IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION

Criminal Case No: 44 – 2015

STATE

-v-

KELEVI ROKOVINO

For the Prosecution	:	Ms. Naibe S [ODPP] and A/CPL Chand A. [Police Prosecution]
For the Defendant	:	In Person, Waived Right To Counsel
Trial – Prosecutions' Case	:	23rd November 2020
No Case To Answer Ruling	:	23rd November 2020
Hearing For Costs	:	19th April 2022
Ruling On Costs	:	5th August 2022

RULING ON COSTS

BACKGROUND

1. Mr. KELEVI ROKOVINO formerly a 'defendant', now applies for as he phrased it in his *in homine* written application 'cost and compensation' against the prosecution resulting from being acquitted during his trial.

2. There is also a second application made by Mr. ROKOVINO to have his canvas with grey stripe and with the brand New Balance, returned to him. He attaches to his application a copy of a Search Warrant and Information To Obtain A Search Warrant where the search was approved by a Justice of the Peace on the 24-02-15 and the search was confined to a dwelling house at Tavualevu Village to seize 'Steak', a ¾ black trousers and '1 white canvas'. He also attaches a police search list indicating that a white canvas with the brand New Balance, was seized on the 26-02-15 from the dwelling house of Ralulu where Arieta Ralulu was present.

3. Mr. ROKOVINO was acquitted by this court presiding at Tavua during his trial. He was acquitted at No Case To Answer stage pursuant to section 178 of the **Criminal**

Procedure Act 2009 regarding both offences reflected in the following amended charge:

First Count

Statement of Offence

BURGLARY: Contrary to Section 312(1) of the Crimes Act of 2009.

Particulars of Offence

KELEVI ROKOVINO between the 23rd of day of February 2015 and the 24th day of February 2015 at Tavua in the Western Division, entered into Tavua Meat Company Shop, property of **Mohammed Jabbar** as a trespasser with intent to steal herein.

Second Count

Statement of Offence

THEFT: Contrary to section 291(1) of the Crimes Act of 2009.

Particulars of Offence

KELEVI ROKOVINO between the 23rd of February 2015 and the 24th day of February 2015 at Tavua in the Western Division, stole beef Meat valued at $400, with the intention of permanently depriving the said **Mohammed Jabbar** of the said property.

4. The defendant was initially charged with aggravated burglary and the case was transferred to the High Court at Lautoka. The High Court opined that it was not a case of aggravated burglary presumably because no offensive weapon was allegedly in the possession of the defendant when committing burglary and or it is not alleged by the prosecution that the defendant committed the burglary with another or others.

5. The case was then remitted to the Magistrates' Court in its original jurisdiction to try the matter resulting in the amended charge [outlined above] being filed by the prosecution.

6. While the case was in the High Court, it was the Office of the Director of Public Prosecution [ODPP] that handled the prosecution of the matter.

7. Before the matter was transferred to the High Court and after the matter was remitted from the High Court and during the defendant's trial when he was acquitted, it was police prosecution that handled the prosecution.

8. As for the costs and compensation application, both the police prosecution and ODPP made submissions.

9. In relation to the amended charge, the defendant before this court elected to have his case tried in the Magistrates' Court.

10. For their case in relation to the 2 counts reflected in the amended charge, the prosecution called and adduced oral testimony from 2 witnesses.

11. The costs and compensation application including the return of property application made by Mr. ROKOVINO touches on the strength or extent of the prosecution's evidence. It is important that the evidence led during his trial is summarised.

12. Prosecution witness 1 [PW1] was Mr. Jabbar, businessman, the named victim in both counts. He testified that he owns and runs a meat company at Tavua. On the 23rd of February 2015 he closed his business at 5pm. The following morning around 8am when he went to open his business, he found the mosquito screen, main door, tower bolts and padlock to his business all 'broken'. The inside of his shop was ransacked with freezers open and papers on the floor. 2 bags of meat worth about $400 were missing. The meat was in 2 plastic bags and was in sacks. The meat was kept inside a deep freezer. PW1 described the missing meat to consist of beef shin meat from the legs of a cow. Each sack of meat would roughly weigh 20kg with a total weight of approximately 40kg. PW1 has operated his business for more than 40 years.

13. When cross-examined by the defendant, PW1 accepted that he gave a statement to police and identified his signature on a document purporting to be his police statement [this document was not tendered]. PW1 added that he gave 2 statements to police and 1 of the statement was regarding when the meat was recovered. PW1 said that he only sold meat from cows or he only sold beef. There are more than 10 breeds of cows in Fiji. PW1 said that he can identify his own meat. PW1 accepts that there was no identification mark on the meat that went missing. PW1 said that he told police it was shin meat. PW1 runs the only butcher in Tavua but he does not know how many people in Fiji sell meat. PW1 said that later police showed him meat maybe 2 or 3 days after the 24th of February 2015 which PW1 told police was stolen.

14. In response to the court's question, PW1 accepted that some parts of the meat shown to him by police were in the same condition and the ones showed to him by police was not in the same plastic or sack. PW1 accepted that the meat shown to him by police did not have any bone. When asked how he knows the meat shown by police to him is his, PW1 answered 'I see and I know'.

15. No secondary evidence such as a photo of the meat or the actual meat was shown in court or tendered during the prosecution's case.

16. It may be important to bear in mind that when the defendant first appeared before my brother Magistrate on the 27-02-15, an order was made for the beef 'to be returned to lawful owner forthwith'. I understand this to mean that the court granted the order for the release of the meat in police custody to the named victim or Mr. Jabbar and this is presumably pursuant to section 155(1)(c) of the **Criminal Procedure Act 2009**.

17. PW2 the second witness for the prosecution is Mr. Kolinio Toro, residing at Tavualevu Village, who testified that on the 24-02-15 at 9am while he was in town he was called by the defendant who told PW2 that he was selling 'cow meat'. The defendant had a white sack. PW2 asked the defendant where he got the meat from and the defendant told him that he got it from Yaladro from a family function. PW2 was given a piece of meat by the defendant. PW2 said that the meat was packed in a plastic. PW2 cannot tell which part of a cow the meat was from. PW2 added that the meat was 'warm and 'fresh'.

18. When cross-examined, PW2 said that he, the defendant and another person were arrested by police as suspects. PW2 said that he was forced by police to say that the defendant 'broke into the butcher shop'. PW2 accepted that he could have been charged if he did not give his statement. PW2 cannot recall whether the defendant told him the meat was from a function.

19. There was no application by the prosecution to declare PW2 a hostile witness. PW2's evidence was unchallenged.

20. In any event, having considered the prosecution's evidence, this court found that both limbs of the No Case To Answer test under common law [although the defendant could succeed on either limb] was not met [see for example **State v. Abdul Aiyaz** Criminal Case HAC 33 of 2009 (31st August 2009) and **Moidean v. Reginam** (1976) 22 FLR 206].

21. The court ruled that the prosecution had failed to adduce evidence direct or circumstantial touching on the essential element of identification. That it was the defendant being the burglar and the person who stole. The prosecutions' case touching on identification was that the defendant was in possession of beef meat soon after the alleged burglary and theft. The court found that the evidence led was rickety or dangerous to rely upon especially with no chain of custody established, no significant or identifying mark on the alleged stolen meat, discrepancy in the condition or state of the meat and or its packaging when it was stolen versus when it

was purportedly recovered and identified by PW1 *inter alia*. It would be speculation for the court to find on the evidence led, that the prosecution had adduced evidence touching on identification.

22. This court also found for the same reasoning or based on the so unreliable identification evidence led, that no reasonable tribunal could convict the defendant.

23. The result was the defendant being acquitted of both counts pursuant to section 178 of the **Criminal Procedure Act 2009**.

24. No appeal has been filed by the prosecution regarding the acquittal.

25. The acquittal is the basis of Mr. ROKOVINO's current application before me.

APPLICATION FOR COSTS and COMPENSATION

26. In support of his application, Mr. ROKOVINO relies on section 150 of the **Criminal Procedure Act 2009**.

27. Mr. ROKOVINO submits that he was 'unreasonably prosecuted' despite the prosecution knowing the fact that the case against him was doomed to fail.

28. It is also submitted that the prosecution unreasonably prolonged the matter for the past 5 years.

29. Mr. ROKOVINO also filed his sworn affidavit attaching what appear to be the police statement of PW1 Mr. Jabbar and a police statement of a person named Onisimo Rauqe. PW1's police statement reflects that it was recorded on the 24-02-15 while Mr. Rauqe's police statement is dated the 25-02-15.

30. PW1 Mr. Jabbar's police statement reflects that he runs a meat business. He describes securely locking his shop the day earlier at around 5pm before going home. On the following day at about 8.15am when he returned to his shop, he noticed the front screen door was forced open. The front door to the shop was open. The tower bolt was damaged. 'Upon checking I discovered that about $400-00 worth of meat was stolen from the freezer'. Nothing else was stolen PW1 said. He reported the matter to police.

31. Mr. Rauqe's statement reflects that one 'Junior' [it appears Junior is Mr. ROKOVINO] called Mr. Rauqe while Mr. Rauqe was in town at around 10am on the 23-02-15. Mr. Rauqe went to Junior and saw Junior with 2 others selling 'meat (beef)'. The meat

was packed in a sack. The meat was 'cut in big sizes'. The meat was cold. Junior told him that he slaughtered his cattle. Mr. Rauqe was given some meat 'on credit'. The meat was cooked. To his knowledge, Mr. Rauqe knows that only Junior's uncle has cattles. Mr. Rauqe does not know anything about stolen meat.

32. Further in his affidavit, Mr. ROKOVINO states that there was no evidence to have him charged in the first instance if one were to look at the timeline or date reflected in Mr. Rauqe's police statement and the date PW1's shop was supposedly 'broken into'. It would mean that the meat with Junior or Mr. ROKOVINO on the 23-02-15 around 10am could not have been stolen meat as the meat was allegedly stolen on the 24-02-15.

33. Mr. ROKOVINO adds in his affidavit that he was remanded for a 'couple of weeks' before bail was granted to him. The case has been looming over him for 5 years.

