

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

CRIMINAL APPEAL NO.AAU 0161 of 2016
[In the High Court at Lautoka Case No. HAC 02 of 2014]

BETWEEN : **TIMOCI NAULU**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST
CORRUPTION**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. V. Singh for the Appellant**
: **Ms. F. Puleiwai for the Respondent**

Date of Hearing : **11 September 2020**

Date of Ruling : **14 September 2020**

RULING

[1] Following a trial in the High Court at Lautoka the appellant had been convicted on two counts of bribery contrary to section 4(2) (a) of the Prevention of Bribery Act 2007. At the conclusion of the evidence the assessors had returned unanimous opinions of guilty on one of the counts (count 02) and not guilty on the other count (count 01). The learned trial Judge had agreed with the unanimous opinion of guilty on count 02 but disagreed with the unanimous opinion of not guilty on count 01. In a reasoned judgment delivered on 12 October 2016 the trial Judge had set out what he described as his cogent reasons for disagreeing with the unanimous opinion of not guilty on count 01. Upon conviction, on 17 October 2016 the appellant had been sentenced to a term of three years imprisonment for each count to be served concurrently with a non-parole term of 02 years. In addition, the appellant was fined \$1,500.00 to be paid immediately, in default of which the appellant was ordered to

serve a further 150 days imprisonment to be consecutive to the terms imposed for the offences.

- [2] The brief facts, as could be gathered from the ruling of the single judge dated 31 May 2018 are

'[2] The background to the convictions may be stated briefly. The appellant was the Crime Officer of the CID branch of the border police station at Nadi. At the time of the offence the appellant held the rank of Acting Inspector. In the first count it was alleged that between 25 and 29 September 2013 the appellant as a public servant without lawful authority or reasonable excuse solicited an advantage of \$5,000.00 from Kamlesh Kumar in return for abstaining from performing his duty in not filing charges against Kamlesh Kumar. The second count alleged that the appellant actually received FJS200 and AUD\$200 from Kamlesh Kumar on 29 September 2013 as a public servant without lawful authority or reasonable excuse in return for abstaining from performing his duty in not filing charges against Kamlesh Kumar.'

- [3] On 18 November 2016 through his lawyers Babu Singh & Associates (Barristers and Solicitors) the appellant had filed a summons seeking an order for an enlargement of time to file an appeal against conviction and sentence. It was out of time by 2 days and the single judge of this court had granted an enlargement of time pursuant to sections 26 and 35(1) of the Court of Appeal Act, 1949.

- [4] Grounds of appeal urged on behalf of the appellant were as follows.

Against conviction

1) That the trial Judge erred in law and in fact in convicting the Appellant when he overturned the assessors verdict of not guilty in count one.

2. That the trial judge erred in law in fact when he convicted the appellant on counts 1 (one) and 2 (two) as there are duplicity in the charges and or in the alternative the charges are bad in law when he considered and combine the elements of offence "without lawful authority or reasonable excuse" into one.

3. The trial judge erred in law and in fact when he failed to separate in both counts the element of offences (ii) without lawful authority or reasonable excuses in the summing up and he failed to address the assessors on the use of the word "or" and the meaning of without lawful authority and reasonable excuse.

4. *That the trial judge erred in law and in fact when he failed to advise the assessors on the correct number of elements of the offences in each count where at the closing address by both counsels submit different number of elements of offences present in each charge/count to be proved by the prosecution.*

5. *That the trial judge erred in law and in fact in convicting the appellant on both counts when the prosecution failed to adduce evidence and prove beyond reasonable doubt that the accused abstained from performing the act namely not to file charges against the complainant, Kamlesh Kumar."*

Against sentence

6) *That the sentence imposed by the trial judge is excessive and harsh in all circumstances.*

7. *That the trial judge erred in law and in fact when he imposed the final sentence for three(3) years for each of the two counts [at paragraph 19 of the sentencing remarks] and later pronounced in his conclusion period for the first count in the said paragraphs 24(i) and (ii). Hence the inconsistency with his sentencing remarks.*

8. *That the fine of \$1,500.00 is harsh and excessive.*

9. *That the learned trial judge erred in law and in fact when he said "at the conclusion of the hearing you.... solicited an advantage...from one Kamlesh Kumar in order to finish two pending cases against with the Board Police [at paragraph 2 of the sentencing remarks] when there was no detail facts of the two pending cases adduced in evidence by Kamlesh Kumar;.*

10. *That the trial judge fail to cite any authority to support his preposition in refusing to consider the accused mitigation as a first offender and of a good character."*

- [5] At the leave to appeal hearing the appellant had been represented by Mr. E. Maopa and the respondent by Ms. F. Puleiwai. Chalanchini P sitting as a single judge of this court had granted leave to appeal against conviction and sentence (on grounds 8 and 10) in the ruling delivered on 31 May 2018. Thereafter, there had been another ruling on the appellant's application for bail pending appeal where bail pending appeal had been refused by Calanchini P on 25 June 2018.

