

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

**CRIMINAL APPEAL NO. AAU 31 OF 2019**  
**(High Court HAA 1 of 2019)**  
**(Magistrates Court No: EJR 1 of 2017 at Tavua)**

**BETWEEN** : **LUKE KETEWAI** *Appellant*

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

**Coram** : **Calanchini P**  
**Chandra JA**

**Counsel** : **Mr R Vananalagi for the Appellant**  
**Mr M Vosawale for the Respondent**

**Date of Hearing** : **20 November 2019**

**Date of Ruling** : **11 December 2019**

**RULING**

[1] Following a trial in the Magistrates Court at Tavua the appellant was convicted on one count of robbery. On 10 December 2018 he was sentenced to 3 years 5 months and 3 weeks imprisonment without any term of non-parole. The appellant filed a timely notice

of appeal against conviction and sentence in the High Court. In a judgment delivered on 29 March 2019 the Court dismissed the appeal against conviction, the appellant having abandoned his appeal against sentence.

[2] On 25 April 2019 the appellant filed in this Court a timely notice of appeal against conviction and on 31 August 2019 filed an application to abandon that appeal pursuant to Rule 39 of the Court of Appeal Rules. It must be noted that the appeal to this Court was a second tier appeal and as a result pursuant to section 22 of the Court of Appeal Act 1949 the Court's jurisdiction is restricted to grounds of appeal that raise an error of law only.

[3] It is at this stage appropriate to set out the background to the practice that this Court now adopts for applications to withdraw or abandon an appeal against conviction and or sentence. The starting point is Rule 39 itself. The rule came into effect as part of the Court of Appeal Rules 1949 and was in virtually identical terms to Rule 23 of the Criminal Appeals Rules 1908 (UK). Between 1949 and June 2018, Rule 39 provided:

*“An appellant, at any time after he has duly served notice of appeal or of application for leave to appeal or of application for extension of time within which, under the Act, such notices shall be given, may abandon his appeal by giving notice of abandonment thereof \_\_\_ to the Registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal.”*

[4] It followed that a criminal appeal against conviction and or sentence was deemed to have been dismissed by the Court of Appeal on the giving of notice (in the prescribed form) of abandonment by the appellant. It is clear that this was in effect an administrative procedure that did not in any way involve the exercise of a discretion by either the Court of Appeal or the Registrar.

[5] It must be noted that until 1990 the word appellant in Rule 39 was a reference to a convicted person only. However by virtue of the Court of Appeal Act (Amendment)

Decree 1990 the State acquired the same right to appeal to the Court of Appeal as a convicted person and that right is now found in section 21(2) of the Act.

- [6] The common law has to a limited extent qualified the circumstances under which an appellant may abandon an appeal. In Gibbon v R 31 Cr. App. R. 143 the Court of Appeal indicated that where an appellant had not seen his counsel until the last moment and had not had time to lodge the prescribed written notice, the appellant should not be prevented through his counsel or himself from making his application. This was a sentence appeal and the appellant was entitled to exercise that right provided that fact is conveyed to the Court the moment when the appeal is called. Then in R v De Courey [1964] 1 WLR 1245 the Court of Appeal indicated that if an appellant, or his counsel, does not abandon an appeal orally when it is called on, he cannot as of right abandon it after it has been opened whether the appeal is against conviction or sentence. Under those circumstances the appeal can only be abandoned by leave of the Court. However neither decision affects the right to abandon an appeal against conviction and or sentence exercisable by the appellant provided notice either in the prescribed form or orally is given at any time prior to the appeal being called on for hearing.
- [7] Over the years the courts were required to consider applications by appellants who subsequently wanted to withdraw the notice of abandonment after the appeal was deemed to have been dismissed by the Court of Appeal. A number of decisions had provided some guidance as to how such applications should be considered, for example see R v Healey 40 Cr. App. R. 40 and R v Moore 41 Cr. App. R. 179.
- [8] Then in order to avoid such a situation the Supreme Court in Masirewa –v- The State [2010] FJSC 5; CAV 14 of 2008, 17 August 2010 discussed the approach that should be taken by an appeal court when considering an application by an appellant to abandon an appeal. In Serukalou –v- The State [2012] FJCA 34; AAU 61 of 2011, 7 June 2012 this Court confirmed that the same approach should apply to applications under Rule 39 of the Court of Appeal Rules. It was also noted in that decision that the purpose for



adopting such an approach was to avoid situations where an appellant may have had a “*change of heart*” or second thoughts.

- [9] This approach required the Court to conduct a hearing before the notice of abandonment could take effect and the appeal dismissed by the Court of Appeal. As section 35(1) of the Act did not provide for abandonment notices to be considered by a single judge of the Court, notices of abandonment are required to be considered by the Full Court.
- [10] Once again, it must be stressed that there is no suggestion in the Supreme Court decision of **Masirewa** (supra) that an appellant’s right to abandon an appeal has been qualified or modified provided that notice is given prior to the appeal hearing. The purpose of the hearing is to ensure that the appellant’s decision to abandon his appeal has been an informed decision made without coercion or mistake. If the Court is so satisfied then it has no jurisdiction to refuse to grant the abandonment or to refuse to dismiss the appeal.
- [11] With the development of the procedure emanating from the decision of the Supreme Court in **Masirewa –v- The State** (supra) it became necessary to amend the wording of Rule 39 and the amended version appears in 2016 Revised Laws of Fiji. It came into effect on 21 June 2018. The amendment does not confer upon the Court of Appeal any jurisdiction or discretion other than that which had existed prior to the amendment coming into effect. The right to abandon an appeal upon giving notice by application prior to the appeal hearing remains for the benefit of the appellant, whether the appellant be a convicted person or the State.
- [12] In this case Luke Ketewai confirmed that his decision to abandon his appeal was made voluntarily. He confirmed that he had received legal advice and that he understood the consequences in the event that his application were granted.
- [13] Under the circumstances the application to abandon this appeal against conviction is granted and the appeal is dismissed.

Order:

*Appeal under section 22 of the Court of Appeal Act against conviction is dismissed.*



*W. Calanchini*

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

*S Chandra*

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Hon Mr Justice S Chandra  
**JUSTICE OF APPEAL**