34. In his written submission, Mr. ROKOVINO accepts that the prosecution can institute prosecution but submits that the power has to be exercised fairly and adhere to the rules of natural justice. Mr. ROKOVINO amongst others, relies on the International Covenant on Civil and Political Rights [ICCPR] and section 150 of the **Criminal Procedure Act 2009**.

35. Furthering his arguments regarding the proceedings being unreasonably prolonged, Mr. ROKOVINO in his written submission outlines that he was first produced for the matter in court on the 27-02-17 [see paragraph 20 of his written submission].

36. The year 2017 is in error and I interpret that Mr. ROKOVINO means 2015 instead. 2015 is also consistent with the court record and the overall background of his case.

37. Mr. ROKOVINO submits that he was remanded for nearly 3 months.

38. He has written letters to the ODPP in May 2015, February and October 2016. He attaches his letters in his written submission. Mr. ROKOVINO states that he did not receive a response.

39. His letters appear to show that they have been stamped 'RECEIVED' by ODPP.

40. His letters to ODPP have a common theme in that he seeks that the case against him be reconsidered and he puts the prosecution on notice that if he is acquitted, he will apply for cost.

41. Mr. ROKOVINO also attaches to his written submissions, letters he has written to the judiciary in April and May 2017 all stamped indicating that they have been received

by the recipient. In summary, he sought a speedy trial and the issuance of a production order in-order that he be produced from corrections to attend his case.

42. The Rakiraki Court registry has made enquiries with the judiciary regarding the letters alluded to by Mr. ROKOVINO this court is still awaiting a response. This I will consider in Mr. ROKOVINO's favour and I accept that it is likely that the letters were indeed received by the judiciary as the copies of the letters also has RECEIVED Stamps. I am fortified in this view as there is in this EJR file before me for example, a correspondence from the Fiji Corrections Service dated the 23-08-19 attaching a letter purportedly written by KELEPI SALAUCA [alias of Mr. ROKOVINO] addressed to the Chief Registrar seeking an early trial date and for a production order to be issued for him.

43. If his application for costs and compensation is successful, Mr. ROKOVINO asks that he be awarded $3,000.

TIMELINE

44. Since Mr. ROKOVINO raises that his prosecution was unreasonably prolonged and that he was not tried within a reasonable time, it is important that I summarise the sequence of his case.

DATE	DESCRIPTION
27-02-15	He was first produced charged with one count of aggravated burglary and a second count of theft. He was remanded in custody and the case transferred to the High Court. An order was made for him to be medically examined before being taken into remand. The Resident Magistrate ordered that the 'stolen meat' be returned to the owner.
10-03-15	Case was first called in the High Court. The matter was remitted to the Magistrates' Court. He was further remanded in custody.

17-03-15	Case was recalled in the Magistrates' Court. The prosecution indicated that they may amend the charge to burglary and add another 'charge' of absconding bail. Disclosures were served and plea deferred. He was further remanded.
31-03-15	Another medical examination or check up for him was ordered. He was further remanded in custody.
07-04-15	Bail hearing was held.
14-04-19	Bail ruling pronounced. Bail refused. Further remanded.
27-04-2015	Amended charge filed for one count of burglary and a second count of theft. He pleaded not guilty to both counts.
08-05-15	Bail hearing held regarding fresh bail application. Further remanded.
15-05-15	Bail ruling pronounced. Bail granted to him. [**Note** – He is remanded though for another case CF 127 – 15]
Between 03-08-15 and 23-05-16	He was not produced consistently as there was information he was using different names Salauca and Rokovino.
30-05-16	A trial was fixed for the 28-11-16

30-09-16	Trial for the 28-11-16 was vacated by the court as the Resident Magistrate was to attend to the 'island court sitting'.
17-10-16	A new trial was fixed for the 17,18-04-17 [2 day trial]
24-10-16	A new trial was re-fixed this time for the 27,28-02-17 [2 day trial]
27-02-17	The 2 day trial was vacated as the Resident Magistrate was attending to Nadarivatu court sitting [rural].
Between 06-04-17 and 11-09-18	He was not produced. There was indication that he may be remanded or serving for another matter.
28-09-18	He appeared and informed the court that he is serving an imprisonment term ordered by the High Court for aggravated robbery. He was given time to sort out his disclosures. His production order was extended as he was a serving prisoner.
11-12-18	He maintained his not guilty plea to both counts. He was advised to put his alibi notice in writing. A trial date for the 26-03-19 was fixed. Production order extended.

26-03-19	The trial was vacated as a prosecution witness who was summonsed was not present. A warrant was issued for the absent witness.
01-04-19	The witness with a warrant, appeared. His warrant was cancelled. Case was adjourned for a trial to be fixed. Production order extended for Mr. ROKOVINO who is still a serving prisoner.
12-11-19	A trial for the 11-05-2020 was fixed.
11-05-20	The defendant was not produced from the corrections facility. The court was advised that due to COVID-19, serving prisoners were not released. The trial was vacated. A production order was issued for Mr. ROKOVINO.
22-06-20	A new trial was fixed for the 29-09-20. The court was informed by the prosecution that 2 prosecution witnesses had passed away.
22-09-20	Trial was vacated by the court due to the backlog of cases involving defendants who were in remand during the COVID-19 period and bail had to be determined. A trial for the 23-11-20 was fixed. The production order for Mr. ROKOVINO was extended.

