

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 38 of 2013**

**BETWEEN** : **RAM CHANDRA**  
**Appellant**

**AND** : **THE STATE**  
**Respondent**

**BEFORE** : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. N. Vere for the Appellant  
Ms. M. Fong for the State

Date of hearing : 21 November, 10 December 2013  
30 January 2014 and 28 February 2014

Date of Judgment : 13 March 2014

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**JUDGMENT**

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1. The appellant first appeared in the Suva Magistrates Court on 21 May 2013 where he was charged with one count of malicious acts contrary to s.15 (c) of the Public Order Act, 20. The particulars of the charge alleged that on the 20<sup>th</sup> May 2013 he “endeavours (sic) to disturb the public peace by inciting hatred of any class of person.”

2. After many mentions of the case in which the accused's mental health was discussed, he finally entered a plea of not guilty on the 2<sup>nd</sup> July, 2013. In the interim a medical report on the state of the accused's mental health had been obtained from St. Giles hospital.
3. On the 3<sup>rd</sup> October 2013, the police prosecutor after considering the report made an application to the Court under s.169 (2)(b)(ii) of the Criminal Procedure Decree for the accused to be discharged. The Magistrate then notes on the record "*Section 105(5)*", without further note. She then proceeded to discharge the accused and ordered that he undergo treatment at St. Giles as an outpatient.
4. The appellant appeals the order of discharge on the basis that he submits that the learned Magistrate should have acquitted him of the offence. He submits that the Magistrate should have considered section 28 of the Crimes Decree 2009 which provides for acquittal where there is mental impairment.
5. The appellant further submits that his rights under the Universal Declaration of Human Rights have been breached, in particular his right to a fair trial without unreasonable delay.
6. Difficulties arise in that appeal caused by the Magistrate's lack of care in recording what actually eventuated at the hearing of 3 October 2013. The record is exactly expressed as

*"Police Prosecutor*

*Section 169 (2)(b)(iii) (sic) of the Criminal Procedure Decree*

*Accused to be discharged*

*Section 105(5) " "*

7. It is to be assumed from the note that the police prosecutor made the request for the accused to be discharged but there are no reasons given . We must assume again that it was because of the Mental Health Report, which report is inconclusive and recommends medication. There is no such section as s.105(5), neither in the Criminal Procedure Decree nor in

the Crimes Decree and it is quite uncertain what the learned Magistrate is referring to.

8. Section 169 of the Criminal Procedure Decree sets out the consequences of a withdrawal of a complaint already before the Court. It reads:

*“s.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.*

*(iii) any other order permitted under this Decree which the Court considers appropriate.”*

9. The withdrawal of charge in the Court below was certainly made before the accused was put to his defence and therefore subsection (2) (b) becomes operative. The Magistrate therefore has unfettered discretion to acquit or to discharge. The learned Magistrate has exercised her discretion to discharge without providing reasons, nor does she have to.

10. A similar application was considered by Goundar J. in the Lautoka High Court in **Sada Siwan & another** CA HAA 050/2008, where 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 principle, or mistakes the facts, or is influenced by extraneous considerations or fails to take account of relevant considerations.”*

and later

*“Failure to give weight or sufficient weight to relevant considerations will only vitiate the exercise of a judicial discretion but only if that failure is central to the exercise of the discretion. (Charles Osenton & Co. v. Johnston [1942] AC 130). In exercising the discretion the court must not only take into account the interest of the prosecution but that of the accused as well.”*

11. The need to take into account the interests of the accused was stressed by the Supreme Court in **Eliki Mototabua v. State** CAV 005 of 2009.
12. In the present case the only reason that may have been in the mind of the Magistrate is her reference to “*section 105(5)*” a section that does not exist. Section 105 of the Criminal Procedure Decree 2009 however deals with *defence of unsoundness of mind on trial*” and it is to this defence that it can be assumed that the Magistrate turned her mind.
13. If indeed the Magistrate did consider that the accused had unsoundness of mind as a result of the findings of the psychiatric report before the Court then the provisions of section 28 of the Crimes Decree 2009 should have been considered. Section 28 specifies that a person is not criminally responsible if at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment. It must be proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment. If this be the case the Court must return a special verdict of not guilty of an offence because of mental impairment.
14. The psychiatric report dated 19<sup>th</sup> June 2013 prepared consequent to a mental examination of the accused opined that
  - (i) *“the accused has the capacity to participate fully with court of law”.*
  - (ii) *“ I cannot report with certainty the state of his mind at the time of the alleged offence (sic) due to limitation.”*

15. The report then is inconclusive and therefore it cannot be used to engage the special verdict of not guilty finding. The Magistrate did not refer to s.28 not should she have the report being inconclusive as to impairment of mind.
16. The Magistrate is left solely with a discretion pursuant to section 169(2) and which she must exercise in the interests of both parties. The State has a right to prosecute the charge as laid to determination. The accused has a right if on the balance of probabilities he was mentally impaired at the time of the offence to be acquitted. Unfortunately the Magistrate did not state precisely what she had considered, save as to make a reference to a non-existence section of some legislation but by making reference briefly to section 105 which in the Criminal Procedure Decree refers to "*unsoundness of mind on trial.*" Section 105 makes it mandatory to make a finding of not guilty of an offence by reason of insanity and as a result the discretion in withdrawing the complaint should have resulted in an order acquitting the accused. If the Magistrate believed that the accused was of unsound mind at the time of the offence, then that will always apply.
17. A clearer note of proceedings from the Magistrate would have been of greater assistance.
18. The appeal succeeds. The order discharging the accused is quashed and an order acquitting him is substituted.

**P.K. Madigan**  
**Judge**

At Suva

13 March 2014