IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 37 OF 2023

BETWEEN **JOELI TAWATATAU**

APPELLANT

AND **THE STATE**

RESPONDENT

Counsel Appellant in person.
Ms. S. Swastika for the Respondent.

Date of Hearing 20 October, 2023
Date of Judgment 30 October, 2023

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged with one count of act with intent to cause grievous harm contrary to section 255 of the Crimes Act 2009 at the Magistrate's Court, Lautoka. It was alleged that the appellant on the 3rd day of December, 2017 at Lautoka in the Western Division, with intent to do grievous harm to Simione Tui unlawfully wounded the said Simione Tui by stabbing him with a broken louver blade.

2. The appellant pleaded not guilty and the matter proceeded to determination on the principle of *autrefois convict*. On 22nd October, 2020 the learned Magistrate terminated the proceedings on the grounds that the proceedings had resulted in double jeopardy. Thereafter the appellant made an application for costs and compensation. After hearing both the parties the learned Magistrate dismissed the application for costs and compensation.

3. The appellant aggrieved by the refusal of the Magistrate's Court filed a timely appeal in this court against the decision of the learned Magistrate.

APPEAL TO THE HIGH COURT

4. The appellant filed five grounds of appeal as follows:

1) ***THAT*** *Learned Magistrate erred in law when she failed to consider that the chronology of event clearly stated that the appellant has already warn the State on many occasions to withdraw the charges laid against him as if their prosecution dooms to fail on the grounds of double jeopardy then the appellant/accused will take legal action against the State such as award of cost.*

2) ***THAT*** *Learned Magistrate erred in law when she fail to invoke section 150 (2) and (3) of the Criminal Procedure Act 2009 as the prosecution has being prolonging this indictment although many warnings from the appellants/accused but all fell on deaf ears as according to chronology of events.*

3) ***THAT*** *Learned Magistrate erred in law when she failed to consider that the appellant was charged on the 4th of December 2017 and the respondent first called this offence in Court on the 17th of July 2018 but the criminal charges filed against him in Court on the 18th*

September 2018 which is term as "inordinate delay" by the respondent.

4) ***THAT*** *Learned Magistrate erred in law and in fact failing to consider that the State had maliciously laying the charge and maliciously proceed thus charge against me though on many occasions I raise them that I already have been dealt by the prison tribunal.*

5) ***THAT*** *the Learned Magistrate erred in law and in fact failing to consider that the applicant/appellant were seriously brutalized by the wardens during and after the process of interrogation of this indictment.*

SUBMISSIONS MADE BY THE APPELLANT

5. The appellant contended that he was charged for the offence of act intended to cause grievous harm under the Crimes Act which was a double jeopardy since he had been charged and convicted by a prison tribunal under the Corrections Service Regulation 2011 for the same or similar offence of assault or act of violence.

6. He had time and again put the prosecution and the court on notice that he will be seeking costs and compensation if he is going to be successful in his application that is if the charge filed against him is terminated on grounds of *autrefois convict*.

7. The appellant further submitted that he had sought costs and compensation on grounds that he has been unreasonably prosecuted and the matter was prolonged by the prosecution. The appellant relied on the case of *State v Ravuvu [2004] FJHC 105; HAA0065J.2003S (4 June 2004)* wherein Shameem J. at second last paragraph of the judgment had this to say about cost application:

*In considering a costs application, a court should ask both parties to make submissions, and should specify the ground on which costs are awarded. There are no other grounds on which costs may be awarded (**Graham Southwick v. State** CAV0001 of 2003S) and a ruling on costs should specify whether the prosecution was unreasonably brought, or unreasonably prolonged*

8. The learned Magistrate erred in refusing his application for costs and compensation when she overlooked the fact that the prosecutor had no reasonable grounds for bringing the proceedings and had unreasonably prolonged the matter.

9. All the grounds of appeal can be dealt with together since it basically states the same complaint but in a differently constructed manner.

DETERMINATION

10. The learned Magistrate correctly took into account the test required pursuant to section 150 of the Criminal Procedure Act that it had to be shown that the prosecutor either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the matter.

11. Section 150 states:

(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 sub-section (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…"

UNREASONABLE DELAY IN PROSECUTION

12. Under this heading the learned Magistrate had mentioned the following at paragraph 6 of her decision:

Paragraph 6

The Court maintained strict case management control of the proceedings and advanced the matter as expeditiously as it could in the circumstances.

UNREASONABLE PROSECUTION

13. Under the above heading the learned Magistrate had mentioned the following at paragraph 4 as follows:

Paragraph 4

…Indeed, there were High Court decisions and a statutory provision within the Corrections Service Act 2006 that led the State to believe it could proffer these charges against you. It is for the courts to subsequently interpret the law and so that is what this court did after the plea in bar was raised: see State v Tawatatau et al Division of the Resident Magistrate in Extended Jurisdiction on the Plea in Bar of Autrefois Convict, Criminal Case NO. 634 of 2018 (unreported, 22 October 2020).

14. Additionally, I would like to mention that the award of costs or compensation is a matter of judicial discretion by the court it is not an award or a grant to a successful litigant as of right in a criminal charge. The fact that the proceedings against the appellant was terminated by the court does not mean the prosecutor is liable to pay costs and compensation to the accused. It is for the applicant to show that the

prosecutor had no reasonable ground to bring the proceedings or had unreasonably prolonged the matter.

15. The learned Magistrate has clearly stated in her ruling that the substantive matter was dealt with expeditiously and the court had maintained a strict case management control of the proceedings. Even in cases where accused persons have been acquitted after a trial does not mean that orders of acquittal or discharge are "lottery tickets" towards financial gain.

16. Section 37 (2) of the Corrections Service Act 2006 states:

When a prisoner is charged with and punished for a prison offence, nothing shall prevent criminal proceedings being taken against the prisoner arising from the same circumstances, but a court shall take into account any penalty imposed under this Act, when sentencing a prisoner for a criminal offence.

17. The prosecution was properly and correctly brought against the appellant the law is clear that any punishment for a prison offence is only applicable as far as the sentence is concerned. The appellant is very fortunate that the proceedings were terminated against him. In view of the above, the prosecution against the appellant was not unreasonably brought against him.

18. In *R v Hogan [1960] 2 QB 513* (decision of Court of Criminal Appeal of England) the appellants had escaped from prison. They were recaptured. They were disciplined under the prison rules by visiting committee of justices. Certain privileges were forfeited from the appellants. They were later charged and convicted among other offences for escape by force and sentenced to 2 years' imprisonment.

19. It was held that the principle that a person who had been convicted of an offence could not be subsequently charged with the same offence in an aggravated form in relation to the same facts was confined to conviction by courts of competent jurisdiction. The visiting justices had dealt with escapes as a matter of internal discipline.

20. There was nothing that prevented the accused from being charged with the common law offences of escape. Forfeiture of privileges was a matter for consideration in sentencing only.

21. In *Serupepeli Cerevakawalu and Osea Baleasavu v State Criminal Appeal 042 of 2001S*, Shameem J declined to set aside 12 months' sentence imposed on certain appellants after conviction for offence of wrongful confinement and criminal intimidation. The appellants had earlier been dealt with by Controller of Prisons under the Prisons Act. Their remission had been forfeited and certain other privileges forfeited as well. The basis of the reasoning was that prison rules are in place for maintenance of orders inside prison. They do not create criminal offences but only disciplinary offences. Shameem J held that the word "convicted" in s 28(1)(k) meant convicted by a court of competent jurisdiction and it could not be extended to a penalty "imposed by a domestic or internal tribunal".

22. In *R v Bryan Gwyn Green 1993 Criminal Law Review 46* the issue was whether a person who had been dealt with for contempt in civil proceedings for breaching a non-molestation order could later be charged with offence of assault arising from the same facts in criminal proceedings. It was held such criminal proceedings could be laid, on the grounds that *"the Family Division when exercising its jurisdiction in contempt proceedings relied upon a jurisdiction which was quite separate from any criminal proceedings which might be brought in criminal courts. It was an inherent power which derived from its jurisdiction to enforce its orders. It was*

important to bear in mind that contempt proceedings should be dealt with swiftly and decisively. There was no doubt that the contempt jurisdiction of the court was quite separate from the criminal jurisdiction of any other court notwithstanding that it might arise out of the same set of factual circumstances".

23. Furthermore, in *Jone Di Atulaga v State [2013] HAM 240 of 2012 Ruling on Cost 26 June 2013 at [18] the High Court noted that when the applicant in that matter had been acquitted after voir dire hearing, the proceedings were not brought unreasonably as Prosecution could not predict whether a court will accept the evidence of any witness.*

24. I have perused the copy record and the decision of the learned Magistrate, there is nothing to suggest that the learned Magistrate had erred in the exercise of her discretion to refuse the application for costs and compensation. The substantive matter commenced on 10th July, 2018 and came to finality on 22nd October, 2020 a little over 2 years. It is also noted that the appellant had delayed the filing of his application for *autrefois convict* which was only done on 27th January, 2020. It is not proper for the appellant to blame the prosecution when he delayed his application.

25. There is nothing in the copy record or in the decision delivered by the learned Magistrate that will suggest that the discretion exercised was manifestly wrong and/or not judicially exercised.

26. Before I leave I would like to mention that contrary to the assertion of the appellant the prosecution of the charge against him was on the basis of the evidence and was not brought against him maliciously. The underlying factor is that a prosecution is based on the statements given by the complainant and other witnesses which satisfies the merits test and there is also a public interest consideration involved.

27. It is the court that makes the final decision and not the prosecutor. The prosecutor puts before the court all the evidence in support of the charge to the best of his or her ability. No prosecutor can predict the outcome of a charge or information filed in court.

CONCLUSION

28. Upon considering the submissions filed and upon hearing the appellant and the state counsel this court rules that all the grounds of appeal be dismissed due to lack of merits.

29. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka

30 October, 2023

Solicitors

Appellant in person.

Office of the Director of Public Prosecutions for the Respondent.