

IN THE MAGISTRATES' COURT OF FIJI
AT SUVA
EXTENDED CRIMINAL JURISDICTION

Criminal Case No. 900 of 2017

1. KELEPI SALAUCA
2. VERETI ISIRELI VANANALAGI

Applicant

v.

THE STATE

Respondent

For the Applicant: In Person

For the Respondent: Ms. B. Kantharia for the Director of Public Prosecutions

RULING ON COSTS

1. **KELEPI SALAUCA** and **VERETI ISIRELI VANANALAGI** (hereinafter 'the Applicants') applied for costs pursuant to section 150 (2), (3) and (4) (d) of the **Criminal Procedure Act 2009**. Their application for costs was filed following an order of acquittal after a No Case to Answer finding by this court on 27 February 2023.
2. The Applicants filed comprehensive submissions in support of their application for costs. They argue that the proceedings had not been reasonably brought, they further argue that

the State had no reasonable grounds for bringing the proceedings, had unreasonably prolonged the matter and that in all the circumstances of the case, it was in the interests of justice that costs be awarded. 1

3. They submit that if the State had properly analyzed the evidence prior to filing a complaint against them, or if it had properly analyzed the evidence after the first Applicant had made oral and written representations regarding the weaknesses of the State's case, no charge would have been filed or a diligent prosecutor would have come to court to withdraw the charge.
4. Instead, they argued, laxity followed laxity on the State's part and after significant, and they argue, unreasonable delay, the matter concluded following this court's ruling denying the State an adjournment and an order of acquittal following this court's finding that they had no case to answer after the State offered no evidence at trial.
5. The State argued that it had arrested and charged the Applicants based on the evidence available to it. The crux of the State's case was that the Applicants had been found and apprehended inside the stolen vehicle that was the subject of the *Theft* charge. They relied on the doctrine of recent possession to establish their case against the Applicants.
6. The Applicants argued that discrepancies in accounts, clear indications that the vehicle had come to complete stops at various times, and the innocent explanations offered by the Applicants' for how they came to be in the vehicle should have been enough to cause the State to not charge them or to withdraw charges once these weaknesses had been highlighted to it by way of representations. The first Applicant argued that the reason for the proffering of the complaint and for the continuation of these proceedings in court was because the State was trying to cover up their bad faith, violent arrests.

Issues

7. There are five issues to be determined by this court: 1

- (i) *Were criminal proceedings instituted by the Respondent against the Applicants?*
- (ii) *Did the criminal proceedings terminate in favour of the Applicants either by way of a discharge or an order of acquittal?*
- (iii) *Did the prosecutor have reasonable grounds for bringing the proceedings?*
- (iv) *Did the prosecutor unreasonably prolong the matter?*
- (v) *Do the interests of justice otherwise require an order of costs?*

The Law

8. Section 150 of the **Criminal Procedure Act 2009** provides, *inter alia*,

"150. (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 orders as to costs as may be required in the circumstances to –

- (a) ...
- (b) ...
- (c) ...
- (d) otherwise meet the interests of justice in any case."

9. Section 56 (2) of the **Criminal Procedure Act 2009** provides as follows:

"56. (2) Any person who believes from a reasonable and probable cause that an offence has been committed by any person may file a complaint with a Magistrates Court."

10. Section 56 (2) of the **Criminal Procedure Act 2009** sets out the test to be applied in determining whether a prosecutor has reasonable grounds for bringing criminal proceedings against a defendant. Pursuant to the language of statute, reasonable grounds equals a belief, based on a reasonable and probable cause, that an offence has been committed.
11. According to **Ishizawa v. Pohapei**, 2 FSM Intrm. 67, 76 (Pon. 1985), probable cause is “a reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a crime has been committed.” Per that persuasive authority, “in probable cause determinations, a court must regard the evidence from the vantage point of law enforcement officers acting on the scene but must make its own determination as to whether, considering all the facts at hand and, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred.”
12. Applied to a reasonable and probable cause to bring a complaint situation, the test would be, “in probable cause determinations, a court must regard the evidence from the vantage point of the material the prosecutor had in his or her possession at the time of filing the charge, but must make its own determination as to whether, considering that material, a competent prosecutor, would consider it more likely than not that an offence had been committed.”
13. In **A v. New South Wales** [2007] HCA 10; (2007) 233 ALR 584; 81 ALJR 763 (21 March 2007), the High Court of Australia per Gleeson C.J and Gummow, Kirby, Hayne, Heydon and Crennan JJ. observed, *albeit* in the context of proving the tort of malicious prosecutions:

“58. Secondly, the inquiry about reasonable and probable cause has two aspects. That is, to decide whether the prosecutor did not have reasonable and probable cause for commencing or maintaining the prosecution, the material available to the prosecutor must be assessed in two ways. What did the prosecutor make of it? What should the prosecutor have made of it?”

...

70. There are several questions bound up in the proposition that absence of reasonable and probable cause requires an examination of what the prosecution "made" or "should have made" of the material available to the prosecutor when he or she decided to prosecute, or to maintain an existing prosecution. As has already been noted, two kinds of inquiry are postulated: one subjective (what the prosecutor made of the available material) and the other objective (what the prosecutor should have made of that material). Does proof of the absence of reasonable and probable cause require a state of persuasion (a "belief") in the mind of the prosecutor? What is the subject-matter of the state of persuasion that is to be considered? Is it a persuasion about the likelihood of a particular outcome of the prosecution (the conviction of the person prosecuted)? It is a persuasion about what the material considered by the prosecutor reveals ("guilt" or "probable" guilt" of the person prosecuted)? Or is it a persuasion about the material's sufficiency to warrant setting the processes of the criminal law in motion? What, if any, weight may be given by the prosecutor to the existence of various checks and balances, like the interposition of committal proceedings and the assignment of particular functions to the Director of Public Prosecutions, that form an integral part of the system of criminal justice?

71. Those questions should be answered as follows. If the plaintiff alleges that the defendant prosecutor did not have the requisite substantive state of mind when instituting or maintaining the prosecution that is an allegation about the defendant prosecutor's state of persuasion. The subject-matter of the relevant state of persuasion in the mind of the prosecutor is the sufficiency of the material then before the prosecutor to warrant setting the processes of the criminal law in motion."

14. This is not a suit for malicious prosecutions. It is an application for costs pursuant to section 150 (2) and (3) and (4) (d) of the **Criminal Procedure Act 2009**. We do not need to delve into the subjective state of mind of the prosecutor because malice is not an element requiring proof pursuant to section 150 (2) and (3) of the **Criminal Procedure Act 2009**.

15. Lack of reasonable and probable cause can and should be determined on the basis of the subject-matter of the relevant state of persuasion in the mind of the prosecutor alone *i.e.* the sufficiency of the material then before the prosecutor to warrant setting the processes of the criminal law in motion or maintaining prosecutions once initiated.
16. Fortunately, this court will not need to set out its own test for gauging sufficiency of the material then before the prosecutor to warrant setting the processes of the criminal law in motion or maintaining prosecutions once initiated.
17. The Director of Public Prosecutions is an important regulator of criminal proceedings in Fiji: **Fiji Independent Commission against Corruption v. Devo** [2008] FJHC 132; HAC177D.2007S (27 June 2008) and section 117 (8) of the **Constitution**.

18. According to the *Prosecutor's Handbook 2014*, a resource material I was privileged to author on behalf of the Office of the Director of Public Prosecutions in 2014 in conjunction with the currently suspended Director of Public Prosecutions and a working group he had convened.

“The Director of Public Prosecutions is the premier law officer in all criminal matters. All prosecutors whether State Counsel, public prosecutors or private prosecutors; must comply fully with his directives.”

It is important to note that the Fiji Independent Commission against Corruption is an exception to this rule: section 117 (8) (b) and (c) but *cf.* with section 117 (8) (d) of the **Constitution**.

19. According to the *Prosecutor's Handbook 2014*, the test for prosecutions in Fiji is paragraph 5 of the *Prosecution Code 2003*.
20. Section 5 of the *Prosecution Code 2003* provides:

“5.1 ... No person in Fiji shall be prosecuted unless there is sufficient evidence and it is in the public interest to prosecute.

5.2. The first step is to be sure that there is a reasonable prospect of a conviction. This is an objective test, which includes an assessment of the reliability of evidence, and the likely defence case. The test is whether a court, properly directed in accordance with the law is more likely than not, to convict the accused of the charge alleged.

In assessing whether or not a court is likely to convict the following questions should be asked:

- (a) Is it likely that the evidence will be excluded by the courts?
- (b) Is the evidence reliable? Will the confession be excluded? Is there reliable evidence of identification? What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Is the witness's background likely to weaken the prosecution case? Is the witness an unreliable one with a dubious agenda or motive? Are there concerns about the accuracy of witnesses?

5.3 Prosecutors should not ignore evidence because they are not sure whether it can be used or is reliable. They should examine it closely when deciding if there is a reasonable prospect of conviction."

21. Moreover, according to section 4 of the *Prosecution Code 2003*:

"4.1 Proceedings in all criminal cases are usually instituted by police or the relevant statutory authority. If the prosecutor (whether police or public) is not satisfied that there is sufficient evidence, charges must not be laid. There should either be a referral to the DPP for instructions or a request for further investigations.

4.2. Review is a continuing process and a prosecutor must take account of any change in the circumstances of a particular case. If at any stage of the preparation or trial, it appears that the prosecution no longer has sufficient evidence, the

prosecutor must not proceed with the case but must seek directions from a senior police prosecutor or from the DPP.

Prosecutors should attempt to discuss the sufficiency of evidence with the police before withdrawing charges. This can be done verbally or in writing.”

Analysis

22. Criminal proceedings were initiated against the applicants by way of a complaint filed in the Magistrates’ Court on 31 August 2017.

23. The criminal proceedings terminated in favour of the applicants on 27 February 2023.

24. All that is left to be determined is:

- (i) whether the prosecutor had reasonable grounds for bringing the matter,
- (ii) whether the prosecutor had unreasonably prolonged the matter, and
- (iii) whether the interests of justice otherwise requires an order of costs in the applicants’ favour.

25. Ms. Kantharia for the Director of Public Prosecutions filed the Affidavit of Detective Corporal 3036 Savou in response to the applicants’ application for costs and compensation. In that Affidavit, Detective Corporal 3036 Savou deposed the following:

“Background of the case

5. **That** the Applicants were charged with *one count of Theft* contrary to section 291 (1) of the *Crimes Act 2009* in CF 900/17 together with their co-accused namely **Simeli Sugu, Emosi Nacamavuto, and Semi Baleisuva.**

6. **That** the alleged incident took place on 29th August, 2017 wherein it is alleged that the applicants together with others had stolen a vehicle belonging to the Fiji Electricity Authority (FEA) which was parked outside one of the FEA’s personnel’s house.

7. The vehicle which was allegedly stolen from the FEA's personnel's house was fitted with GPS tracking system and upon realizing that the vehicle was stolen, the FEA personnel informed his office of the same. Using the GPS tracking system the FEA personnel was able to track the stolen vehicle.

8. Same was report to the Police. At this time the stolen vehicle was tracked to be moving towards the Nadairivatu Community Police Post. The personnel's manning the post were informed by the Police and a road block was erected.

9. The stolen vehicle approached the roadblock but stopped a few meters before it and started to reverse; at this time the police and villagers worked together to apprehend occupants of the vehicle. The alleged stolen vehicle landed in a drain and all five accused persons who were in the vehicle, in an attempt to escape from being captured started to throw empty bottles and stones at the police officers.

10. The police officers with the assistance of the villagers were able to apprehend all the occupants who were present in this stolen vehicle.

11. That the occupant's in the alleged stolen vehicle were **Kelepi Salauca, Simeli Sugu, Emosi Nucamavuto, Vereti Isireli Vananalagi, and Semi Baleisuva.**

12. That the Applicant – **Kelepi Salauca** was interviewed under caution by Corporal Tomasi Daucakacaka on 30/8/2017.

13. That the Applicant – **Kelepi Salauca** chose to exercise his right to remain silent for most of the questions asked during the course of the interview except for the following questions:

Q30 – *What about in the early morning of 29.08.2017. Did you go anywhere?*

Ans. – *Yes at around 5.30am I left home to go down to the west to see my mother in Tavua Village.*

Q51 – *It is believed that the same vehicle that you were travelling in when it was stopped at Nadala was the same vehicle that was stolen from Ramatau Road, Navosai (Isuzu DMX brand - white in colour registration IU 658). What can you say about that.*

Ans. – *I don't know anything about this stolen vehicle.*

Q53 – *What was the relationship between you and the person who stole the vehicle?*

Ans. – *I have no knowledge about the stolen vehicle and the person who stole the vehicle.*

Q60 – *During the investigation, it is believed that you have the knowledge about the said stolen vehicle.*

Ans. – *I don't know anything about the allegation of the stolen vehicle.*

Q61 – *On that note, can you justify your answer above since you were caught boarding this stolen vehicle?*

Ans. – *I am not aware that the vehicle was stolen. Since that was the only vehicle I managed to stop to take me to the highland's since the bus goes there once. My intention of stopping the vehicle is to get taxi early because I will have to look for another vehicle to take me from the Highlands down to Tavua.*

Q. 62 – *Where did you manage to stop this vehicle before boarding it?*

Ans. – *Savani Bridge.*

Q. 66 – *Why did you choose this route to your destination rather than using other alternatives which is easier for you to take?*

Ans. – *It is the crosscut down to Tavua.*

Q67 – *I put to you that you have been part of the team that night when the vehicle was stolen. Can you tell what time you and your friends stole the vehicle from Ramatau Road, Navosai?*

Ans. – *I don't know anything about the allegation of the stolen vehicle.*

Q68. – *Can you tell me the exact place where you and your friends stole the vehicle?*

Ans. – *I don't know anything about the stolen vehicle.*

Q69. – *Can you take me to the place where the vehicle was stolen?*

Ans. – *No because I don't know where this vehicle was stolen from.*

Q70. – *The vehicle which you and your friends used before being arrested is now parked outside the carpark. Can you show and confirm to me that it's the same that you board before being arrested.*

Ans. – *No I don't know that vehicle because there are plenty vehicle of the same look.*

Q71. – *Take a look at these objects (pinch bar, metal rod, plice, bottles, stones) where found inside the vehicle when you were arrested. Tell me what's the reason for taking this items with you and the team?*

Ans. – *When I board the vehicle there was no such materials like that. As far as I am concern those were the items used by the police to stop the vehicle and use it to assault me.*

Q72. – *How can you say that the objects were used to assault you by the police?*

Ans. – *Because they were armed with those same objects before stopping the vehicle.*

Q73. – *How can you say that the objects were used to assault you by the police?*

Ans. – *I can see the police and the villagers of Nadal.*

Q74. – *How can you confidently say that the police beat you up and not the villagers of Nudala as they were also present there?*

Ans. – *The first people that approach me were the police and whilst they were assaulting me I can see them wearing half uniforms and some wearing civilians with police patch marked on their shirts."*

14. Given that the FEA had GPS fitted in their vehicle, track report showing the route the vehicle travelled was disclosed by the FEA and this report at no point shows that the vehicle had stopped at the Sawani Bridge as alleged by the 1st named applicant – **Kelepi Salauca** that he got into the vehicle at the Sawani Bridge.

15. **That** the second named Applicant – Vereti Isireli Vananalagi was interviewed under caution by Acting Sergeant 3035 Tevita Savou on 30 August 2017 and he exercised his right to remain silent in the entire interview.

16. That the applicant's together with others who they were all apprehended together on 29/08/2017 were after being interviewed under caution, charged and produced in custody before the Magistrates' Court at Nasinu."

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26. In his Affidavit in support of his application for costs, the first Applicant **Mr. Salauca** submitted a copy of the GPS Vehicle Trip Report for the vehicle in question. The Vehicle Trip Report showed that the vehicle had stopped at Khalsa Road, Fiji, at Colo-i-Suva Forest Park, at Smith Street, Vatukoula, and along the Kings Road, Nausori. He also submitted the Statement of Maciu Tuilau which I read over carefully in arriving at my decision today.

27. The State clearly relied on the doctrine of recent possession. In Timo v. State [2019] FJSC 1; CAV0022.2018 (25 April 2019), the Supreme Court of Fiji discussed the principle of recent possession and observed that it was circumstantial evidence which allows a court to draw the inference that the person who is found in possession of the stolen item has stolen the item or been a party to the theft. Per Keith J.:

"Indeed, this was a classic example of the application of that strand of circumstantial evidence commonly called "recent possession". In cases where a defendant is found to have been in possession of property which has been stolen very recently, so that it can be said that he was in recent possession of it such that it plainly calls for an explanation from him about how he came to be in possession of it, and either no explanation is given, or such explanation as is given is such that the court is entitled to infer, looking at all the relevant circumstances, that the defendant stole the property in question or was a party to its theft. And if the property had been stolen in a burglary or a robbery, the court is entitled to infer, again looking at all the relevant circumstances, that the defendant took part in the burglary or the robbery in which the property was stolen; see for example, Blackstone's Criminal Practice 2016, paras F.63-F.64, and applied in Fiji in Wainiqolo v The State [2006] FJCA 49 and Rokodreu v. The State [2018] FJHC 209."

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28. The State may also have intended to rely on **Mr. Salauca** and his co-defendants' alleged actions after the stop of the stolen vehicle as further circumstantial evidence pointing to consciousness of guilt.

29. In his well-researched and well-written submissions, **Mr. Salauca** argues the following:

"9. The principle of Recent Possession means if anyone is found in possession of property (or items allegedly stolen) soon after it was stolen and he fails to give a credible or reasonable explanation of the manner in which he came into possession of it, it is justifiable to infer that he was either the thief or else a guilty receiver of that stolen property.

10. It is respectfully submitted ...that I did give an explanation to the Police as to how I came to be an occupant of that vehicle (refer to Caution Interview annexed to the Affidavit of the Applicant Q27 – 30, Q60 – 78).

11. The only problem the Police can't release me is because I was badly injured due to unprofessional approach/conduct by the Police taskforce team at Nadala, Nadarivatu during arrest."

30. After carefully reviewing the Affidavits and their respective Annexures, the submissions filed before me, the case authorities referred to me and having had the benefit of oral submissions made by counsel for the State and **Mr. Salauca**, I find that the State had reasonable and probable cause to warrant setting the processes of the criminal law in motion against the Applicants and their co-defendants, and for maintaining prosecutions once initiated.

31. While it is true that **Mr. Salauca** had proffered an innocent explanation for how he came to be in that vehicle, the fact remains that there was no definitive indications on the material adduced before me – materials that it is agreed the State relied on to ground its complaint, that the vehicle had indeed stopped at Sawani Bridge to pick him up as **Mr. Salauca** had said.

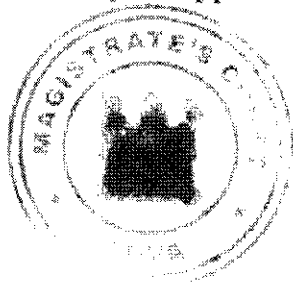
32. It was open to the State to bring charges against the Applicants' and their co-defendants on the basis of the doctrine of recent possession and the Applicants' and their co-defendants' alleged conduct at the time of their arrest and to thereafter leave it to the Court to determine whether or not this evidence was sufficient to prove the Applicants' guilt beyond reasonable doubt on its own and/or in conjunction with any explanations the Applicants' and their co-defendants may have wished to offer at trial. In my considered view, the State had a *prima facie* case and for that reason, had reasonable grounds for bringing the matter to Court.
33. I now turn my mind to consider whether or not the State had unreasonably prolonged the matter. A careful consideration of the Court Record indicates that it had not. Case managing trial matters involving multiple accused persons is always a complicated and time intensive process. There were multiple incidents where some or all of the defendants were not present, either because they were remanded or serving in other matters or because they had absconded bail. There too was the matter of *alibi* notices, bail applications and other pre-trial matters to deal with.
34. A trial date first fixed for 25 July 2018 had to be vacated despite the State's readiness to begin because four of the five defendants were not present. On 29 September 2018, after three of the five defendants had been present in court it transpired that some of the defendants had lost their disclosures. On 25th October 2018, the Legal Aid Commission withdrew as counsel. On 23 July 2019, a second trial date was vacated on the Court's own motion despite the fact that the State was ready. It seemed the Court was concerned about the fact that a trial in absentia application had not been made. COVID-19 delayed matters over 2020 and 2021. When the proceedings was finally fixed for trial to 27 February 2023, the proceedings concluded in the defendants' favour by way of a finding that they had no case to answer and consequential orders of acquittal.
35. I find that the State have not unreasonably prolonged the matter.
36. I now turn my mind to whether or not costs are warranted pursuant to section 150 (4) (d) of the **Criminal Procedure Act 2009**.

37. In the circumstances, after carefully perusing the material before me, the Court Record and after turning my mind over the comprehensive oral submissions made before me in open Court. I find that the manner in which the court managed the case, the orders available to the court to make pursuant to section 168, section 170 and section 178 of the **Criminal Procedure Act 2009** which it did in fact make, and the interim award of costs made pursuant to section 150 (4)(a) of the **Criminal Procedure 2009** was sufficient redress to meet the interests of justice during the course of these proceedings.

38. Costs are not required in the circumstances to otherwise meet the interest of justice.

39. For these reasons, the Applicants' application for costs is denied.

40. **28 days to appeal to the High Court.**



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Seini Puamau
RESIDENT MAGISTRATE

Dated at Suva this 13th day of July 2023.