

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO.AAU 113 of 2016
[In the High Court at Suva Case No. HAC 272 of 2014]

BETWEEN : **SURYA DEO SHARMA**
Appellant

AND : **THE STATE**
Respondent

Coram : **Gamalath, JA**
: **Prematilaka, JA**
: **Dayaratne, JA**

Counsel : **Mr. M. Fesaitu and Ms. P. Mataika for the Appellant**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **10 May 2022**

Date of Judgment : **26 May 2022**

JUDGMENT

Gamalath, JA

[1] I have read the judgment of Prematilaka, JA in draft and I agree with his reasons and conclusion.

Prematilaka, JA

[2] Following a trial in the High Court at Suva the appellant was convicted on the unanimous opinions of three assessors and the concurring verdict of the trial judge on one count of rape contrary to section 207(1), (2)(a) and (3) of the Crimes Act, 2009 and on one count of abduction of person under 18 years of age with intent to have carnal knowledge contrary to section 211(1) of the said Act. On 04 August 2016 he

was sentenced to an aggregate term of 11 years 11 months and 15 days of imprisonment with a non-parole term of 08 years 11 months and 15 days.

- [3] The appellant had lodged a timely application for leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act on 04 grounds of appeal and Calanchini, P sitting as a single judge had by the Ruling delivered on 27 April 2018 refused leave to appeal on the consolidated single ground stating *inter alia*:

'At the hearing Counsel for the Appellant submitted that the four grounds of appeal can be considered as raising one issue that being the issue of reasonable doubt. In other words, for the purposes of section 23(1) of the Act, do any of the grounds raise an arguable point that would support the conclusion that the verdict should be set aside on the grounds that it is unreasonable. On this point it should be noted that such words as "unsafe" or "dangerous" have no application for setting aside a verdict under section 23 of the Act.'

- [4] The appellant had since renewed his appeal on same four grounds of appeal in terms of section 35(3) of the Court of Appeal Act.

- [5] When the appeal was taken up for hearing before the full court, the counsel for the appellant in the presence of the appellant informed court that his client wished to withdraw his appeal and tendered an application signed by the appellant seeking to abandon his appeal in Form 03 as per Rule 39 of the Court of Appeal Rules. Rule 39 provides that

"An appellant, at any time after he has duly served notice of appeal or for 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 in the form 3 in the Second Schedule to the Registrar, and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal."

- [6] Despite the 'deemed to have been dismissed' clause in Rule 39, the long-established practice of this court is to have abandonment applications mentioned before court in the presence of the appellant himself and satisfy itself of the requirements given in **Masirewa v. State** Criminal Appeal No. CAV0014 of 2008S:17 August 2010 [2010] FJSC 5.

[7] The Hon. Chief Justice has confirmed this position in a recent Ruling in **Kumar v State** [2022] FJSC 5; CAV 014 of 2021 (26 January 2022).

19. It is obvious that the Appeal is not abandoned upon filing of the Application under Rule 39 but needs to be called before the Court of Appeal for an order that the Appeal is abandoned.

20. What is stated at the preceding paragraph is the practice adopted by the Court of Appeal when parties wish to abandon or withdraw the Notice of Appeal or Application for Leave to Appeal or Application for Extension of Time.

[8] Thus, the dismissal of an appeal upon an abandonment application being filed could happen only when the abandonment is allowed by an order of the Court of Appeal.

[9] Answering Court the appellant said that he was standing by his decision to abandon the appeal. In terms of the Supreme Court guidelines in **Masirewa v State** (supra) this court asked the appellant in the presence of his counsel whether (i) he wished to abandon his appeal (ii) he was doing so voluntarily (iii) he had received legal advice (iv) reasons for the abandonment at this stage and (v) he understood the consequences of this court allowing his abandonment application namely that he cannot prosecute his appeal again before this court. He answered the questions in the affirmative.

[10] I am satisfied that the appellant's application to abandon his appeal is a considered decision upon legal advice that had been taken without any pressure but voluntarily and on his own free will. I am also satisfied that the appellant fully understood the consequences of the abandonment of his appeal.

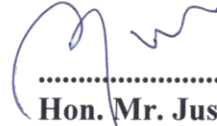
[11] In the circumstances, I allow the abandonment of the appeal and accordingly, the appeal should stand dismissed by this Court.

Dayaratne, JA

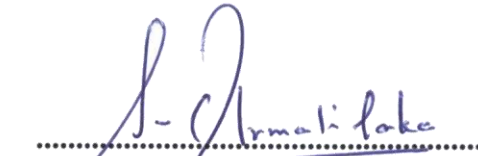
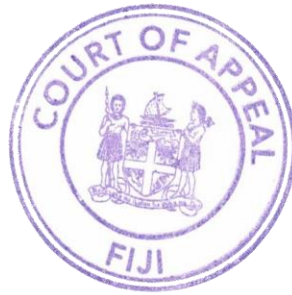
[12] I have read the draft judgment of Prematilaka, JA and agree with his conclusion.

The Orders of the Court :


- (i) *Abandonment of the appeal allowed.*
- (ii) *Appeal against conviction stands dismissed.*



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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



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Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL