharged the defendant. The case was brought to the High Court for review pursuant to section 47(1) of the *Magistrates Court Act*.
18. The High Court held that the proper thing to do was to apply to have the warrant first withdrawn when a warrant was outstanding against the accused. The Magistrate ought to have addressed the outstanding warrant before proceeding to the withdrawal of the complaint.

⁴ [2001]142;HC-CRAC 162 of 2001(19 September 2001)

⁵ SBCA 4; CA-CRAC 6 of 1988 (7 December 1988)

⁶ Refer to paragraph 8 submissions by Ms. Rochelle Palmer

⁷ [2001]142;HC-CRAC 162 of 2001(19 September 2001)

The High Court further stated that the circumstances of the withdrawal must be for proper reasons.⁸

19. Ms. Palmer submits that applying the principles in *R v Solo Sade*, this Court may consider the withdrawal of the charge against the defendant only after addressing the outstanding warrant. Ms. Palmer submits that the warrant must be recalled and cancelled prior to hearing the application for withdrawal of the charge. Ms. Palmer submits that should the court find that Prosecution presents valid charge for the withdrawal; the court may grant the application in the defendant's absence.⁹
20. Ms. Palmer argues that, given that there is no evidence against the defendant, the principles enunciated by Ward CJ in the case of *Tome* would support the acquittal of the defendant if the court accept the reason submitted by the prosecution as valid.
21. When asked to explain the nature of the evidence, yet to be further, investigated by the police, Ms. Mae explained that the prosecution would discuss this with the police. When the court pointed out that, it has been 10 months since the police charged the defendant; Ms. Mae said she is not able to assist the court. She said she the case file was given to her a week before the trial date. At its highest, the evidence against the defendant, at this stage of the proceedings, is that some people saw the defendant, talking with other two co-accused before the alleged offending. Ms. Mae argues that, the police be given time to gather evidence to connect the defendant to the crime.
22. Ms. Palmer submitted, that, with due respect to the submission by the prosecution, the RSIPF and the work they do, the proper approach should be to investigate who is the person involved in the burglary, instead of saying the defendant is involved. Ms. Palmer argues that, the disclosures place the defendant, at the scene three weeks before the incident and unless the police can find someone who said they saw the defendant at the scene on the day of the incident, it is farfetched to continue to look for people who will give evidence to support the theory of their case.
23. There is force in the argument pressed by Ms. Palmer. The police did not progress their investigation into this matter during the three months the defendant was remanded in custody and during the 10 months that this matter was called before the court for mentions.
24. Consent to withdraw the charge is granted, but under section 190(2) (b) (i) of the Criminal Procedure Code. I dismiss the charge. I acquit the defendant.

Dated this 29 July 2025


Emma Garo
Chief Magistrate



⁸ Refer to paragraph 13 of the submissions by Ms. Rochelle Palmer.

⁹ Refer to paragraph 18 of Ms. Roschelle Palmer's submission.