23-11-20	The defendant elected a Magistrates' Court trial. The trial proceeded. The prosecution called 2 witnesses and closed their case. A No Case To Answer Ruling was given by the Court ruling that the Mr. ROKOVINO had no case to answer. He was acquitted. Mr. ROKOVINO then made his application for cost and return of property.

PROSECUTION'S RESPONSE

45. Oddly, despite Mr. ROKOVINO filing his affidavit in support of his application of costs and compensation, the prosecution has not filed any reply affidavit.

46. Prosecution instead filed their submission and relies on the same.

47. Both the police prosecution and ODPP have filed submissions.

48. It is submitted that the prosecution relied on circumstantial evidence to prove its case against Mr. ROKOVINO in that he was selling beef on the 25th of February 2015. The state was also relying on evidence that the defendant did not own cattle. The prosecution denies prolonging the case in court and part of it was due to Mr. ROKOVINO using another alias and the reason why he was not produced from corrections.

LEGAL PRINCIPLES AND ANALYSIS

RETURN OF PERSONAL PROPERTY

49. I will first deal with Mr. ROKOVINO's application for the return of his shoes or canvas.

50. Article 12(1) of our **2013 Constitution** promotes a person's right to be secure against unreasonable search and seizure of his or her property.

51. In addition, article 24(1)(c) promotes a person's right to privacy and respect of their private and family life.

52. These rights are consistent with our international obligations where we are a party for example to the Universal Declaration of Human Rights [UDHR]. In article 17 for instance, it promotes the right to be protected from arbitrary depravation of property.

53. Although commenting on the rights under the repealed **1997 Constitution** namely the right to be free from cruel, inhumane or degrading treatment, his Lordship Prakash J.'s observations about Constitution rights is worth repeating. His Lordship in **Naba v State** [2001] FijiLawRp 51; [2001] 2 FLR 187 (4 July 2001) said that:

> *In interpreting these provisions it is evident that they need to be considered within the evolving human rights jurisprudence both in Fiji and internationally. Section 3 and Chapter 4 of the Constitution mandates us to promote democratic values based on freedom and equality. In our interpretation of human rights we are obliged by the Constitution to consider social and cultural developments, and developments in the understanding, promotion and content of particular human rights...*
>
> *...For the judiciary in Fiji the Constitution sets high standards and high expectations in the promotion and progressive development of human rights and fundamental freedoms. For us there is no luxury of a declaratory theory of law. We need to be dynamic and creative, sensitive to popular expectations and democratic values.*

54. The above sentiment is consistent with article 2 and 3 of our **2013 Constitution** which obliges the court to interpret and apply the spirit and purpose of the constitution based on the values that underlie a democratic society based on human dignity, equality and freedom.

55. As for Mr. ROKOVINO or any other person, the right to enjoyment of property and privacy do not exist in a vacuum and are not absolute.

56. In some cases, there is no need for a search warrant or a formal court order for a seizure of a particular property. For instance, a person can be carrying on their person a house breaking implement or a murder weapon and this implement or weapon is owned by that person.

57. That item can be seized or deprived from that person for instance during the arrest of that person or during the attempted commission of the offence or immediately

prior to or during or immediately after the commission of the offence. The seizure of the property can be for the purpose of preventing the commission of the offence and can also be used as evidence in a trial against that person.

58. This is perfectly lawful.

59. In other cases, a search warrant maybe sought for and granted.

60. For the purpose of this application as there are other enforcement agencies, the Fiji Police Force continues its existence under the **2013 Constitution** [see article 129].

61. The primary legislation is the **Police Act 1965**.

62. Section 5 of the Act stipulates that 'The Force shall be employed in and throughout Fiji for the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime and the enforcement of all laws and regulations with which it is directly charged; and shall be entitled for the performance of any such duties to carry arms.'

63. Not only can a Magistrate issue a search warrant, section 97 of the **Criminal Procedure Act 2009** empowers a Justice of the Peace to do so too.

64. Section 98 of the same Act provides the standard of persuasion before a search warrant can be ordered where the Magistrate or Justice of the Peace must be satisfied that there is reasonable suspicion and the application for a search must be made on oath.

65. If there is 'anything relevant to the commission of the offence' is for example in a building, a search warrant can be issued authorising a police officer or other person to conduct the search. Once the target item is found or 'any other thing reasonably suspected as having been stolen or unlawfully obtained is found', it can be seized and taken to court.

66. According to Mr. ROKOVINO's application and documents submitted, that seems to be the case and that a search warrant was obtained by police sanctioned by a Justice of the Peace.

67. It is not Mr. ROKOVINO's contention that his property was deprived off him unlawfully or unreasonably and I have no reason too to reach a different conclusion.

68. The police search list submitted by Mr. ROKOVINO does not assist his application though. The search list indicates that the dwelling of the Ralulu's was searched.

There is no indication that Mr. ROKOVINO was present and there is no information before me about Mr. ROKOVINO's ties to this family. It touches on whether Mr. ROKOVINO is entitled or is the owner of the property in question.

69. It could be the case that Mr. ROKOVINO was residing at that dwelling or left his property there but more information will need to be provided.

