IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0010 of 2019
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0080/11; High Court No: HAC 0016/2010]

BETWEEN: **RAVINESH VIKASH PADIYACHI**

Petitioner

AND: **THE STATE**

Respondent

Coram: The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
The Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsels: Petitioner in Person
Mr L. J. Burney for the Respondent

Date of Hearing: 14th April, 2022

Date of Judgment: 28th April, 2022

JUDGMENT

Gates J

[1] This appeal concerns the correctness of the trial judge's order refusing leave to Defence Counsel to withdraw from the case.

[2] The petitioner's sole ground of appeal to his court as lodged is:

> *"That the learned trial judge erred in law and in fact when he forced the appellant's counsel to continue representation despite informing to the court of his intention to withdraw."*

The Facts

[3] The Petitioner was charged along with a co-accused Mohammed Nadim of murder. Two Indian nationals had been engaged in a business involving scrap metal. They employed the Petitioner as a Manager, and he lived with them at their residence in Nakasi. Both accused persons were the last persons seen with the two deceased. On 13th December 2009, they were seen drinking grog at the back of the deceased's house, whilst the deceased were in their living room drinking alcohol. The deceased were never seen alive again.

[4] On 16th January 2010, their bodies were found by a labourer digging a toilet pit. They were packed in two suitcases in the unoccupied back garden of a house belonging to the Petitioner's father at Benai, Ba. Once collected their bodies were seen to have several cut injuries on their neck and face caused by a sharp weapon. Two cut injuries had caused their deaths. The medical evidence revealed that the deaths would have occurred 3 to 5 weeks prior to the post mortem examinations.

[5] The Petitioner with his co-accused were tried before assessors and Fernando J in the High Court on 2 counts of murder contrary to Section 199 read with Section 200 of the Penal Code [Cap.17]. They were both convicted, sentenced to life imprisonment with a non-parole period fixed at 20 years.

The High Court Rulings on Withdrawal

[6] Both Accused appealed to the Court of Appeal against their convictions. They did not appeal against their sentences. The single ground to this court was also urged on the Court of Appeal [Ground 4]. The Court of Appeal dismissed the appeal. The appeal judgment devoted 5 pages [paras 59 – 71] to a consideration of the trial judge's refusal to allow

Defence Counsel's application to withdraw. In the petitioner's co-accused's case ***Nadim v. The State*** [2016] FJSC 24, CAV0029.2015, which for some reason came up before the Supreme Court separately, was decided on 22 June 2016. Almeida Guneratne J said at para [19]:

> *[32] In that context I took the opportunity to look at the principles emanating from **R v. Long-Hall**, The Times, March 24, 1989; **R v. Edwards** (N.W.) [1983] 77 Cr. App. R.5, CA as well as **R v. Southgate** [1963] 47 Cr. App. R. 252, CA and lastly the precedents reflected in a plethora of cases such as **R v. Cocks** [1976] 63 Cr. App. R. 79.*
>
> *[33] I saw nothing in the learned High Court Judge's directions on the said Ground (4) that offended any one or more principles enunciated in those precedents I have adverted to."*

Ruling No.1 23.6.2011

[7] The application to withdraw as a law firm was first made orally to the judge on 17.6.2011. Mr Valenitabua for Gordon and Chaudhary Lawyers said his firm wished to withdraw as counsel on record for both Accused persons. The reason for the application was given as non-payment of legal fees.

[8] The trial was fixed for 4 weeks commencing on 27.6.2011, some 10 days off. On 20.6.2011 an affidavit from an employee of the firm was filed in support of the oral application. A copy of the fee agreement was exhibited. Fees were to have been paid by 10.6.2011. The solicitors considered the petitioner was not serious about paying their Counsel and he had not complied with the agreed timing of the required payment.

[9] The learned judge considered he had inherent jurisdiction to decide the matter. Mr Chaudhary had appeared for them both, on other interlocutories, pre-trial conference, and the agreed facts. On the day fixed for pre-trial conference, the application for withdrawal was also made. In his ruling the judge referred to ***R v. Cunningham*** [2010] 1 SCR 331; 2010 SCC 10. His Lordship also referred to ***Practice Direction No.1*** of 2011 of 6th April 2011.

[10] The judge concluded his Ruling at paragraphs 19 – 20:

> *"[19] The trial is fixed for 27/6/2011 and this application is made orally on 17/6/2011 and formally on 21/6/2011. Therefore, it is an application made at the last minute, where accused persons would not have sufficient time to obtain legal representation of another Counsel if the application is allowed. The accused persons are on bail. Yet the court will have to adjourn the trial if this application for withdrawal is allowed for the accused persons to get legal representation. The two accused persons are charged with the most serious offences of murder, where in fairness they should have legal representation.*
>
> *[20] In this court the trial roll extends to August 2012 and therefore if an adjournment is to be granted, the next possible trial date would be in August/September 2012. That would affect the accused persons by hanging over their heads these serious charges and also would affect the state witnesses. Time of court too will be wasted as there is no sufficient time to refix another Trial during that period."*

[11] Fernando J held this was not a fit case to permit withdrawal and refused the application.

<u>*Ruling No.2*</u>

[12] On 27th June 2011 the judge heard another motion for leave for counsel to withdraw. This was 3 days before the 4 week trial was listed to commence. The grounds were on the same basis, namely non-payment of fees and also included conflict of interest and lack of instructions. The lawyers added an application for legal aid for their clients, and alternatively asked for the trial date to be vacated and a fresh date to be set for a hearing in October 2011.

[13] An affidavit was filed in support. It was said that the Petitioner had been called into the office on numerous occasions to impart instructions and pay fees but he had not attended or done so. The deponent added that Mr Chaudhary was still prepared to do the case *pro bono* but he was not available till October.

[14] On the occasion of the previous ruling, the judge whilst refusing to allow late withdrawal, allowed some extra days for Mr Valenitabua to prepare his case. In his Lordship's ruling two other matters were dealt with which need not concern us in this judgment.

[15] The judge rejected the '*no instructions'* argument and set out the times the case had been previously mentioned with Mr Chaudhary appearing for interlocutory matters. The court stated Mr Chaudhary had never informed the court that he was yet to receive instructions. After all, this was a two accused murder trial already fixed for 4 weeks in the judge's list. The client's instructions on the disclosure statements of the prosecution witnesses and the alleged confessions in the caution interviews should have been taken by then.

[16] The judge said the only ground for withdrawal was non-payment of fees. His Lordship commented *"No further applications can be allowed to be made on more grounds unless it arose thereafter."* This direction was clearly right.

[17] The deponent had suggested it was not fair to act for the accused if fees have not been paid "*as it could affect the standard and level of representation*."

[18] In his ruling the judge referred to the Rothstein J judgment in ***Cunningham*** (supra):

> *(3) Conflict of Interest*
>
> *[40] I am also unpersuaded by the Law Society of British Columbia's point that forcing unwilling counsel to continue may create a conflict between the client's and lawyer's interests. It is argued that where counsel is compelled to work for free, he or she may be tempted to give legal advice which will expedite the process in order to cut counsel's financial losses even though wrapping up a criminal matter as quickly as possible may not be in the best interests of the accused. The argument, however, is inconsistent with the Law Society's position – with which I agree – that the court should presume that lawyers act ethically. There are many situations where counsel's personal or professional interests may be in tension with an individual client's interest, for example where counsel acquires an interesting new file that requires immediate attention, or has vacation plans that conflict with the timing of court proceedings affect the client. Counsel is obligated to be diligent, thorough and to act in the client's best interest. Similarly, if counsel agrees to be retained pro bono, he or she must act just as professional as if acting for the client on a paid retainer of the same nature. Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both*

the integrity of the profession and the administration of justice require nothing less."

[19] As for adjourning the case, his Lordship explained:

> *"17. The trial roll in this court extends up to August 2012. This was mentioned to the counsels in court, as well as in my ruling dated 23/06/2011 on this issue. Therefore very well knowing that there are no free dates until August 2012 the applicant requests this court to alternatively fix this case for trial in October 2011, which is not possible."*

<u>*Ruling No.3*</u>

[20] A third application for withdrawal was heard on 18th July 2011 as a Ruling delivered on 19th July 2011, the next day. The application came during the trial, immediately after the ruling on the *voir dire*.

[21] This time counsel said their firm had filed a writ of summons against the petitioner for breach of contract for failing to keep his undertaking to pay retainer fees in compliance with their signed retainer agreement. The writ was filed on the same day as the application for withdrawal was heard. It was argued that this created a conflict of interest for the lawyers who would be witnesses in the civil case.

[22] His Lordship refused the application concluding his ruling as follows:

> *"6. Filing a writ of summons for unpaid fees as agreed, is the prerogative and right of a lawyer. In this case the filing of the writ in itself does not create any conflict of interest between the lawyers and the accused persons. The civil case can proceed independently of the criminal case and without any obstacles to the criminal defence that the lawyers may present on behalf of the accused persons. Further the counsel should act diligently and competently and the court should presume that lawyers act ethically, as I mentioned in my said earlier rulings.*
>
> *7. I am of the view that this filing of the writ of summons could have waited until the conclusion of the criminal proceedings, but it was filed to allow a fresh ground to base the instant application for leave to withdraw. This application was filed soon after the ruling on Voir Dire was delivered and immediately before the commencement of the trial proper. It appears that having filed two earlier applications, the counsel for the accused persons have discovered a procedure to circumvent the earlier orders of*

the Court. This in my view is prejudicial to the accused persons and therefore I dismiss this application forthwith."

[23] The trial judge had followed authorities providing guidance on the issue of counsel's withdrawal. He had also followed the procedure recommended in ***Practice Direction No.1*** of 6th April 2011. That direction read:

1. *This Direction applies to counsel appearing in all courts in Fiji including the Court of Appeal and the Supreme Court. It repeats much of the same sentiments as in the Practice Direction published by Nimmo CJ in 1972 [see CPC annotated by Marie Chan 2008 at p 400].*

2. *Occasionally counsel is obliged to withdraw from a case. This may be because instructions have been withdrawn, counsel no longer feels 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.*

3. *Where counsel needs to withdraw, it is counsel's duty as a matter of courtesy and good practice to appear on the next listed mention or hearing date and seek leave to withdraw. But application for leave to withdraw need not await the next court date. Counsel may apply before such date by motion and affidavit. The court will then consider whether to grant leave. This may involve a consideration as to whether or not counsel may be able to continue to serve his or her client's best interests if he or she were ordered to continue and if leave were declined:* ***Ram Sharan v. Kanyawati*** *[1969] 15 Fiji LR 220 at p 223;* ***Lockhart-Smith v United Republic*** *[1965] E.A. 211 at p 265.*

4. *However this Direction is no more than a restatement of earlier practice, with which newer members of an increasing Bar may be unfamiliar. It is framed to avoid the situation where counsel, previously briefed and appearing in a matter, fails to appear on the next occasion thus abandoning his or her client. Procedurally, if there is to be a withdrawal by counsel, it is necessary for that counsel to appear before the court and obtain leave for his or her withdrawal from the case.*

5. *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.*

6. *In summary the court is unlikely to permit withdrawal:*

   (a) where counsel would be in breach of his or her duty to the client

(b) where, though for valid reasons, the application to withdraw is made at the last minute, which would cause postponement of trial, wasted witness costs whether attending from overseas or locally, or where by the withdrawal a waste of court time and public funds is likely to be occasioned

(c) to enable counsel to undertake an alternative commitment whether of a public or private nature

(d) where counsel's fee in whole or in part has not been paid.

7. If the court refuses to permit withdrawal and counsel nonetheless withdraws, a report may be lodged with the Chief Registrar for consideration of future action under the Legal Practitioners Decree. With a sense of service and duty to the client and to the Court uppermost, no practitioner, it is to be anticipated, would allow such a situation to arise.

8. In the case of counsel being hospitalized, another counsel may make the application upon his or her behalf. In certain instances a court may insist on the production of a medical certificate as in Form 62 of the CPC."

[24] The court in ***Cunningham*** (supra) opened its judgment with the answer to the main question:

> *"[1] What is the role of a court when defence counsel, in a criminal matter, wishes to withdraw because of non-payment of legal fees? Does a court have the authority to require counsel to continue to represent the accused? In my opinion, a court does have this authority, though it must be exercised sparingly, and only when necessary to prevent serious harm to the administration of justice."*

[25] Counsel are entitled to their fees and may sue for them, perhaps agreeably after the case is over. But the court has to be mindful that the Accused at trial must not be abandoned whilst in jeopardy. In complex cases it may be impossible for an Accused to defend himself competently. At the same time a busy court with a backlog of cases, with lists extending 18 months or more into the future, cannot easily vacate a hearing date and find another date within the next few weeks. There are many constraints.

[26] These factors were clearly in Fernando J's mind in deciding these applications for withdrawal.

[27] The court in ***Cunningham*** (supra) had referred to an earlier decision, ***MacDonald Estate v. Martin*** [1990] 3 S.C.R. 1235 which had confirmed that inherent jurisdiction included the authority to remove counsel from a case when required to ensure a fair trial:

> *"The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [p.1245]"*

And the comment in ***Cunningham*** at [18]:

> *"It would seem to follow that as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel's application for withdrawal."*

[28] The courts need the inherent jurisdiction in order to control their own processes. This includes overseeing lawyer withdrawal. The grounds as to why this should be so are both obvious and numerous. Rothstein J in ***Cunningham*** at [22] summarized some of the reasons:

> *"An accused, who becomes unable to pay his lawyer, may be prejudiced if he is abandoned by counsel in the midst of criminal proceedings. Proceedings may need to be adjourned to allow the accused to obtain new counsel. This delay may prejudice the accused, who is stigmatized by the unresolved criminal charges and who may be in custody awaiting trial. It may also prejudice the Crown's case. Additional delay also affects complainants, witnesses and jurors involved in the matter, and society's interest in the expedient administration of justice. Where these types of interests are engaged, they may outweigh counsel's interest in withdrawing from a matter in which he or she is not being paid."*

[29] It is important to bear in mind the differing roles of Law Societies, or in Fiji, the Independent Legal Services Commission in disciplining the lawyers, and the role of the courts. The purpose of the court overseeing withdrawal is not disciplinary. The courts authority is preventative - to protect the administration of justice and to ensure trial fairness: ***Cunningham*** (supra) [35].

Petitioner's complaint

[30] In his oral address, the Petitioner made complaint about several counsel who had acted for him, including the Senior Counsel who thoroughly and competently had argued his appeal at the Court of Appeal. The Petitioner made comments such as:

> *"I was new to the system. I didn't know what to do."*
> *"He should have reminded me about my instructions."*
> *"He did not advise me whether I should give evidence."*

[31] This last comment is rather strange since he had given evidence during the *voir dire*. In order to do so Counsel would have had to discuss with him the pros and cons of giving or not giving evidence. He must have given instructions to his trial counsel Mr Valenitabua in order for counsel to conduct the 19 day *voir dire*. This was a lengthy process and could not have taken place without instructions. Not only was Counsel's task performed competently and diligently, he achieved significant success for his non-paying client by having the alleged confessions ruled out as inadmissible.

[32] The ground dealing with what was said to be an error by the judge in not permitting counsel's withdrawal has grown from that alone, to a suggestion before us that the trial miscarried because of the incompetence of counsel. This was not a ground before the Court of Appeal. This is a new ground.

[33] In the Court of Appeal, Prematilaka JA had this to say:

> *"[71] Before parting with this appeal I must mention that there is not even an allegation that counsel who appeared for the Appellants had done anything short of his best in the conduct of the defence due to the dispute relating to the non-payment of professional fees. Thus, there is no question of the Appellants complaining of not having had a fair trial due to the refusal of their counsel's application to withdraw. In terms of section 23 (1) (a) of the Court of Appeal Act, an appeal could be allowed inter alia on any ground constituting a miscarriage of justice. The appellants have not elevated their complaint set out in ground four to that level either."*

[34] Not only did trial counsel conduct himself with competence and vigor during the *voir dire*, he presented the defence throughout the trial also with the same expertise, as a perusal of the trial record illustrates. It was a strong prosecution case and not an easy one to rebut. This was a different situation from that with counsel's errors in ***Nudd v The Queen*** [2016] HCA 9 at para. 162:

> *"It is most unfortunate that a person charged with such a serious crime as the appellant was, should come to be represented by a person whose competence fell short of the standard which a court should be entitled to expect. However, just as in medicine there may be terminal cases which not even the most brilliant surgeon can remedy, there will be prosecution cases which an accused could not successfully defend with the aid of the most resourceful and competent of counsel. We have come to the conclusion that this was such a case. That does not mean of course that a person against whom the case is a very strong one, is not entitled to a fair trial. But unlike in the operating theatre, there is in the criminal court a suitably qualified judge, detached from the protagonists and whose duty it is to intervene and make such corrections as need to be made to ensure a fair trial. Trial judges may only correct errors that become apparent to them, but in this case such errors as might otherwise have caused the trial to miscarry, were duly corrected by way of her Honour's summing up and insistence that instructions be duly obtained."*

[35] A perusal of the High Court record does not confirm any of those late complaints of the Petitioner of his counsel's conduct of the case to suggest lack of diligence or competence, or the propounding of mistaken views on the law as in ***Nudd*** (supra), ***Teeluck v. Trinidad*** [2005] UKPC 14; [2005] 1 WLR 2421. There has been no miscarriage of justice.

[36] But the nub of the Petitioner's complaint in his oral argument before us was that his former counsel Mr Chaudhary "*had abandoned*" him. This was not an error in the trial. The judge did his best to see that the petitioner had competent counsel to defend him, and allowed extra days for preparation for the trial. That time was well used and, in a difficult and strong case, counsel made as much progress for his client as could be expected.

[37] Because Mr Chaudhary had managed to get him bail, the petitioner considered he was the only counsel in whom he could have confidence. On the evidence presented Mr Chaudhary was overseas. He at least was not available to appear for the petitioner on the trial date. The

petitioner had to choose another counsel to appear for him. The complaint against Mr Valenitabua was not well founded and appears to have been an afterthought. Special leave must be refused and the petition dismissed.

Aluwihare J

[38] I am in agreement with the reasoning and the conclusions reached by Gates J.

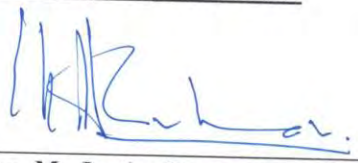
Keith J

[39] I agree with the judgment of Gates J, and for the reasons which he gives, I agree that leave to appeal to the Supreme Court should be refused.

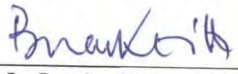
Orders:

1) *Special leave is refused.*
2) *The petition is dismissed.*

Hon. Mr Justice Anthony Gates
Judge of the Supreme Court



Hon. Mr Justice Buwaneka Aluwihare
Judge of the Supreme Court



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