- [6] Following the leave to appeal ruling the Court of Appeal registry had called for the judge's notes from the High Court registry on 03 August 2018 presumably in terms of rule 44(2) of the Court of Appeal Rules under 'Part III – Criminal Appeals' read with section 27 of the Court of Appeal Act followed by a similar request on 29 July 2019.
- [7] However, it does not appear from the record that since the date of the leave to appeal ruling on 31 May 2018, the appellant or his lawyers have complied with rule 44(4) of the Court of Appeal Rules in lodging the copies of documents referred to in rule 44(3) for certification by the Registrar in order to have the matter listed for hearing before the full court.
- [8] After the ruling was delivered refusing bail pending appeal on 25 June 2018 the matter was mentioned for the first time on 05 June 2020 with notice to all the parties (*i.e.* Babu Singh & Associates and FICAC) including Natabua Correction Centre where the appellant had been detained. However, the appellant and his lawyers were absent. Babu Singh & Associates (Barristers and Solicitors) had sent a letter addressed to the Court of Appeal registry dated 28 May 2020 stating *inter alia* that the appellant had been released upon serving his sentence somewhere in September 2019 and they were trying to locate him to file an abandonment notice to abandon the appeal.
- [9] The matter once again came up on 26 June 2020 where neither the appellant nor his lawyers were present and this court directed the appellant's lawyers to be present on the next date. Then, on 06 August 2020 and 04 September 2020 the appellant was absent but represented by his lawyers who informed this court that their efforts to trace the appellant had not yielded any positive results. The respondent's counsel also indicated to court that FICAC too had attempted to get information of the whereabouts of the appellant but failed and made an application that this court should dismiss the appeal in terms of section 35(2) of the Court of Appeal Act. The respondent cited **Tamanitoakula v Fiji Independent Commission Against Corruption** [2019] FJCA 152; AAU82.2015 (19 July 2019) in support of its application. The appellant's counsel also did not object to that application.

[10] Section 35(2) of the Court of Appeal Act is as follows:

' If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal.'

[11] In Tamanitoakula the appellants, represented by counsel, had been granted leave to appeal against conviction but none of them had lodged appeal records for certification for almost 02 years and in the meantime they had been released after serving the sentences. The whereabouts of the appellants had been unknown and they had provided no forwarding addresses to the CA registry for service of notices. In the circumstances Calanchini P in Tamanitoakula had dismissed the appeal acting under section 35(2) of the Court of Appeal Act.

[12] Though the circumstances are almost similar in the present appeal, I do not think that the appeal could be dismissed under section 35(2) of the Court of Appeal Act for the following reasons. In my view, the power of dismissal of an appeal under section 35(2) could be exercised by a single judge only

- (i) If the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal.
- (ii) As long as a decision has not been made by the single judge under section 35(1), particularly on leave to appeal or extension of time.

[13] Since the appellant had been allowed leave to appeal against conviction and sentence it cannot be said that the appeal is vexatious or frivolous. The power of dismissal under section 35(2) came to an end with the leave to appeal ruling. The single judge is *functus* thereafter with regard to the power of dismissal under section 35(2).

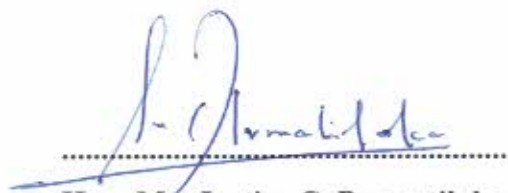
[14] Therefore, I am not inclined to act under section 35(2) of the Court of Appeal act and dismiss the appeal.

- [15] However, from the two affidavits filed by the lawyers for the appellant and the respondent, it appears that Mr. Maopa, counsel for the appellant at the leave to appeal hearing had tried to contact the appellant's surety but found that he had passed away. His attempt to contact the appellant's wife too had been unsuccessful. The appellant had been released from prison in September/October 2019 and he had moved back to his village in the interior of Sigatoka valley but his current whereabouts are unknown. It has also been confirmed that after the ruling on bail pending appeal the appellant's wife had not visited the office of Babu Singh & Associates and thereafter she too could not be contacted through her mobile phone. The appellant's lawyers' messages left with his relatives too had not been met with positive results and they had exhausted all avenues to locate him.
- [16] Considering all the circumstances, I am inclined to form the view that the appellant has not demonstrated any intention to prosecute his appeal diligently and this matter would only consume valuable judicial time and also waste time and resources of the CA registry and the lawyers of the appellant and the respondent.
- [17] Therefore, the appellant's appeal should be deemed to have been abandoned in terms of rule 44 (13) of the Court of Appeal Rules for non-compliance with rule 44.

Order

1. The appeal is deemed abandoned.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL