

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

MISCELLANEOUS CASE NO: HAM 179 of 2022

MAIKELI BALEINAGAGA

V

THE STATE

Counsel : Applicant in Person
Mr. Joeli Nasa for the State

Hearing : 7 September 2023

Ruling : 11 October 2023

RULING

Introduction

- [1]** This is an application made by the Applicant for reinstatement of appeal [In Lautoka High Court, Criminal Appeal No. HAA 01 of 2022].
- [2]** The Applicant was charged in the Magistrate's Court of Nadi with one count of Robbery, contrary to Section 310 (1) (a) (i) of the (Crimes Act) No. 44 of 2009 [Magistrate's Court of Nadi Criminal Case No. 419 of 2013].
- [3]** In the Magistrate's Court of Nadi, the trial proceeded in the absence of the Applicant (in absentia). On 30 August 2019, the Applicant was found guilty and convicted of the charge of Robbery. On 2 September 2019, the Applicant was sentenced (in absentia) to 8 years and 7 months imprisonment, with a non-parole period of 8 years imprisonment. The

sentence imposed on the Applicant was to be made effective from the date on which he was arrested.

- [4] Pursuant to his arrest, the Applicant filed an appeal in the High Court of Lautoka. The appeal was filed over 2 years out of time. The case number assigned was Lautoka High Court, Criminal Appeal No. HAA 01 of 2022.
- [5] On 19 September 2022, the Learned Counsel for the Applicant sought the leave of Court to withdraw the appeal. The application to withdraw the appeal was granted and the appeal was accordingly dismissed.
- [6] This Application has been made in person by the Applicant by way of a Notice of Reinstatement of Appeal, which was filed in Court on 21 September 2022. On 31 January 2023, the Applicant filed an Affidavit in Support of the Application for Reinstating of Appeal.
- [7] In the Notice of Reinstatement of Appeal the Applicant provides the following Grounds for Re-instatement of his Appeal:
 - (1) That the legal representation of the Legal Aid (Commission) is flagrantly incompetent as they failed to get proper instructions and give sufficient advice on all matters pertaining to the appeal.
 - (2) That the Legal Aid (Commission) advanced Grounds of Appeal without carefully perusing the Judgment and Sentence and properly advising the Appellant on the proposed grounds.
 - (3) That the Legal Aid (Commission) advanced the Grounds of Appeal without any proper consultation with the Appellant.

The Affidavit in Support of the Application for Reinstating of Appeal

- [8] The Affidavit deposed to by the Applicant in Support of the Application for Reinstatement was filed in Court on 31 January 2023. Therein the Applicant *inter-alia* states as follows:

- (1) That by way of this Affidavit he wishes to explicitly state the reasons behind his unintended decision to withdraw his appeal on 20 September 2022 (should be 19 September 2022).
- (2) That since the inception of the appeal proceedings, the Legal Aid Commission was his Solicitor on record. However, there was no assigned Legal Officer to act as his permanent Solicitor throughout the proceedings of the appeal (prior to 20 September 2022).
- (3) That in all his appearances before Court, the Legal Aid Commission Lawyer assigned to him was incompetent and failed to take proper instructions or even consult him or talk to him before or after his appearances in Court.
- (4) That even the Amended Grounds of Appeal filed by the Legal Aid Commission was done without being explained to him and that all papers and presentation done in Court on his behalf was without his prior knowledge or consent.
- (5) That his several attempts to seek the audience of the Legal Aid Commission Lawyer representing him proved unsuccessful as they continuously changed and had no time to talk to him before and after the Court appearances.
- (6) That on 20 September 2022 (should be 19 September 2022), the assigned Legal Aid Commission Lawyer appearing on his behalf continuously threatened and intimidated him in Court to such an extent that he stated that there is a high likelihood of the sentence imposed on him being increased (enhanced).
- (7) In frustration and disappointment, the Applicant deposes that he had succumbed to the intimidating tactics of the Legal Aid Commission Lawyer and withdrew his appeal without intending to do so.
- (8) That the withdrawal of the Appeal on 20 September 2022 (should be 19 September 2022), was merely due to the threatening and intimidating advice given to him by his Legal Aid Commission Lawyer.

- (9) In view of the above, the Applicant seeks the indulgence of Court to reinstate his appeal in the interest of justice.

