

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

**CRIMINAL APPEAL NO. AAU 58 of 2021**  
**[In the High Court at Lautoka Case No. HAC 60 of 2017]**

**BETWEEN** : **SATISH CHAND**

**AND** : **THE STATE**

*Appellant*

*Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
**Mr. A. Singh for the Respondent**

**Date of Hearing** : **10 January 2024**

**Date of Ruling** : **11 January 2024**

**RULING**

[1] The appellant had been charged in the High Court at Lautoka as follows:

**‘COUNT 1**

**Statement of Offence**

**RAPE**: *Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

**Particulars of Offence**

**SATISH CHAND**, on the 27<sup>th</sup> of February 2017 at Lautoka, in the Western Division, penetrated the vagina of **S.D**, a 10 year old, girl with his finger.

**COUNT 2**

**Statement of Offence**

**SEXUAL ASSAULT**: *Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.*

**Particulars of Offence**

*SATISH CHAND, on the 27<sup>th</sup> of February 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted S.D by kissing her neck and causing a love bite.*

- [2] After trial, the judge had concurred with the assessors, convicted the appellant and sentenced him on 12 November 2020 to an aggregate sentence of 09 years', 10 months' and 02 weeks' imprisonment with a non-parole period of 06 years, 10 months and 02 weeks.
- [3] The appellant's appeal against conviction and sentence is untimely. The appellant made an application to abandon the sentence appeal by filing Form 3 on 02 June 2023 and his application was duly considered on the same day in terms of *Masirewa* guidelines (**Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) and on the same day it was allowed. Accordingly, his sentence appeal was deemed abandoned in terms of Rule 39 of the Court of Appeal Rules.
- [4] 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).
- [5] The delay in the conviction appeal is approximately 05 months. There is no explanation for the delay. However, 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.

[6] The trial judge had summarized the facts in the judgment as follows:

6. *The sole witness to substantiate on the alleged incidents is the PW1, S.D. I am mindful that the law requires no corroboration. Therefore it can be acted on the evidence of a sole witness. However, if we are to rely on a sole witnesses' evidence we must be extremely cautious of the credibility and the dependability of such evidence. Therefore, having that in mind, I will be extra-careful in considering the evidence of the PW1, together with the demeanor shown in giving her evidence.*

### **Analysis**

7. *Before analyzing the evidence of the PW1, I will consider the evidence of the Dr. Sudhiksha Singh. This evidence goes unchallenged by the accused. She confirms that PW1's hymen was not intact and such injury could have caused by an insertion of a finger. The injury on the neck was a recent one caused within 24 hours, by the time she was examined on the 27<sup>th</sup> of February at 5.00pm. The history given was compatible with the findings. It is evident that PW1 was examined in the presence of her mother, the PW2.*

8. *When analyzing the evidence of the PW1, the evidence of the incident itself is not challenged or cross-examined upon by the accused. It explained by her how the accused came behind, held her and inserted his finger to her vagina and kissed her on the neck, making a love bite. However he somewhat challenges, accompanying the PW1 to her house. The PW1 stands by her version of events and the accused fails to create any reasonable doubt in the prosecution version.*

9. *The evidence of the PW2 and the PW3, confirms the PW1's evidence on all relevant points. The PW3 was a neutral person. She has helped the accused and his family on many times and issues. Even the PW2 was having a very good relationship with the accused by the time of the alleged incident. Though the accused state in his evidence that he has scolded the PW2 in the previous week, it was never suggested from the PW2, of any such.*

10. *The accused further suggests that the PW2 and her family has framed him over a rivalry in the music industry. It is suggested that due to the said rivalry, the PW1 was coached when giving evidence. However, it should be noted that the accused fails to point out any inconsistency between the statement of the PW1 to the police on the day of the alleged incident and her evidence given in court. Therefore that stance of the accused too fails to create any doubt in the prosecution case.*

11. *The accused provides an alibi. Even assuming it is accepted, it proves only that he was away from 10.30am to 12.00noon on the day of the alleged incident. As for the prosecution version, the alleged incident has taken place around 9.30am. The accused unsuccessfully tries to stretch his alibi to 8.30am. His evidence is contradictory with his own witness's evidence and could not be accepted or relied upon.*

12. *All in all the prosecution has proved all the necessary elements of the alleged counts, beyond reasonable doubt and the defence has not created any reasonable doubt in the prosecution case. Therefore, the unanimous opinion of the assessors is correct and they had no other option than opining the accused guilty as charged. I agree and concur with the opinion of the assessors and find the accused guilty of the alleged counts of rape and Sexual Assault.*

[7] The grounds of appeal urged by the appellant against conviction are as follows:

**Ground 1**

*THAT the Learned Trial Judge erred in causing serious prejudice and resulted to unfair trial when it accepted the last minute withdrawal of my trial counsel to represent me competently at the trial.*

**Ground 2**

*THAT the appellant's trial was not conducted properly and competently due to the unavailability or last minute withdrawal of counsel which was not taken into consideration by the Trial Judge before allowing counsels last minute withdrawal.*

**Ground 1 and 2**

[8] The respondent has submitted the sequence of event regarding the withdrawal of the appellant's counsel as follows:

- a. *On 24 October 2019, appellant present with counsel Mr. Anil J Singh. Matter called before Justice Wimalasena. Adjourned for mention to fix a trial date on 20<sup>th</sup> November 2019.*
- b. *On 20/11/19, appellant present with Mr. Anil J Singh. Trial fixed from 05<sup>th</sup> – 9<sup>th</sup> October 2020. Mention on 01<sup>st</sup> July 2020. Bail extended.*
- c. *On 01/07/20, appellant present with Mr. Kalou instructed by Mr. Anil J Singh. He informs that they wish to withdraw as counsel on the basis of lack of interest from appellant. Appellant informed court that he wishes to retain Mr. Iqbal Khan as counsel. Matter adjourned to 19<sup>th</sup> August 2020 for appellant to confirm legal representation.*
- d. *Matter called on 29/08/20. Mr. Nacolawa, a new counsel for the appellant present. He sought for the trial date to be vacated as he did not have any disclosures and that he has recently been engaged. Court informed all parties that trial date will not be vacated as in the past it had been vacated once and*

*that trial date was fixed in November of 2019. Appellant confirmed that he was ready for trial on his own.*

[9] The Privy Council in **Dunkley and another v R ( [1995] 1 All ER 279 at )** held that:

*“The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If notwithstanding his efforts counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation”*

[10] The Practice Direction No 1 of 2011 on Withdrawal of Counsel in Criminal Proceedings issued by the Hon Chief Justice has stipulated the instances where the counsel may seek to withdraw, where it states that:

*“Occasionally counsel is obliged to withdraw from a case. This may be because instructions have been withdrawn, counsel no longer feel able to represent the client satisfactorily, or considers there to be a conflict of interest, or conflict with his or her duty to the court in continuing to appear for the client, or that counsel is physically incapacitated from appearing. This is not an exhaustive list of instances, for there are likely to be other and proper reasons for seeking withdrawal.”*

[11] The Practice Direction has further discussed about the appropriate stage of the proceedings for a counsel to withdraw, where it states that:

*“At the interlocutory stages leave may more readily be obtained. At the commencement of a trial or during a trial, leave may not so easily be granted.”*

[12] The Court of Appeal in **Nadim v State (2015) FJCA 130; AAU0080.2011 (02 October 2015)** dealt with as to when the court should to allow the counsel to effect a last minute withdrawal in the context of alleged non-payment of fees and stated that it is not an acceptable ground for the court to allow the counsel to effect a last minute withdrawal.

[13] In **R. v. Cunningham** [2010] 1 SCR 331 the Supreme Court of Canada dealt with the question whether, in criminal matter, court has authority to refuse to grant defence

counsel's request to withdraw because the accused has not complied with financial terms of retainer and said:

*'The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles. If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the court should allow the withdrawal. If timing is an issue, the court is entitled to enquire into counsel's reasons. In either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege. If withdrawal is sought for an ethical reason, the court must grant withdrawal; if it is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request if it determines, after weighing all the relevant factors, that allowing withdrawal would cause serious harm to the administration of justice.*

*Refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer and, in that context, an order in the nature of certiorari should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record.'*

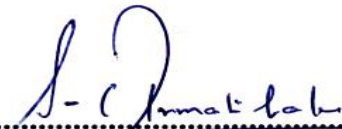
[14] In this matter it is clear that the court had allowed the appellant's counsel Mr. Anil J Singh to withdraw on 01 July 2020 when the trial had been fixed from 5-9 October 2020 and it was not a last minute withdrawal at all. The court had rightly refused Mr. Nacolawa's application on 19 August 2020 to vacate the trial as the new counsel had ample time to get ready for the trial. In any event, the appellant had informed court that he was ready to proceed with the trial on his own and he also had ample time to get ready for the trial. It appears that the appellant had indeed cross-examined the victim and put forward his defence of total denial.

[15] In the circumstances and in the light of legal principles discussed above, I see no real prospect of success in the appellant's grounds of appeal.

**Order of the Court:**

1. Enlargement of time to appeal against conviction is refused.



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

**Solicitors:**

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