70. The prosecution have not responded too to the return of property application of Mr. ROKOVINO although I am satisfied that they have been made aware it.

71. Prosecutorial experience and judicial experience shows that even exhibits or properties in police custody are misplaced, stolen, lost or destroyed.

72. I have not received any information from police or prosecution whether the subject property was and still is in police custody.

73. It may be also be the case I will also need to hear from a representative of the Ralulu family about the release of the property.

74. Section 155(1)(c) of the **Criminal Procedure Act 2009**, allows the court in any criminal proceedings to make an order for the restoration or awarding of possession of any such property or thing to the person appearing to the court to be entitled to possession of it without prejudice to any civil proceedings which may be taken in relation to the item.

75. At this stage, I am not inclined to make any order regarding the property alluded to in Mr. ROKOVINO's application until I have heard from the relevant parties and received more information.

76. I am minded to keep this case alive although Mr. ROKOVINO's has been acquitted, until this property issue is sorted.

77. The prosecution will need to respond and I can hear the parties hereafter.

COSTS AND COMPENSATION

78. For convenience, I reproduce the primary legislative provision of section 150 of the **Criminal Procedure Act 2009** regarding costs below:

150 (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 any 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 the trial, and in such case the order may be that if 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".

79. It is Mr. ROKOVINO's contention that the prosecution had no reasonable grounds for bringing the proceedings against him and that the prosecution has also unreasonably prolonged the matter.

80. It is not necessary that both grounds be proven by Mr. ROKOVINO on the balance of probabilities. Costs can be ordered against the prosecution on one or both grounds if at least one ground is satisfied.

81. Although Mr. ROKOVINO has been acquitted, this court is not *functus* and can still deal with Mr. ROKOVINO's application.

82. Why is the court not *functus*?

83. Section 150(2) of the **Criminal Procedure Act 2009**, clearly outlines that after being acquitted, the court may order the prosecutor to pay to the defendant reasonable costs as the court determines.

84. Furthermore, although this application is made within or affiliated to a criminal proceeding, resulting in the acquittal of Mr. ROKOVINO, the burden and standard of proof as we would expect in a criminal proceeding will not apply regarding this application.

85. In criminal trials, the burden is on the prosecution because of the presumption of innocence [article 14(2)(a) of our **2013 Constitution**; **Woolmington v DPP** [1935] A.C 462].

86. The standard of persuasion in criminal trials is beyond a reasonable doubt or making the court sure of the defendant's guilt.

87. It is a high standard.

88. The reason for the high standard is attributable to, firstly the departments such as the police or prosecution who are expected to be organized and that the public expects that they should be held up to a 'generous' standard. Secondly, the high burden reduces the risk of a wrongful conviction and reinforces legitimacy of the criminal justice system. Thirdly, a 'basic sense of fairness' balances the scale in favour of both the individual or defendant and the state because of the inequality of resources between the parties [Roderick Munday (9th eds) **Evidence** 2017, page 70 paragraph 2.10].

89. The standard of proof to justify an arrest or being deprived of liberty is lower which is based on reasonable suspicion [see article 9(1)(e) of our **2013 Constitution** and section 18(a) of the **Criminal Procedure Act 2009**].

90. The standard of reasonable suspicion also applies to the obtaining of a search warrant as discussed earlier [section 98 of the **Criminal Procedure Act 2009**].

91. In certain situations during criminal proceedings, adopting the civil standard of proof is applicable and is not a new phenomenon.

92. For instance in bail applications during criminal proceedings, there is a presumption in favour of bail. This presumption can be displaced on the civil standard which is on the balance of probabilities [**State v Tuimouta** [2008] FJHC 177; HAC078.2008 (18 August 2008)].

93. Additionally, for certain offences [such as unlawful possession of illicit drugs or breach bail], the defendant will need to discharge his legal burden on the balance of probabilities [see section 61 of the **Crimes Act 2009**].

94. Another example, it is presumed that all persons are not suffering from a mental impairment or everyone is presumed sane. This presumption under our criminal law can be displaced on the balance of probabilities [section 28(3) of the **Crimes Act 2009**].

95. Regarding this application for costs and compensation by Mr. ROKOVINO, the standard of reasonable suspicion will be too low. The standard of beyond a reasonable doubt is too high. It is only logical that the civil standard, that is, on the balance of probability or more likely than not, is applied.

96. I am fortified in this view relying on the **Practice Direction (Costs In Criminal Proceedings)** of the Lord Chief Justice of England and Wales [2013] EWCA Crim 1632 where at paragraph 4.2.5, his Lordship referred to the Court of Appeal Case of **In re P (A Barrister)** 2001 EWCA Crim 1728; [2002] 1 Cr App R 207. The case dealt with principles about penalising or ordering compensation in relation to the misconduct of a lawyer also a non-party but fundamentally, the Court of appeal held that the 'normal civil standard of proof applies'.

97. Generally, the party that makes the application or claim carries the burden [**Tebara Transport Ltd v Attorney General** [1981] FJSC 2; Civil Appeal 2 of 1980 (1 January 1981)].

98. For this application by Mr. ROKOVINO for costs and compensation, it is he who carries the burden as he is the Applicant.

99. The standard he must reach in-order to satisfy the court that costs are to be ordered is on the balance of probabilities.

100. If Mr. ROKOVINO does discharge his burden and standard of proof, section 150(4) of the **Criminal Procedure Act 2009**, provides a wide discretion to the Court to order 'costs as may be required' to defray costs incurred by any party as a result of an adjournment, recompense any party, penalise a lawyer for improper action even make an order for the lawyer to pay costs personally and make any other order that otherwise meet the interests of justice in any case.

101. It is worth contemplating the following principles stated in Blackstone's, Criminal Practice, 2015 (Supplement 3) at page 73:

*The principles were established in **Bradford Metropolitan District Council v Booth** (2000) 164 JP 485 and establish that a magistrates' court has a discretion to make such orders as to costs as it thinks just and reasonable, both as to the quantum of the costs and as to the party which should pay them. What is just and reasonable will depend on the relevant facts and circumstances. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged. Those principles were confirmed in **R (Peripanathan) v City of Westminister Magistrates' Court** [2010] 4 All ER 680.... the normal presumption that the unsuccessful party will pay the successful party's costs does not apply; such an order will not usually be made unless the authority had acted dishonestly or unreasonably.*

102. To the situation of Mr. ROKOVINO, were there reasonable grounds for bringing the proceedings against him?

103. Reasonable is being fair or logical or appropriate [**Concise Oxford English Dictionary**, 12th eds, 2011 at page 1198].

104. It must also be borne in mind that the decision to prosecute revolves around Code 5 of the **Prosecution Code 2003**. The principles in this code are not only followed by prosecuting agencies in Fiji such as ODPP and police prosecution [see website **https://odpp.com.fj/state-councils/**] but other members of the International Association of Prosecutors [IAP].

105. The test for prosecution is that there must be sufficient evidence and it is in the public interest to prosecute a person or party. Both these factors must exist. For instance, it is in the public interest to prosecute a suspect in a murder case but the suspect cannot be prosecuted if there is insufficient evidence.

106. The prosecution should ensure that there is a reasonable prospect of a conviction. For example, objectively assessing the reliability of the evidence, the likely defence case and whether a court property directed with the law, is likely to convict the defendant.

107. The test for prosecution will not work unless the investigative material or result of investigation is before the prosecutor or prosecuting agency.

108. In contrast to both the prosecutorial and investigative powers vested to the Fiji Independent Commission Against Corruption [FICAC], ODPP only has prosecutorial powers stemming from the **2013 Constitution** and previous Constitutions but they do not have investigative powers which is vested with the Fiji Police Force.

109. This is a primary reason there is a symbiotic relationship between ODPP and police investigators or police prosecutors with police investigators regarding the investigation and prosecution of a suspected offence.

110. Police investigations can result in the recording of police statements, charge statements, police caution interviews of suspects, search and seizure and exhibition of suspected stolen items or items relevant to the commission of an offence.

111. It is common place for the police investigation results and materials or copies of it to be placed in a file or reflected in an investigation file traditionally referred to as a 'police docket'.

112. For Magistrates', we still view these police dockets when some investigations are referred for the Magistrate to determine whether an inquest should be held under the **Inquests Act 1967**.

113. For the prosecution, should a suspect be prosecuted or charged with an offence, the prosecutor is expected to provide material and relevant information usually from the police docket and disclose that to the suspect who now becomes a defendant.

114. Having presided over the trial for Mr. ROKOVINO where witnesses were cross examined on their prior out of court or police statements and the two police statements of Mr. Jabbar and Mr. Rauqe Mr. ROKOVINO attaches in support of his costs application [which is not challenged by prosecution who did not file any responding affidavit], it is likely that the investigation into Mr. ROKOVINO's case underwent the usual process of the recording and compilation of police witness statements, compilation of a police docket, vetting by prosecution and then the laying of the charge.

115. The problem regarding Mr. ROKOVINO's application is that this court does not have the benefit of all the disclosures or the materials or information contained in the police docket which will explain the basis as to why he was charged.

116. The legal maxim *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* is worth emphasising and I find has not been rebutted by the evidence and information before me regarding the cost application.

117. The principle is, until the contrary is proved, when a person acts in an official capacity, it is presumed that that person is duly and properly appointed and discharges their official duty [see **Peniasi Kunatuba v The State** Miscellaneous Suva HAM 66 of 2006 (25th September 2006)].

118. This court is in no position to determine whether the charge against Mr. ROKOVINO from *ab initio* was unreasonably brought against him. The presumption that the prosecution acted within their official duty remains un-displaced. It is Mr. ROKOVINO who carries the burden of rebutting that presumption and has not done so.

119. That is not the end of the matter however.

120. It could be argued and I find merit in the thought that bringing proceedings is not only confined to when Mr. ROKOVINO is charged, it also extends right up to the final determination of his case which in this case was his trial date.

121. The prosecution in their submission accept, that their case against Mr. ROKOVINO rests on circumstantial or indirect evidence. That he was found with meat around the material time that some meat was supposedly stolen from a butcher.

122. For lay persons, it is a common misconception that circumstantial evidence such as an offender being seen around the crime scene or in possession of stolen item close to the time of the theft, that it has a lesser value than direct evidence such as a confession 'I did it, I stole' for example.

