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

CRIMINAL APPEAL NO. AAU 0019 of 2009
[In the High Court at Suva HAC 139J. 2007S]

BETWEEN	**:**	**ILAISA SOUSOU CAVA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	**:**	**26 June 2023**
Date of Ruling	**:**	**27 June 2023**

RULING

[1] On 26 November 2008, the majority of assessors at Suva High Court found the appellant (and one of his co-accused) guilty of the offence of murder and unlawful use of motor vehicle committed at Lami in the Central Division between the 24 and 25 August 2007 contrary to the relevant provisions of the Penal Code [**State v Nute** [2008] FJHC 325; HAC139.2007 (26 November 2008)]. On the same day, he was convicted [**State v Nute** [2008] FJHC 326; HAC139J.2007S (26 November 2008)] and sentenced to life imprisonment with a minimum term of 16 years imprisonment for murder and 07 months' imprisonment for unlawful use of motor vehicle, both sentences to be served concurrently [**State v Nute** - Sentence [2008] FJHC 327; HAC139S.2007S (26 November 2008)].

[2] The appellant's belated appeal (filed nearly 07months out of time on 20 July 2009) against conviction and sentence had been heard in the Court of Appeal on 11 February 2013. The Court of Appeal in a unanimous decision (**Nute v State** [2013] FJCA 134; AAU0110.2008; 0019.2009 (6 December 2013) had dismissed his conviction appeal on 06 December 2013 where with regard to the sentence appeal the judgment stated as follows:

> *'**Ground 5 – Minimum term imposed***
> *[30] This ground was abandoned at the hearing.'*

[3] The Supreme Court had dismissed the appellant's appeal against conviction on 23 April 2015 [**Cava v State** [2015] FJSC 3; CAV0028.2014 (23 April 2015)]. Thereafter, on 28 October 2020 the appellant had filed a leave to appeal application in the Supreme Court seeking leave out of time to appeal against sentence and it had been dismissed on 13 January 2022 as the appellant had abandoned his sentence appeal in the Court of Appeal and there was nothing for the Supreme Court to determine. The Chief Justice sitting alone had advised the appellant in the Ruling on 13 January 2022 to seek enlargement of time to appeal against sentence from the Court of Appeal, if he so wished [**Cava v State** [2022] FJSC 1; CAV 0028 of 2014 (13 January 2022)]

[4] Consequently, the appellant had filed the instant application seeking leave to appeal against his sentence out of time on 05 April 2022. Thus, his application for extension of time is late by about 13 years, 04 months and 03 weeks.

[5] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[6] The delay is very substantial. The appellant has not given acceptable reasons for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] The appellant's main contention is that though he was represented by a counsel before the Court of Appeal his counsel did not inform him of the reason for the abandonment. He further submits that the full court of the Court of Appeal too did not inquire him as to the reason for the abandonment or whether he was in agreement with the abandonment; nor did the court appraise him of the consequences of the abandonment.

[8] The appellant submits that the abandonment is not in compliance with Rule 39 of the Court of Appeal Rules and the decision in **Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010).

[9] Rule 39 of the Court of Appeal Rules states:

> *'39. 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.'*

[10] Without referring to Rule 39, the Supreme Court said in ***Masirewa***:

> *'[11] Where written or oral applications are made by an unrepresented petitioner seeking leave to withdraw an appeal, appellate courts should proceed with caution. It would be prudent for instance to ask the petitioner, on the day the matter is listed for hearing, why the petition was to be withdrawn, whether any pressure had been brought to bear on the petitioner to do so, and whether the decision to abandon had been considered beforehand. This inquiry should be made of the petitioner personally and recorded even in cases where the petitioner is represented. The purpose of the inquiry is to establish that the decision to withdraw has been made deliberately, intentionally and without mistake. Ideally, the decision should be informed*

also. That aspect is not always an easy matter to achieve in a jurisdiction such as Fiji with limited access to appellate advice, and occasionally if rarely, will give rise to difficulty.'

[11] It does not appear from the record that there had been a Form 3 filed in compliance with Rule 39 seeking abandonment of the sentence appeal. Nor is there any record of compliance with in ***Masirewa*** guidelines by the full court. Neither had the Court of Appeal dismissed the appellant's sentence appeal nor had it been deemed to have been dismissed.

[12] In **Namulo v State** [2012] FJCA 23; AAU20.2010 (30 March 2012) it was held that:

'Although Rule 39 refers to an appeal being deemed to be dismissed by the Court, it is apparent from section 23 (1) that the power to dismiss an appeal "in any other case" is vested in the Court of Appeal.'

[13] In **Kumar v State** [2022] FJSC 5; CAV 014 of 2021 (26 January 2022), the Chief Justice siting as a single judge stated:

'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.

[14] In **Matairavula v State** [2013] FJCA 13; AAU0032.2010 (15 February 2013), the Court of Appeal further stated:

[3] For an appeal to be abandoned under Rule 39, the first requirement is that the appeal has to exist……. The second requirement under Rule 39 is for the appellants to give a notice of abandonment (Form 3) to the Registrar.

[25] ……If an unrepresented appellant wishes to withdraw his appeal, then the court must ensure that not only his decision is an informed decision but he is freely and voluntarily making the decision to withdraw.

*[26] It must be borne in mind that **Masirewa** guidelines equally apply to the appellants who are represented by counsel. The guidelines are not only to protect the administration of the appellate process from misuse but also the legal practitioners against attacks on their integrity by their clients.*

Appellate courts will require compelling grounds to reinstate appeals where appellants blame their lawyers for their predicaments.'

[15] The Court of Appeal has followed the practice of inquiring from appellants in person and represented *inter alia* the following matters when considering an application to abandon the appeal against conviction and/or sentence.

a. Does the appellant confirm filing Form 3;
b. Does the appellant still wish to abandon his/her appeal against conviction/sentence;
c. Is the appellant doing so voluntarily;
d. Has the appellant received legal advice;
e. What are the appellant's reasons for doing so;
f. Does the appellant understand the consequences if his/her application to abandon is granted – i.e. the appeal against conviction/sentence will be dismissed.

[16] Therefore, as to whether the 'abandonment' of the sentence appeal by the appellant's counsel is valid in law and if not, whether his sentence appeal is still pending and undecided are questions of law and the appellant should be allowed extension of time to appeal against sentence in order to argue these matters fully before the full court.

[17] With regard to the main appeal against sentence, the appellant's main complaint is that the trial judge had failed to give reasons for exercising his discretion in imposing a minimum term and also for setting its length at 16 years (which according to the appellant is excessive) as stated in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016). In fact in ***Balekivuya*** the Court of Appeal said that there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term and that there are also no guidelines as to what matters should be considered when determining the length of the minimum term. If the full court decides to entertain the appellant's sentence appeal, it may consider addressing this issue and his challenge to the decision to impose a minimum serving period and fixing it at 16 years by the trial judge. However, it should be mentioned here that the appellant's co-accused's appeal against sentence was dismissed by the Supreme Court stating that when considering the aggravated circumstances this seems to be a heinous crime that calls for deterrent punishment and the minimum term of 16

years imprisonment before applying for parole for the count of murder cannot be said to be excessive [see **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014)].

Order of the Court:

1. Enlargement of time to appeal against sentence is allowed.

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent