

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO.AAU 0087 of 2013
[High Court Criminal Case No. HAC 099 of 2010]

BETWEEN : **EPARAMA MANI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Rajasinghe, JA

Counsel : **Mr. Fesaitu. M for the Appellant**
Ms. Vodokisolomone. S for the Respondent

Date of Hearing : **22 August & 05 September 2017**

Date of Judgment : **14th September 2017**

JUDGMENT

Gamalath, JA

[1] I agree.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellant on two counts under the Crimes Decree, 2009 (now the Crimes Act, 2009). The first is under section 311 (1)(b) of the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed on 01 May 2010 at Samabula. The Information dated 11 June 2012 describes the particulars of the first count as the Appellant having stolen \$350.00 in

cash, a black berry mobile valued at \$800.00 and a gold diamond ring valued at \$1000.00 amounting to a total of \$2,150.00 from Anthony Price. The second count is the Appellant having caused grievous harm to Filimoni Bogileka contrary to section 258 of the Crimes Decree No.44 of 2009 on the same day at the same place.

- [3] After trial, on 25 March 2013 the three assessors expressed a unanimous opinion that the Appellant was guilty of both counts. The Learned High Court Judge on 26 March 2013 concurred with the assessors' opinion in the Judgment and convicted the Appellant on both counts. On 02 April 2013 the Learned Judge imposed sentences of 09 years and 04 years of imprisonment on first and second counts respectively: Both are to run concurrently with a 05 year non-parole period.

Preliminary observations

- [4] The Appellant in person had tendered an application for leave to appeal and an enlargement of time which had reached the Court of Appeal Registry on 21.08.2013. Thus, the Appellant's leave to appeal application was late by more than 03 ½ months but it had been accompanied by an affidavit dated 20th August 2013 explaining the reason for the belated leave to appeal application. In **Nawalu v State** Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11 the Supreme Court held

'Section 35(1)(b) of the Act empowers the Court of Appeal to extend time within which a notice of appeal may be given. Strictly speaking all such applications under the Rules should be in Form 6 of the 2nd Schedule to the Rules. With unrepresented appellants the appellate courts have not insisted on a strict application of the Rules.'

- [5] The reason for the delay adduced by the Appellant is that he was issued with a copy of the summing up only on 23 July 2013 which had not been contradicted by the State. The Appellant thereafter had filed a notice of additional grounds of appeal in the registry on 26 May 2014. The registry had also received a set of written submissions from the Appellant on 06 June 2014. The Appellant seems to have contested only the conviction up to then.

- [6] R Vananalagi & Associates had filed an amended petition of appeal on behalf of the Appellant on 02 December 2014 where both conviction and sentence had been challenged. However, the same lawyers filing written submissions on behalf of the Appellant on 23 December 2014 had indicated unequivocally that the Appellant was only appealing against sentence and not the conviction and even requested the Court of Appeal to disregard all grounds of appeal filed prior to 02 December 2014. Thus, those written submissions only dealt with matters relating to the sentence. The State in its written submissions filed on 12 January 2015 had reiterated the Appellant's abandonment/withdrawal of appeal against his conviction and dealt with the leave to appeal out of time and sentence. The State had conceded that leave to appeal out of time (i.e. enlargement of time within which the application for leave to appeal could be filed) and leave to appeal (i.e. on questions of mixed law and facts) to the Full Court may be granted.
- [7] However, in the single Judge ruling dated 13 March 2015 both extension of time and leave to appeal had been refused. The single Judge of the Court of Appeal had not considered the ground of appeal against the conviction at all on the basis that it had been abandoned and the ground on sentence had been refused for lack of merit and observed that if leave is granted, the Appellant would run the risk of his sentence being enhanced by the Full Court.
- [8] The Appellant had filed a renewed application in terms of section 35(3) of the Court of Appeal Act which had been received by the registry on 19 March 2015 containing 03 grounds of appeal against the conviction and 02 grounds of appeal against the sentence. He had prayed that alternative to setting aside the conviction this court may reduce the sentence on court two to reflect the time spent in custody and reduce the sentence to reflect the wrong starting point adopted by the trial judge. The registry had received on 07 April 2016 another renewed application from the Appellant to have his leave to appeal application determined by the Full Court where he has come out with 07 grounds of appeal only against the conviction but no mention has been made of the sentence. He had prayed that the conviction be set aside. His written submissions filed by himself and received on 13 June 2016 also have dealt only with the grounds of appeal against conviction.

- [9] The Legal Aid Commission acting on behalf of the Appellant had sought to add another ground appeal by way of a letter dated 31 July 2017 and filed another set of written submissions of the same date dealing altogether with 07 grounds of appeal against conviction sans appeal ground 06 (not pursued). The Respondent in its written submissions dated 11 August 2017 had also followed the same sequence in reply.
- [10] In the written submissions the Legal Aid Commission had stated *inter alia* that the Appellant had not instructed his earlier counsel to abandon or withdraw his appeal against the conviction. There is no such formal application to abandon or withdraw made on behalf of the Appellant in the record provided to us or in the original High Court Record. Nor is there any formal order allowing such abandonment or withdrawal by the Court. Thus, in my view it cannot be concluded that there is an abandonment of the appeal against the conviction as there had not been an application to abandon made in terms of the law which is Rule 39 of the Court of Appeal Rules and granted in accordance with judicial guidelines, Rule 39 provides

"An appellant, at any time after he has duly served notice of appeal or for application for leave to appeal, or of application for extension of time within which, under the Act, such notices shall be given, may abandon his appeal by giving notice of abandonment thereof in the form 3 in the Second Schedule to the Registrar, and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal."

- [11] In the circumstances, having considered the above matters and the facts of the case and being mindful of the tariff of 10-16 years for the offence of aggravated robbery as laid down in several judicial pronouncements (see **Samuel Donald Singh v State** Crim. AAU15 and 16 of 2011, **Nawalu v State** Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11, **Nabainivalu v State** Criminal Appeal CAV 027 of 2014 : 22 October 2015 [2015] FJSC 22, at the commencement of the hearing of the appeal on 22 August 2017 it was indicated to the Appellant and his counsel as prescribed in **Kumar v. The State** Criminal Appeal No. AAU 0018J of 2005: 29 July 2005 [2005] FJCA 54 that this court had the power to pass any other sentence warranted by law in terms of section 23(3) of the Court of Appeal Act if it thinks that a different sentence should have been passed, afforded an opportunity for them to make representations in that regard and also informed them that, however the

Appellant was free to canvass his appeal regardless if he so wished. The Appellant's counsel consulted him in open court and informed the Bench that his client nevertheless wished to proceed with the appeal.

[12] The court also informed the Appellant and his counsel that there was no valid appeal before us to consider unless the Appellant at least now sought to renew the application for extension of time and the same was granted by this court. It was further indicated to them that the court would consider whether leave to appeal should be granted or not only thereafter and that in any event the matter of sentence would still be considered as part of the judgment of the court. The counsel for the Appellant made an application orally for the enlargement of time. Both parties were allowed adequate time till 28 August 2017 to file written submissions on those matters.

[13] It must be pointed out that section 35(3) of the Court of Appeal Act does not stipulate the time period within which a renewed application should be filed against the refusal of an application under section 35(1). Neither does the Act prescribe the manner in which a renewed application should be made. In other words the Act does not prescribe any particular Form to be used. Thus, I believe that such an application could even be made orally, subject however to the other party being given an opportunity to meet any such application. In this case the renewed application to extend time to file the leave to appeal application was made orally on behalf of the Appellant and the State was given the same time to respond by way of written submissions.

[14] The State had filed further written submissions on 28 August 2017. The Counsel for the Appellant also had filed another set of written submissions on 28 August 2017 in support of his application for enlargement of time and further submissions on leave to appeal. Then he had lodged a letter on 29 August 2017 with the Court of Appeal registry stating *inter alia* that the day after the hearing he had received a call from the Appellant from prison where he had indicated that he now wished to withdraw the appeal and he had personally visited the Appellant in prison on 28 August 2017 and the Appellant had confirmed his desire to withdraw the appeal. A Notice of Abandonment of Appeal in Form 3 signed by the Appellant and his counsel too had been attached to the said letter.

[15] The Court directed the Registry to have this matter called on 05 September 2017 to consider the application to abandon the appeal. Accordingly the matter of withdrawal was taken up before the Full Court on that day where the Appellant, his counsel and the counsel for the State were present.

[16] The Court caused the entire proceedings of the day to be recorded, translated into the Appellant's vernacular and directed that a transcript of them be filed of record.

[17] The Notice of Abandonment of Appeal was shown to the Appellant and he confirmed that the signatures therein were those of him and his counsel. Answering Court he said that he stands by his decision to abandon the appeal.

[18] The Court asked the Appellant several questions personally on the guidelines given in **Masirewa v. State** Criminal Appeal No. CAV0014 of 2008S:17 August 2010 [2010] FJSC 5 and several other decisions of the Court of Appeal. The summary of questions and answers are as follows.

(i) Q: Why the Appellant wanted to abandon the appeal. A: He would complete the 05 year non-parole period of imprisonment in April 2018 out of the total sentence of 06 years and therefore, be likely to be released before the end of year 2018.

(ii) Q: Whether his decision to abandon the appeal was voluntary and of his own free will. A: Yes

(iii) Q: Whether any pressure was brought to bear upon him to do so. A: No

(iv) Q: Whether he received legal advice. A: Yes; from his counsel.

(v) Q: Whether he had understood the consequences of abandonment. A: No

The Court informed the Appellant that if his application to abandon is allowed the appeal would be deemed dismissed and he would not be able to prosecute the appeal before the Court of Appeal thereafter. He said that he understood and agreed to the consequences of abandonment.

[19] I am satisfied that the Appellant's application to abandon his appeal is a considered decision upon legal advice that had been taken without any pressure but voluntarily and on his own free will. I am also satisfied that the Appellant fully understood and agreed to the consequences of the abandonment of his appeal.

[20] In the circumstances, I allow the abandonment of the appeal and the appeal should be deemed to be dismissed by this Court.

Rajasinghe. JA

[21] I agree with the reasons and conclusions by Prematilaka JA.

The Order of the Court :

- (i) *Abandonment of the appeal allowed.*
- (ii) *Appeal against conviction and sentence stands dismissed.*



A handwritten signature in black ink, appearing to be "S. Gamalath", written above a dotted line.

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

A handwritten signature in black ink, appearing to be "C. Prematilaka", written above a dotted line.

.....
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

A handwritten signature in black ink, appearing to be "T. Rajasinghe", written above a dotted line.

.....
Hon. Mr. Justice T. Rajasinghe
JUSTICE OF APPEAL