The Affidavit in Reply filed by Paula Gusunivosa Gade

[9] In response to the Affidavit filed by the Applicant, on 8 August 2023, the State filed an Affidavit in Reply, deposed to by Paula Gusunivosa Gade, Senior Legal Officer, Legal Aid Commission. Therein it is *inter-alia* stated as follows:

- (1) That he has been serving with the Legal Aid Commission since 2016.
- (2) That the Applicant in this matter formally engaged the services of the Commission in the pursuit of his appeal in Lautoka High Court, Criminal Appeal No. HAA 01 of 2022.
- (3) That in the said appeal case, he was tasked as Counsel to assist the Applicant in providing him legal advice and guidance on his appeal matter.
- (4) That in carrying out his duties, at all times he act with utmost professionalism, competence and candour towards assisting the Applicant.
- (5) That following his advice to the Applicant at the relevant time, the Applicant voluntary instructed him that he wished to withdraw his appeal.
- (6) That the decision to withdraw the appeal in Case No. HAA 01 of 2022 by the Applicant was after he had properly guided and advised the Applicant on the nature of his self-urged grounds of appeal, its strengths, weaknesses and including its likely outcome if it proceeded to hearing.
- (7) That following his advice, the Applicant withdrew his appeal on his own free will.
- (8) The Learned Counsel further deposes that he did not coerce, threaten, induce, give any false promise, intimidate or assert any unlawful conduct towards the Applicant as to compel him withdraw his appeal.

- (9) That at the time the Applicant withdrew his appeal, Court was satisfied that he was withdrawing his appeal voluntarily before proceeding to dismiss the case.
- (10) The Learned Counsel submits that he denies and opposes the Applicant's grounds for reinstatement. He and other Lawyers of the Commission, who had attended to the Applicant at the time of his appeal, acted competently at all times. He rendered proper legal advice to him after studying all his relevant appeal documents and acted solely on instructions received from the Applicant at all times.
- (11) He verily believes that he has discharged his duties with professionalism, competency and candour to the Applicant at all times during the course of this proceedings.
- (12) Therefore, he moves that this application for Reinstatement of Appeal by the Applicant be dismissed.

The Submissions filed by the Applicant in Opposition to the Affidavit filed by Paula Gade

[10] On 30 August 2023, the Applicant filed a document in the form of a written submission opposing the Affidavit in Reply filed by Paula Gusunivosa Gade. By way of the said submission, the Applicant moves that the Affidavit in Reply filed by Paula Gusunivosa Gade be disregarded and that the application for reinstatement of appeal be allowed.

The Hearing

[11] This matter was taken up for hearing before me on 7 September 2023. During the hearing both the Applicant and the Learned State Counsel were heard. The Applicant and State also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

Analysis

- [12] It must be stated at the very outset that the grounds provided for by the Applicant in the Notice of Reinstatement of Appeal are all in relation to the appeal itself and the Grounds of Appeal and not providing reasons for the reinstatement of the appeal.
- [13] However, in his Affidavit filed in Support of the Application for Reinstatement, the Applicant has provided reasons as to why he is seeking a reinstatement of this appeal. He has deposed that the assigned Legal Aid Commission Lawyer appearing on his behalf continuously threatened and intimidated him in Court to such an extent that he stated that there is a high likelihood of the sentence imposed on him being enhanced.
- [14] The Applicant has further deposed that in frustration and disappointment he had succumbed to the intimidating tactics of the Legal Aid Commission Lawyer and withdrawn his appeal without intending to do so. He submits that the withdrawal of the appeal on 19 September 2022, was merely due to the threatening and intimidating advice given to him by his Legal Aid Commission Lawyer.
- [15] However, Paula Gusunivosa Gade, the Learned Counsel who appeared on behalf of the Applicant in the High Court during the course of his appeal has deposed an Affidavit clearly stating that the Applicant voluntarily instructed him that he wished to withdraw his appeal.
- [16] The Learned Counsel has deposed that the decision to withdraw the appeal in Case No. HAA 01 of 2022 by the Applicant was after he had properly guided and advised the Applicant on the nature of his self-urged grounds of appeal, its strengths, weaknesses and including its likely outcome if it proceeded to hearing. The Learned Counsel further deposes that he did not coerce, threaten, induce, give any false promise, intimidate or assert any unlawful conduct towards the Applicant as to compel him withdraw his appeal.
- [17] In *Jone Masirewa v. The State* [2010] FJSC 5; CAV0014.2008S (17 August 2010) at paragraph 11; the Supreme Court outlined certain guidelines that a Court sitting in appeal

should consider before allowing an application for withdrawal of the appeal. The Supreme Court observed as follows:

“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.”

- [18] When the appeal matter came up before this Court on 19 September 2022, the Learned Counsel for the Applicant sought the leave of Court to withdraw the appeal. It is recorded in the proceedings of 19 September 2022 that the Learned Counsel for the Applicant seeks leave to withdraw the appeal. When Court had inquired from the Applicant whether he is doing so voluntarily and on his own free will the Applicant had confirmed that he is withdrawing the appeal voluntarily and on his own free will. Accordingly, the application to withdraw the appeal was allowed and the appeal was dismissed.
- [19] Therefore, it is manifest that the decision to withdraw the appeal had been made by the Applicant deliberately, intentionally and without any misapprehension.
- [20] Therefore, taking into consideration all the above factors, I am of the opinion that this application for reinstatement of appeal is without merit.

[21] Accordingly, the application is dismissed.



Riyaz Hamza

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 11th Day of October 2023

Solicitors for the Applicant : Applicant Appeared in Person.
Solicitors for the Respondent : Office of the Director of Public Prosecutions, Lautoka.