

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

CRIMINAL APPEAL NO. AAU 0047 of 2017
[High Court of Labasa Criminal Case No. HAC 17 of 2015]

BETWEEN : **AKUILA KUBOUTAWA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**
Gamalath, JA
Nawana, JA

Counsel : **Ms. T. Kean for Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **08 November 2022**

Date of Judgment : **08 November 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the High Court of Labasa on a single count of Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004.

[2] The appellant had pleaded not guilty and proceeded to trial. After trial, on 18 November 2016 the assessors unanimously opined that the appellant was guilty as charged. On 21 November 2016, the appellant had been convicted and sentenced to 08 years of imprisonment, subject to a non-prole period of 06 years and 06 months, on 23 November 2016.

[3] The appellant had been given leave to appeal against sentence but not against conviction. Legal Aid Commission has since renewed his appeal against conviction in terms of section 35(3) of the Court of Appeal Act.

[4] When the appeal was taken up for hearing before the full court, the counsel for the appellant in the presence of the appellant informed court that his client wished to withdraw his appeal against conviction and sentence and referred to an application signed by the appellant on 19 October 2022 seeking to abandon his appeal in Form 03 as per Rule 39 of the Court of Appeal Rules. Rule 39 provides that:

"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."

[5] Despite the phrase, 'deemed to have been dismissed', clause in Rule 39, the long-established practice of this court is to have abandonment applications mentioned before court in the presence of the appellant himself and satisfy itself of the requirements given in **Masirewa v. State** Criminal Appeal No. CAV0014 of 2008S:17 August 2010 [2010] FJSC 5.

[6] The Hon. Chief Justice has confirmed this position in a recent Ruling in **Kumar v State** [2022] FJSC 5; CAV 014 of 2021 (26 January 2022).

19. *It is obvious that the Appeal is not abandoned upon filing of the Application under Rule 39 but needs to be called before the Court of Appeal for an order that the Appeal is abandoned.*

20. *What is stated at the preceding paragraph is the practice adopted by the Court of Appeal when parties wish to abandon or withdraw the Notice of Appeal or Application for Leave to Appeal or Application for Extension of Time."*

[7] Thus, the dismissal of an appeal upon an abandonment application being filed, could happen only when the abandonment is allowed by an order of the Court of Appeal.

[8] Answering Court, the appellant said that he was standing by his decision to abandon the appeal and conviction and sentence. In terms of the Supreme Court guidelines in **Masirewa v State** (supra) this court asked the appellant in the presence of his counsel whether (i) he wished to abandon his appeal (ii) he was doing so voluntarily (iii) he had received legal advice (iv) reasons for the abandonment at this stage and (v) he understood the consequences of this court allowing his abandonment application namely that he cannot prosecute his appeal again before this court. He answered the questions in the affirmative.

[9] 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 the consequences of the abandonment of his appeal.

[10] In the circumstances, I allow the abandonment of the appeal and accordingly, the appeal should stand dismissed by this Court.

Gamalath, JA


[11] I agree with Prematilaka, RJA's reasons and conclusions.

Nawana, JA

[12] I agree with the reasons, conclusions and the orders of Prematilaka, RJA.

Orders of the Court:

- 1) Abandonment of the appeal is allowed.
- 2) Appeal against conviction and sentence stands dismissed.


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




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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL


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Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL