

**IN THE COURT OF APPEAL, FIJI**  
**On appeal from the High Court of Fiji**

**CRIMINAL APPEAL AAU 6 OF 2012**  
**(High Court HAC 1 of 2009)**

**BETWEEN** : **TRACY BERNADETTE SHAW** *Appellant*

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

**Coram** : Calanchini P  
Waidyaratne JA  
Prematilaka JA

**Counsel** : Mr S Waqainabete for the Appellant  
Ms P Madanavosa for the Respondent

**Date of Hearing** : 16 September 2016

**Date of Ruling** : 30 September 2016

**RULING**

[1] The Appellant with one other was tried and convicted of murder in the High Court at Lautoka. On 24 January 2012 the Appellant was sentenced to life imprisonment with a non-parole term of 18 years.

- [2] By letter dated 20 February 2012 the Appellant filed a timely notice of appeal against both conviction and sentence. On 13 March 2014 the Legal Aid Commission filed an amended application for leave to appeal against conviction only. The amended notice of appeal did not refer to an application for leave to appeal sentence.
- [3] On 17 March 2014 the Legal Aid Commission then filed written submissions on behalf of the Appellant in support of her application for leave to appeal against conviction. The submissions did not address the question of leave to appeal against sentence. Furthermore, the submissions filed by the Respondents also addressed the application for leave to appeal against conviction only.
- [4] In a written Ruling delivered on 7 April 2014 a single judge of the Court of Appeal refused leave and then dismissed the Appellant's appeal pursuant to section 35(2) of the Court of Appeal Act. The learned Judge made no reference in his Ruling to any appeal against sentence.
- [5] By an undated letter received by the Court of Appeal Registry on 5 May 2014 the Appellant stated that she wished to appeal the Ruling dated 7 April 2014 whereby her appeal against conviction had been dismissed.
- [6] It appears that the proceedings were listed for mention before the President of the Court of Appeal on 18 September 2015. On that occasion Counsel for the Appellant indicated that the Appellant wanted to abandon her appeal against sentence. Directions were given that the Appellant file and serve (through her Counsel) a notice of abandonment of appeal within 7 days. It would appear that no such notice was ever file or served.
- [7] This then was the position when the matter was called on before the Court on 16 September 2016. Although no notice of abandonment had been filed, Counsel for the Appellant sought leave to withdraw on the basis that the Appellant did not want to

proceed with the application, contrary to the advice given by the Legal Aid Commission. Since there was no written notice before the Court as required by Rule 39 of the Court of Appeal Rules there was no application properly before the Court. Presumably on the basis that the Appellant had refused to sign such a notice, Counsel considered it appropriate to apply to withdraw.

- [8] The proceedings to date raise a number of matters that should be the subject of some guidance from the Court. The first is whether in the circumstances of this appeal, the Appellant's application for leave to appeal against sentence remained on foot by the time the application for leave to appeal came before the single judge of the Court. The second issue relates to the right of appeal, if any, against the mandatory sentence for murder imposed pursuant to section 237 of the Crimes Decree. The third issue is what, if any, redress can the Appellant seek in the Court of Appeal? The issues raised are interconnected.
- [9] It is clear that the Appellant's application for leave to appeal against sentence was not pursued by the Appellant after she had filed her initial notice of appeal. Neither the amended notice of appeal filed on 13 March 2014 nor the written submissions filed on 17 March 2014 raise the issue of an application for leave to appeal against sentence. As a result the only inference to be drawn is that the appeal against sentence was not being pursued by the Appellant. It was open to the Respondent to conclude that the appeal against sentence had been withdrawn. Under these circumstances it is not appropriate for the Appellant to seek to re-activate the appeal against sentence at a later date. The Appellant is not entitled to two separate leave hearings when the initial notice of appeal is against both conviction and sentence. Both applications should be heard at the same. If one of the applications for leave is not pursued at the time of the leave hearing then it is to be inferred that the Appellant is no longer proceeding with that appeal. Therefore by the time the learned single Judge concluded the hearing of the application for leave to appeal against conviction and delivered his Ruling in relation to that application, the appeal against sentence had been withdrawn.



- [10] The next issue is whether there is any right to appeal against a sentence imposed for a conviction of murder under section 237 of the Crimes Decree. Section 237 provides that the penalty for murder “*is a mandatory sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered.*”
- [11] The sentence of mandatory imprisonment for life is one imposed by law and as a result there is no right to seek leave to appeal against sentence under section 21(1)(c) of the Court of Appeal Act. The discretion to fix a minimum term before a pardon may be considered does not in any way detract from the concept of a mandatory sentence of imprisonment for life.
- [12] A pardon may be granted by the President on the recommendation of the Mercy Commission at any time under section 119 of the Constitution. If and when an application for a pardon is made by a convicted murderer to the Mercy Commission it can reasonably be expected that the Mercy Commission will take heed of the manner in which the sentencing judge exercised the discretion as to whether to fix a minimum term and if he did the term actually fixed. The discretion does not constitute an early release discretion. Although the exercise of the discretion may be appealable, there does not appear to be any real gain in a successful appeal as the issue of a pardon is entirely a matter for the Mercy Commission. Section 119 does not specify what matters the Mercy Commission is required to consider before determining whether to recommend a pardon.
- [13] As a result the Appellant’s only option is to apply to the Supreme Court for leave to appeal the decision of the single Judge of this Court to dismiss her appeal pursuant to section 35(2) of the Court of Appeal Act.

Order

1. *The oral application to abandon the appeal against sentence is marked withdrawn.*

2. Leave to appeal against sentence is refused and the appeal against sentence is dismissed.



*W. Calanchini*

Hon. Mr Justice W. D. Calanchini  
PRESIDENT, COURT OF APPEAL

*Waidyaratne*

Hon. Mr Justice Waidyaratne  
JUSTICE OF APPEAL

*Prematilaka*

Hon. Mr Justice Prematilaka  
JUSTICE OF APPEAL