

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**Criminal Miscellaneous HAM 047 of 2008**

Between : **STATE** Applicant

And : **MOHAMMED SHARIF SAHIM** Respondent

Date of Hearing : 6<sup>th</sup> March 2009

Date of Ruling : 20<sup>th</sup> March 2009

Counsel : Mr. J. Daurewa for the Applicant  
Mr. M. Raza for the Respondent

**RULING LEAVE TO APPEAL OUT OF TIME**

**Background**

1. By a Notice of Motion dated 27<sup>th</sup> November 2008, the State is seeking an order enlarging the time within which the Director of Public Prosecutions may lodge an appeal. The ruling against which the State wishes to appeal is dated 24<sup>th</sup> July 2008. The nature of the order against which the appeal is sought is a costs order and return of monies seized by police from the accused.

2. The costs awarded by the court against the State were \$1,000.00. The return of moneys ordered was \$3,679.00.
3. Section 158(2) of the Criminal Procedure Code Cap 21 gives the High Court or any Magistrate who acquits or discharges an accused person to order costs against the prosecution. The costs to be awarded must be reasonable. Further no costs can be ordered unless a judge or magistrate considers either that the prosecution had no reasonable grounds to bring the proceedings or it unreasonably prolonged the proceedings.
4. Hence for Section 158 to kick in there must be either an acquittal or a discharge. Additionally a court must be satisfied that the prosecution had no reasonable grounds to bring proceedings **or** even if it had reasonable grounds to bring proceedings, it unreasonably prolonged the proceedings.
5. The Learned Magistrate in this case discharged the accused after a nolle prosequi was entered. Further he considered that the prosecution had unreasonably prolonged the proceedings. He had section 158 in mind.

### **Proceedings in the Magistrate Court**

7. The history of the case against the respondent is set out in the affidavit of Hemant Kumar, Chief Legal Executive with Messrs Mehboob Raza & Associates.

8. There is no need for me to repeat the entire details of the affidavit but only in summary form.
9. The respondent was charged for obtaining money by false pretences. He first appeared in Sigatoka Magistrate's Court on 21<sup>st</sup> February 2001. The case was adjourned four times for prosecution to serve disclosures. It was fixed for hearing for the first time on 15<sup>th</sup> October 2001.
10. After some adjournments for mention, the trial commenced on 2<sup>nd</sup> May 2002, then adjourned to 28<sup>th</sup> May for continuation, then to 3<sup>rd</sup> July 2002 for continuation, then to 2<sup>nd</sup> October 2002 for continuation and then to 6<sup>th</sup> December 2002. So over a period of one year, despite adjournments the trial had not been completed. On 18<sup>th</sup> October 2004, after five adjournments at the request of prosecution, the learned magistrate discharged the respondent.
11. The applicant was recharged on 19<sup>th</sup> June 2008. When the matter was for continuation of hearing the Director of Prosecutions entered a nolle prosequi because the Director of Public Prosecutions received information that cash exhibits were missing from the Magistrates Court Registry.

### **Respondent's Submission**

12. Mr. Raza submitted that the Learned Magistrate was correct in ordering costs as the Director of Public Prosecutions had the file with them since January 2008 and should have known of the existence

or non existence of exhibits instead of entering a nolle prosequi at the last moment

13. The Learned Magistrate was entitled in the circumstances of this case with the spectre of a prosecution hanging upon respondent's head for such a long time to conclude that the state had unreasonably prolonged the proceedings.
14. As far as the refund of \$3,679.00 is concerned, that is a non-issue since the respondent has filed a civil claim in Sigatoka Magistrate's Court against the Commissioner of Police and the Attorney-General for the return of moneys seized by police.

### **Did the applicant act expeditiously?**

15. The Magistrate had made the order on 21<sup>st</sup> July 2008. The notice of motion was filed on 16<sup>th</sup> December 2008. The affidavit in support and the motion was signed on 27<sup>th</sup> November 2008. In other words between the signing of the motion and the filing there was a lapse of 19 days. The state was already out of time to appeal but it displayed a singular lack of urgency in filing the motion. It ran the affairs at a leisurely pace. The days of leisured attitude towards time frames set by statute and rules are well and truly past. The Courts no longer extend generous indulgence to those who do not abide by the time frames.

### **Reason for seeking extension**

16. The excuse mounted for extension of time is that the Director of Public Prosecutions has "yet to receive the Court Record pertaining

to this matter which was requested on 19<sup>th</sup> November 2008". One may surmise what the applicant was doing since 21<sup>st</sup> July 2008 when the ruling was delivered. The applicant had not even asked for records within the 28 days of the ruling and if it had it has not disclosed that on its affidavit. It just slept over during the period.

17. In a simple ruling like the order made by the Learned Magistrate one could effectively frame the grounds of appeal from notes kept by the Counsel appearing at the ruling and amend if need be once records are obtained. Further, one can always write to the Court Officer seeking to peruse the record in his presence. This request I am aware is readily granted by the Courts pending the preparation of typed records.

### **Conclusion**

18. Accordingly I see no good reason why I should grant leave to appeal out of time. The delay here is inordinate excessive and unpardonable. Even if leave were granted then appeal has no prospect of success. Accordingly I dismiss the application with costs in the sum of \$400.00 to be paid in 14 days.

### **Final Order**

19. Application is dismissed with costs in the sum of \$400.00 to be paid in 14 days.

[ **Jiten Singh** ]

**Judge**

At Lautoka

20<sup>th</sup> March 2009.