

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

CIVIL APPEAL NO. ABU 054 of 2019
[High Court Case No. HBC 313 of 2018]

BETWEEN : **RAJENDRA PAL CHAUDHRY** *Appellant*

AND : **ATTORNEY-GENERAL OF FIJI** *Respondent*

Coram : Prematilaka, RJA

Counsel : Mr. D. Sharma and Ms. G. Fatima for the Appellant
: Mr. V. Chauhan for the Respondent

Date of mention : 30 January 2025

Date of Ruling : 10 February 2025

RULING

[1] The appellant has filed summons on 17 February 2023 to reinstate his appeal deemed and marked abandoned on 11 March 2021.

Background

[2] The State had filed committal proceedings for contempt of court in the High Court on 19 October 2018 pursuant to Order 52, Rule 3 of High Court Rules 1988 against the appellant for making scandalous statements against judicial officers and judiciary in Fiji. Orders had been sealed on 22 October 2018. The appellant having filed conditional acknowledgement of service on 20 November 2018, through his counsel had on 22 November 2018 *inter alia*

disputed the jurisdiction of the court under Order 12 rule 7 of the High Court Rules and expressed his intention to file a strike-out application. He had formally filed his strike-out application on 5 February 2019 on the basis that when court granted leave to issue contempt proceedings he resided in New Zealand (which fact was accepted by court), and therefore, the court did not have jurisdiction to hear the committal proceedings. On 14 February 2019, strike-out application and the motion had been heard and prior to parties making submission, court had informed them that if court determines it does not have jurisdiction then the proceedings will end there. However, earlier on 22 November 2018 the court had informed the parties that all issues including any striking out application and substantive matter will be heard together.

- [3] Acting Chief Justice Kamal Kumar on 04 April 2019 sitting in the High Court had dismissed the jurisdictional objection and struck out the said application to strike-out proceedings and found the appellant guilty of contempt of court subject to cost¹ and imposed fifteen (15) months' imprisonment from the date of his arrest (he was and is residing in New Zealand) and a fine of \$50,000.00 on the appellant in the sentence order on 30 May 2019². The appellant had appealed the said conviction and sentence in a timely manner on 19 June 2019. An amended notice of appeal against the appellant's conviction and sentence setting out 05 grounds of appeal had been filed on 01 August 2019.

Appellant's appeal on security for cost.

- [4] Thereafter, security for cost (SFC) had been fixed by the Chief Registrar (CR) at \$15000.00 on 02 July 2019. Before the Chief Registrar, his solicitor Mr. Anand Singh had represented the appellant. Subsequently, the appellant had filed a summons on 05 July 2019 seeking *inter alia* to have the said SFC order set aside. Thereafter, the appellant had filed a summons on 17 July 2019 seeking *inter alia* stay of order for SFC pending the determination of his original summons against the amount of the SFC. On 23 July 2019, a judge of this court had directed the appellant to pay \$5000.00 on or before 30 July 2019 as

¹ **Chaudhry, Re** [2019] FJHC 306; HBC313.2018 (4 April 2019)

² **Chaudhry, Re** [2019] FJHC 488; HBC313.2018 (30 May 2019)

SFC to stay the SFC order made by the CR. The appellant had paid \$5000.00 as directed by court on 24 July 2019.

- [5] Both parties having filed relevant affidavits and submissions as directed by court, the matter of SFC was take up for inquiry on 23 March 2020 when both parties were represented by their counsel (Mr. A. K. Singh had appeared for the appellant). Almeida Guneratne, JA having treated the appellant's summons as a leave to appeal application had delivered his Ruling on 27 March 2020 allowing the matter to be taken up before the Full Court on the question whether the amount of SFC was excessive.
- [6] Iqbal Khan & Associates had filed a notice of change of solicitors on 28 September 2023 identifying them as the appellant's solicitors. However, the new solicitors without taking steps to have the appeal records filed for certification for the Full Court to hear the matter expeditiously had sought to agitate the very issue of SFC over which Almeida Guneratne, JA had already ruled on 27 March 2020. This had resulted in the matter being referred to CR and back to court and another round of affidavit-in-support, affidavit-in- opposition, and affidavit-in-reply and thus, a waist of judicial time, resources and delay.
- [7] Finally, the new President of this court Filimone Jitoko on 13 December 2023 had directed that summons to reinstate the appeal deemed to have been abandoned should be heard first and the matter of SFC now before the Full Court should await the outcome of the decision on summons for reinstatement.
- [8] Since, I now intend to rule on the summons to reinstate the appeal deemed to have been abandoned, the appellant should take steps to have the appeal records filed for certification as per paragraph (5) of PD 1 of 2019 in respect of the matter of SFC.

What happened to the appellant's main appeal on conviction and sentence?

- [9] While the above scenario unfolded in the matter of appeal against SFC, the CR had signed a notice of non-compliance (NNC) on 11 March 2021 based on paragraph (5) Practice

Direction No.1 of 2019 (PD) *i.e.* appeal records not being filed within 42 days of the receipt of transcript and/or the judge's notes. According to the said NNC, the appellant had failed to file the appeal records for certification within 42 days upon the receipt of the judges' notes and transcripts on 01 November 2020 and therefore, the appeal filed on 18 June 2019 had been marked abandoned. As per the NNC the time period of 42 days had lapsed by 23 December 2020.

[10] The appellant had filed a summons accompanied by his affidavit on 24 February 2023 seeking reinstatement of the appeal. It is important to note that there is no proof before me that the NNC had been served on the appellant or his solicitors. According to the appellant, Mr. Anand Singh who was the appellant's counsel in the contempt matter, is said to have travelled to New Zealand on 24 September 2020 for medical treatment but his office had received the transcripts on 19 November 2020. Still, by the time NNC had been issued, the time period allowed to file appeal records had lapsed whichever the date of receipt of the transcripts, whether it is 01 or 19 November 2020. Apparently, Mr. Anand Singh had passed away on 04 December 2020. According to the appellant's affidavit, he had been provided with a copy of the NNC and the PD by the respondent around 20 January 2023 when the appellant wrote to the respondent after 2022 general election (held in December) about his appeal.

[11] However, there is no reasonable explanation as to why the appellant's solicitors had failed to file appeal records for certification from 01 or 19 November 2020 till NNC was issued in March 2021 as his then solicitor's office had received the transcripts in November 2020. The appellant does not appear to have made inquiries about the filing of the appeal records for certification or the status of his appeal in general till December 2022 or January 2023. COVID 2019 restrictions imposed in Fiji in March 2020 were not necessarily impediments for filing of appeal records as the Court of Appeal and its Registry were functioning without a break (except on a few days of full curfew) amid and despite these restrictions. The fact that Mr. Nilesh Sharma, a lawyer who had supposedly taken over administration of Mr. Anand Singh's practice had not contacted the appellant till 11 March 2020 is also not a valid reason for the non-compliance with paragraph 5 of PD No. 01 of 2019.

- [12] In every appeal, the primary responsibility for the preparation of the record on the appeal rests with the appellant [see Rule 18(1) of the CA Rules]. Once the appellant or his solicitors uplifted/received the judges' notes and transcripts from the CA Registry, the sole responsibility for the records to be submitted for certification by the Chief Registrar within 42 days was with the appellant or his solicitors. Then, once the Chief Registrar certifies the record, the rest of the steps given in Rule 18(8), paragraph 4(1) of Practice Direction 01 of 2018 and paragraph 5 of Practice Direction 01 of 2019 should follow until it is placed for a call-over date for the appeal to be fixed for a date and time of the hearing by the Full Court. In terms of Rule 5 of PD No. 01 of 2019, the appeal records should have been lodged with the Chief Registrar for certification within 42 days of the receipt by the appellant of the transcript of the sound recording and or the judge's notes of evidence. The appellant has not filed the records for certification within the said stipulated time.
- [13] Paragraph 7 of the PD 01 of 2019 states that in the event of non-compliance with paragraphs 2, 5 and 6 of PD 01 of 2019 then paragraphs (2) and (3) of Rule 17 of the Rules apply as if the non-compliance were non-compliance with Rule 17, the consequence being that the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed as specified in Rule 17(2) and (3) as the case may be.
- [14] As per Practice Direction 01 of 2023 (signed on 23 June 2023 by the President of this court but took effect from 27 June 2023) in whatever circumstance an appeal is marked as 'having been abandoned' it must be submitted for the sanction of a justice of appeal and a 'notice of abandonment' must be sent to the party affected. However, this provision was obviously not there in 2020 or 2021 and PD 01 of 2023 would not have applied to the appellant. Nevertheless, as far back as in September 2020 Almeida Guneratne, JA said³ that before the decision that "*an appeal is deemed to have been abandoned*" the relevant file ought to be placed before a judge of appeal for judicial sanction and CR is required to give notice of abandonment of an appeal to an appellant concerned. I am afraid in this situation concerning the appellant, as evident from a perusal of the court record, the court

³ Sun (Fiji) News Ltd v Chand [2020] FJCA 167; ABU058.2019 (3 September 2020)

file had not been placed before a justice of this court for sanctioning the abandonment and NNC also had not been served on the appellant or his solicitors. Therefore, the appellant's appeal on his conviction and sentence could yet not be deemed to have been abandoned. Thus, still the appeal is technically on foot. Therefore, I do not have to consider the merits of the appeal grounds of appeal at this stage of the proceedings, for if not for the so called abandonment the appeal should have automatically (subject, of course, to the compliance with the CA Act, its Rules and PDs) proceeded to the Full Court. The merits of the appeal is a matter for the Full Court.

[15] Now, the question before me is whether to sanction the abandonment (which I am inclined to do as I am satisfied with the substantial non-compliance and not satisfied with the reasons adduced for it) and direct the CR to issue a fresh NNC of the abandonment on the appellant and/or his solicitors. This course of action will in likelihood result in another application for leave to file a fresh notice of appeal in terms of section 17(3) of the Court of Appeal Act. This appeal being an appeal filed in 2019 against a conviction and sentence, I think it would not be fair for both parties if I were to go through with another interlocutory proceedings on extension of time to allow or disallow the appellant to file a fresh notice of appeal, for I believe that a finality on the main appeal must be reached without any further delay in one way or the other. My view taken here is reinforced by the fact that the appellant had already deposited \$5000.00 as SFC as directed by court and there appear to have been some mitigating factors (though not sufficient to fully explain the default) for the non-compliance. I am also heavily persuaded to take this course of action by the fact that the sentence imposed on the appellant consists of stiff penal sanctions. If his appeal was purely civil in nature, I may have taken a different view. Therefore, this should not be taken as a precedent to be applied to purely civil appeals.

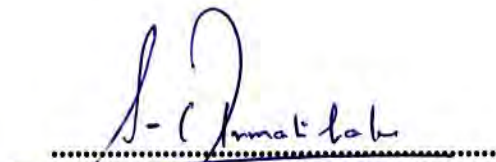
[16] However, there does not seem to a specific provision in the Court of Appeal Act or its Rules or Practice Directions permitting a reinstatement of an appeal after being 'deemed abandoned'. However, until a statutory amendment or a Practice Direction specifically permitting a reinstatement is put in place, when this court holds that the appeal could not have been "*deemed to be abandoned*", the precedent in *Sun (Fiji) News Ltd v Chand*

provides sufficient authority for an order for reinstatement of the appellant's appeal in as much as I have already held that the NNC issued did not have the judicial sanction and no notice of it had been served on the appellant or his solicitors. On the contrary, if the abandonment had been duly effected as required by *Sun (Fiji) News Ltd v Chand* (now by PD 01 of 2023 read with PD 1 of 2019), then no reinstatement is possible but the appellant has to act under Rule 17(2) or (3) as the case may be.

Orders of the Court:

- [1] *Appellant's appeal filed on 18 June 2019 on conviction and sentence is hereby re-instated.*
- [2] *Appellant is directed to comply with paragraph (5) of Practice Direction 01 of 2019 in respect that appeal on conviction and sentence.*
- [3] *Appellant is directed to comply with paragraph (5) of Practice Direction 01 of 2019 in respect of his summons filed on 05 July 2019 against security for cost.*
- [4] *The time period of 42 days as applicable to orders [2] and [3] set out in paragraph (5) of Practice Direction 01 of 2019 should run from the date of this Ruling.*
- [5] *If the appellant or his solicitors fail to comply with the above directions, he is put on notice that I hereby sanction the abandonment of his appeals without further notice of abandonment by the Chief Registrar.*
- [6] *Appellant is directed to pay \$2,500.00 as cost of the re-instatement application to the respondent within 21 days from this Ruling and failure to do so will result in order [5] being automatically invoked and the appeal being abandoned.*




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

R. Patel Lawyers for the Appellant
Attorney-General Lawyers for the Respondent