123. In some cases, circumstantial evidence can be more reliable and stronger than direct evidence and some convictions can result entirely from circumstantial evidence.

124. Distilling circumstantial evidence further, under common law it can be analogous to strands in a rope or links in a chain [**Chand v State** [2016] FJCA 61; AAU0015.2012 (27 May 2016); **Bai v State** [2016] FJCA 150; AAU118.2011 (29 November 2016); **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015)].

125. Depending on the different strands, if one strand is disregarded or missing, there could still be enough strands of circumstantial evidence to convict the defendant.

126. For links in a chain, if one piece of circumstantial evidence is missing, there may not be enough to convict the defendant. For instance, the deceased's body may have been found at the defendant's home, the defendant may have motive to kill the deceased as the deceased had stolen from the defendant, but the defendant did not have the opportunity to commit the murder as the defendant was incarcerated inside prison in self-isolation.

127. Although circumstantial evidence can be powerful evidence, it must still be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but that also the facts must negative any other reasonable conclusion that may exonerate the defendant. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [**Varasiko Tuwai v The State** Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53.

128. Where circumstantial evidence should not be underestimated, similarly, it should not be overestimated.

129. The prosecution called two witnesses during the trial of Mr. ROKOVINO and I have summarised their oral evidence in the preliminary stage of this decision.

130. In any trial, there are bound to be inconsistencies or omissions between what a witness may have said or written out of court such as in a police statement or police caution interview versus their testimony in court.

131. In some cases, the inconsistency or omission between the out of court prior statement versus the in court testimony is material and can affect the reliability and or credibility of the witness.

132. In some cases the inconsistency or omission is immaterial or just a 'deepity' meaning to the extent the inconsistency is proven, the effect or consequence of it to the overall case is so trivial.

133. PW1 Mr. Jabbar appeared to be consistent in his prior out of court police statement [at least the statement provided to this court by Mr. ROKOVINO in his affidavit] and his in court testimony. He added in his oral testimony that he identified some meat later when police showed him.

134. PW2 Mr. Toro verified that the defendant was selling meat on the 24-02-15 which was not disputed by the defendant. Mr. Toro went further and said that he was forced by the police to implicate the defendant to be the one who had entered Mr. Jabbar's butcher.

135. In both their evidence, the reliability of the identification of the meat was embarrassingly inadequate.

136. The beef meat in question is not special. Mr. Jabbar does not have a monopoly of beef meat in the Tavua district. Even Mr. Jabbar accepted that the meat shown to him by police later supposedly recovered from Mr. ROKOVINO, was not in the same plastic or sack and the meat shown to him was boneless.

137. It is not circumstantial evidence that beef meat was burgled from a butcher and soon after, beef meat was found in the defendant's possession and therefore the defendant committed the burglary. That is speculation.

138. The prosecution had overestimated the extent of their supposed circumstantial evidence in this case and any competent prosecutor could forsee that there was no reasonable prospect of a conviction based on the weak evidence in the identification of the meat.

139. I do not find this malicious and presiding over the trial and considering the submissions and evidence and application, it is likely it is more so about competence. The competence to assess the circumstantial evidence carefully and a primary reason every prosecutor, legal practitioner Magistrate or Judge undergoes yearly trainings or workshops.

140. The sequence of the case summarised earlier reflects that on the 22-06-20, the prosecution indicated that 2 of its witnesses had passed away.

141. It is unclear whether these were material witnesses and whether the prosecution had re-assessed their case.

142. It is the continuing duty of the prosecutor to assess the evidence. This is encapsulated in Code 4.2 of the **Prosecution Code 2003** which reflects the following:

Review is a continuing process and a prosecutor must take account of any change in the circumstance of a particular case. If at any stage of the preparation of the trial, it appears that the prosecution no longer has sufficient evidence, the prosecutor must not proceed with the case but must seek the directions from a senior police prosecutor or ODPP.

143. The series of letters written by the defendant to the prosecution and the judiciary was ominous and this itself should have warranted a review of the evidence against Mr. ROKOVINO by prosecution.

144. In any event and in totality based on the weak identification evidence, the appropriate thing for prosecution to do was to either to make an application to withdraw the charge pursuant to section 169 of the **Criminal Procedure Act 2009** or offer no evidence at Mr. ROKOVINO's trial.

145. The prosecution chose to proceed to trial and justifiably in the NO CASE TO ANSWER ruling of this court, Mr. ROKOVINO was acquitted.

146. In this vein, Mr. ROKOVINO's argument and application that the prosecution unreasonably brought the proceedings against him succeeds.

147. Again, this is still not the end of the matter.

148. From the sequence or chronology of the case which I have outlined in the table above, from the 15-05-15, the defendant was in the custody of the state. He was granted bail by my brother Magistrate in this case but he was still remanded for another criminal matter.

149. Between the 03-08-15 and 23-05-16 Mr. ROKOVINO was not produced consistently from corrections as he was using different names that is SALAUCA and ROKOVINO.

150. Between 06-04-17 and 11-09-18 Mr. ROKOVINO was not produced as information was received that he was by then a serving prisoner.

151. On the 28-09-18 when Mr. ROKOVINO was produced and appeared, he confirmed that he was a serving prisoner for a High Court matter.

152. Since being sentenced to imprisonment for his High Court matter, Mr. ROKOVINO has been in the custody of the State right until his trial on the 23-11-20 where he was acquitted. Even now he is still a serving prisoner.

153. Even if the prosecution withdrew the charge prior to his trial on the 23-11-20 or offered no evidence on his trial date, the prejudice to Mr. ROKOVINO is negligible.

154. The prejudice is more overwhelmingly against the State.

155. Consequently, I refuse to make any order for cost or compensation or penalty pursuant to section 150(4) of the **Criminal Procedure Act 2009**.

UNREASONABLY PROLONGING THE PROCEEDINGS

156. Mr. ROKOVINO is entitled to a trial within a reasonable time as protected under article 14(2)(g) of our **2013 Constitution**.

157. Section 150 of the **Criminal Procedure Act 2009** empowering the court to order costs, specifically mentions prosecutor or lawyer.

158. It does not refer to the State.

159. From Judicial experience seeing other similar cases, the corrections department relies heavily on the name written in the production order or remand warrant issued by the court. Some defendants are not produced or there are problems imprisoning defendants or offenders as the name in the production order or remand warrant is different for example from the person's name in their birth certificate or is different from the name mentioned in the charge sheet.

160. This may explain why Mr. ROKOVINO was not produced consistently.

161. I agree that more could have been done to have Mr. ROKOVINO produced earlier in this case from corrections whether he was using an alias or not as the issue is, is he the same person that is required to be produced?

162. The prosecution cannot be faulted for this.

163. They do not have powers to produce the defendant. They can make the application though.

164. It is the court who makes the production order and it is the corrections department officer in charge who must comply. I reproduce section 96 of the **Criminal Procedure Act 2009** which is the legal basis for such authority and obligation:

96(1) Where any person for whose appearance or arrest a court is empowered to issue a summons or warrant is confined in any prison the court may issue an order to the officer in charge of the prison, requiring the prisoner to be brought in proper custody and at a time to be named in the order before the court.

(2) On receipt of an order under subsection (1), the officer in charge of the prison shall act in accordance with the terms of the order, and shall provide for the safe custody of the prisoner during his or her absence from the prison in accordance with the order.

165. The chronology of this case has been summarised and it is clear that the delay in having Mr. ROKOVINO tried early was due to the court's diary. For instance, the trials fixed for the 30-09-16 and 27-02-17 were vacated due to my brother Magistrates' engagement in the island and rural court sittings.

166. Historically too in the past years, a single Magistrate was overseeing the Tavua and Rakiraki court districts. At times during a month, my brother Magistrate from Ba was dealing with cases at Tavua and Rakiraki even attending to rural court sittings at Nadarivatu and Nalawa.

167. The situation has changed in the early quarter of this year 2022 with resident Magistrates now serving Tavua and Rakiraki districts respectively.

168. Any delay in having Mr. ROKOVINO tried early must be considered in light of the available resources.

169. The prosecution cannot be faulted for this.

170. When the trial was fixed for the 26-03-19, the prosecution could not proceed as one of its witnesses was not present although summoned.

171. This is beyond the prosecutions control as once served with a summons, it was the responsibility of the witness to appear. The trial was vacated and a warrant of apprehension was issued for this witness.

172. The trial date for fixed for the 11-05-20 and 22-09-20 was vacated due to COVID-19 related reasons.

173. 2020 was unprecedented due to the pandemic. Understandably, cases had to be adjourned or the number of cases that had to be dealt with daily by the courts was limited to avoid or mitigate the spread of the virus to members of the public and parties to the court proceedings even to judicial staff. Bail had to be reviewed for many defendants in remand as it was unclear at the time when proceedings will return to normal.

174. It was fortunate that Mr. ROKOVINO's trial was held and completed on 23-11-20.

175. I see no reason to fault the prosecution for unreasonably delaying the proceedings. I refuse to order cost and compensation under this limb.

SUMMARY

176. Mr. ROKOVINO's application for cost and compensation against prosecution succeeds in part.

177. Although it is presumed that Mr. ROKOVINO was rightfully charged *ab initio*, the prosecution should not have proceeded to trial due to the weak identification evidence in the case.

178. In that sense, Mr. ROKOVINO's application that the prosecution unreasonably brought the proceedings against him is affirmed.

179. However, there was trifling prejudice to Mr. ROKOVINO as he was in remand and a serving prisoner for most part during the pendency of his case. The substantial prejudice was to the State and for that primary reason I refuse to order cost or compensation against the prosecution in favour of Mr. ROKOVINO.

180. The proceeding too was not unreasonably prolonged by the prosecution. The court diary and availability of resources, the non-production of Mr. ROKOVINO from corrections and his usage of different names and the COVID-19 pandemic are primary factors which delayed his trial. This delay is not attributable to the prosecution. Cost and compensation is refused under this limb too.

181. At this stage, I make no orders as to return of the property or canvas sought by Mr. ROKOVINO purportedly seized by police during investigations. More information is needed and a position of prosecution needs to be determined.

182. 28 days to appeal.

LISIATE T.V FOTOFILI
Resident Magistrate

At Rakiraki this 5th day of August, 2022