

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0026 OF 2002S
(High Court Criminal Case No.030 of 1997S)

BETWEEN:

THE STATE

Applicant

AND:

TONY BIDESI

Respondent

Coram:

Reddy, P
Tompkins, JA
Ellis, JA

Hearing:

Thursday, 7th November 2002, Suva

Counsel:

Vilimoni Vosarogo for the applicant
H.K.Nagin for the respondent

Date of Judgment: Friday, 15th November, 2002

JUDGMENT OF THE COURT

The respondent was charged with embezzlement as a servant and obtaining money by a false pretense. The events to which these charges relate were alleged to have occurred in March and April 1994. By a judgment delivered on 24 December 2001, Surman J ordered that both charges be permanently stayed.

2.

On 20 June 2002 the appellant filed a notice of application for extension of time within which to appeal with an affidavit in support. On 7 August 2002 the respondent filed a notice of opposition, affidavit in support and detailed submissions in opposition to the appellant's application.

The application was set down for hearing in this Court on Thursday 7 November 2002. On 6 November 2002 the appellant filed a notice of abandonment. At the request of the respondent, the application was called before the Court on 7 November 2002. The respondent applied for costs. The appellant resisted that application in reliance on s 32 (1) of the Court of Appeal Act (Cap 12):

"32 (1) On the hearing and determination of an appeal under this Part no costs shall be allowed to either side."

As neither counsel were in a position to make full submissions on whether the Court has jurisdiction to make an order for costs in these circumstances, the application was adjourned to enable counsel to file submissions. These have now been received and considered by the Court.

The respondent submits that having regard to the judgment in this Court in *Southwick v the State* Criminal Appeal AAU0061/1999S, it should have been obvious to the State that a stay of proceedings is not a final judgment and no appeal lies against it. Yet it continued with the application for leave until only days before it was due to be heard. Counsel submits that an award of costs is appropriate and proposes the sum of \$3,000.

3.

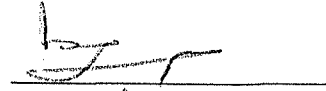
The respondent submits that subs 32 (1) does not apply, since there has been no hearing and determination of the appeal. We accept that submission. The appeal was discontinued without a hearing or a determination, so the section does not apply.

The appellant submitted that s 158 (1) of the Criminal Procedure Code (Cap 21), which gives a judge of the High Court or any magistrate who acquits or discharges a person jurisdiction to order the prosecutor to pay to the accused reasonable costs, has no application in the present circumstances, because there has not been an acquittal or discharge. We accept that submission.

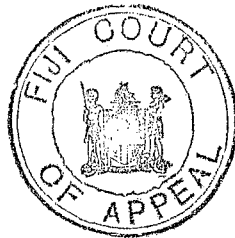
This Court in the *State v Patel* Criminal Appeal No AAU0002 of 2002 judgment 15 November 2002 considered the issue whether costs can be awarded against the State in the absence of express statutory authority where the court had ordered a stay. The Court said:

"On these authorities, we are in no doubt that it is the law in Fiji that the Court has no jurisdiction to award costs against or in favour of the State, except where the jurisdiction to do so is expressly conferred by statute. Nor do we consider that there can be any basis for a distinction between interlocutory and final proceedings. The rule applies to both."

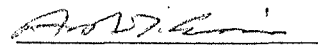
There is no statutory authority for the award of costs against the State following the abandonment of an application for leave to appeal. Accordingly, the respondent's application for costs cannot succeed and is dismissed.



Reddy, P



Tompkins, JA



Ellis, JA

Solicitors:

Office of the Director of Public Prosecutions, Suva for the Appellant
Messrs. Sherani and Company, Suva for the Respondent