

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

CIVIL APPEAL NO.ABU 18 OF 2017
(High Court of Suva Civil Action No. 278B of 2012)

BETWEEN : **RUPENI NAISORO** *1st Appellant*

SAINIVALATI RAMUWAI *2nd Appellant*

AND : **1. THE COMMISSIONER OF POLICE**
2. THE ATTORNEY GENERAL OF FIJI *Respondents*

Coram : **Basnayake JA**
Lecamwasam JA
Guneratne JA

Counsel : **The Appellants in person**
Ms. S. Ali for the Respondents

Date of Hearing : **16 November 2018**

Date of Ruling : **30 November 2018**

RULING

- [1] When this case was taken up for hearing, Mr. S. Valenitabua having marked his appearance for the appellants moved that he be discharged from the proceedings as the appellants no longer wished to have his services.

- [2] The appellants were the accused in the High Court in case No. HAC 033 of 2005 (2005 FJHC 17). Mr. Valenitabua appeared for the 1st appellant in the High Court. After trial before the High Court the appellants were convicted for murder and sentenced to life imprisonment. On appeal, the Court of Appeal on 23 March 2012 (2012 FJCA 21 (23 March 2012) set aside the conviction and acquitted the appellants. On 29 October 2013 the appellants, through their attorney Mr. S. Valenitabua filed the present action claiming damages against the respondents.
- [3] At the trial in the civil action Mr. Valenitabua appeared for the 1st appellant. Mr. Vakaloloma appeared for the 2nd appellant. After trial on 27 October 2016 the learned High Court Judge had dismissed the action of both appellants. On 20 March 2017 a notice of appeal was filed by Mr. S. Valenitabua for the appellants to set aside the judgment of the learned High Court Judge dated 27 October 2016.
- [4] At the hearing before this court on 16 November 2018, Mr. Valenitabua informed court that he received a statutory declaration on 12 November 2018 which was served in his office which persuaded him to make this application to have himself discharged from the case. Ms. Ali for the respondents did not object to the release of Mr. Valenitabua from the case.
- [5] The statutory declaration by the 1st appellant in paragraphs 7, 8, 9, 10 and 11 state as follows:-

“7. That after everything that has transpired up to this point I now have some reservations with my solicitor and in the way he has been conducting my case.....

8. That he is in partnership with David Toganivalu. Mr. Toganivalu was the DPP officer who prosecuted the State case against me. This same Mr. Toganivalu had approached me when I was out on bail for the above murder charge and wanted to negotiate that I turn State witness against Sainivalati Ramuwai, the 1st accused (2nd appellant) and implicate him in the said murder trial and in return that I would be granted immunity.

9. That I flatly refused because I knew nothing about the case and if I testified against Sainivalati Ramuwai, the 1st accused that would

tantamount to perjury and my lying on oath. I immediately made it known to him to proceed and charge me for the offence anyhow which did happen.

10. That now it so happens that since he and Mr. Simone Valenitabua are in partnership both of them will have had "put their heads together" to discuss my appeal without a doubt. For as long as my file is in that office Mr. Toganivalu will always feel uncomfortable with my case since my conviction in which he was the State prosecutor was set aside by the Court of Appeal and he will always feel guilty of his attempts at turning me into a State witness to lie under oath.

11. That I am now beginning to wonder how it is that I lost my civil claim case before Brito J as it is a fairly straight forward case after I wrongfully spent 2 years in remand and was serving 2 years out of a life imprisonment sentence before the real perpetrator above name confessed to the killing. With Mr. Toganivalu now in partnership with Mr. Simone Valenitabua and because of the supposed conflict of interest my imagination into how my case was lost is now beginning to run wild".

- [6] The 1st appellant states that the association between his solicitor Mr. Valenitabua and the prosecutor, Mr. Toganivalu has created a conflict of interest and in the best interest of justice he has to seek the services of another solicitor. Mr. Valenitabua had admitted to having worked in partnership with Mr. David Toganivalu from about 2014. It is evident from the Record of the High Court that the murder trial No. HAC 33 of 2005S that was against the appellants was prosecuted by Mr. Toganivalu with Mr. S. Vodokisolomone.
- [7] The 2nd appellant in this case is Mr. Sainivalati Ramuwai. He too had filed a statutory declaration. In that the 2nd appellant stated that he was represented by Mr. A. Vakaloloma before the High Court in the civil action No. 278B of 2012. Mr. Vakaloloma having been convicted of an offence was imposed a suspended sentence. Ms. S. Ali appearing for the respondents has admitted to Mr. Vakaloloma being under suspension. It is evident that this action was filed in court by Mr. Simone Valenitabua. However at the trial the 2nd appellant was represented by Mr. Vakaloloma.

- [8] In the above circumstances this court takes the view that it is nothing but fair to discharge Mr. Simone Valenitabua from the case. Hence Mr. Simone Valenitabua is discharged from the proceedings.
- [9] The 1st and the 2nd appellants were present in court. They both moved that they be given a date to retain another counsel. They were not ready for the hearing. They could not explain the delay in making this application. They could not explain why this matter was not brought to the attention of the court on the call over date. The writ of summons in this case was filed on 30 October 2012. The writ of summons for both the appellants was filed by Mr. Simone Valenitabua, Barrister and Solicitor. The notice of appeal too was filed by Mr. Simone Valenitabua. This was done on behalf of Mr. Toganivalu & Mr. Valenitabua. Mr. Toganivalu, having been the prosecutor who was successful in obtaining a conviction against the appellants in the High Court on 16 May 2007 we are of the view that in the interest of justice we should allow the appellants to retain another counsel of their choice.
- [10] The notice of appeal was filed in this case on 20 March 2017. At the time of filing this notice of appeal, Mr. Valenitabua was working in partnership with Mr. Toganivalu. The appellants could not deny that they were not aware that Mr. Valenitabua was working in partnership with Mr. Toganivalu from the time of filing the notice of appeal. The learned counsel appearing for the respondents moved for a dismissal of the action and objected to a date being granted. However, she submitted that, should the Court think fit to grant a postponement that the same be granted subject to an appropriate order for costs. Considering the conflict of interest that appears in this case and the prejudice that would be caused to the appellants in the event of a dismissal devoid of merits, we are of the view that a postponement subject to costs would be more appropriate.
- [11] Hence we order that each appellant pay \$500.00 to the respondents (in all \$1000.00) within a period of 28 days from today. In the event of failure to make this payment the appeals are to be dismissed. In the event the payment of costs is made, the Registrar is

directed to have this case mentioned before the Hon. President to fix a date for argument or for any other orders.

Orders of the Court:

1. *Costs in a sum of \$1,000.00 payable to the respondents by the appellants, each paying \$500.00 in 28 days.*
2. *Failure to pay costs resultant in the dismissal of the appeals.*
3. *In the event of payment of costs the case to mention on a date after 28 days before the Hon. President to fix a date for argument.*



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



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Hon. Justice A. Guneratne
JUSTICE OF APPEAL