IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0021 of 2023
[Court of Appeal No. AAU 0086 of 2018]

BETWEEN : **KELEPI SALAUCA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon Mr. Justice Anthony Gates, Judge of the Supreme Court**
The Hon Mr. Justice Brian Keith, Judge of the Supreme Court
The Hon Mr. Justice Lowell Goddard, Judge of the Supreme Court

Counsel : **Petitioner in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **4 April 2025**

Date of Judgment : **29 April 2025**

JUDGMENT

Gates, J:

[1] I have read in draft judgement of Keith J which follows. I am in full agreement with it, its reasons and orders.

Keith, J:

Introduction

[2] On the night of 11 October 2015 the occupants of a house in Malaqereqere, a village near Sigatoka, experienced every homeowner's nightmare. Four men broke into their house. The men were armed with knives. The occupants – a husband and his pregnant wife – woke up when the men came into their bedroom. At least two of the men were masked. The husband was forced onto the floor and kicked in the stomach. His wife was grabbed by the hair, a knife was put at her neck, and she was dragged from room to room to point out where any valuables were kept. She and her husband were then tied up and gagged. The men were in the house for about an hour, and eventually left taking with them property valued at about $33,000. They drove off in the occupants' car worth about $60,000. It is not possible to minimize how terrifying the experience must have been for the couple.

[3] Three iTaukei men were subsequently arrested. One of them was the applicant, Kelepi Salauca. In accordance with the practice in Fiji, I shall refer to him as Kelepi from now on. They were charged with aggravated robbery contrary to section 311(1)(a) of the Crimes Act 2009. At their trial, they all pleaded not guilty. None of them disputed that the robbery had taken place. The issue for the trial judge was whether the three defendants were the robbers. He was sure that they were, as indeed had been the assessors. He accordingly convicted them all. Kelepi was sentenced to a 10 years and 11 months imprisonment with a non-parole period of 9 years. His appeal against his conviction was dismissed by the Court of Appeal, his appeal against sentence having apparently been abandoned. He now applies to the Supreme Court for leave to appeal against his conviction, and for his appeal against sentence to be "reinstated" out of time.

The evidence implicating Kelepi in the robbery

[4] The occupants of the house, who were of Indo-Fijian ethnicity, were not able to identify the robbers. Blankets had been placed over their heads to prevent them from doing that, though from their voices they were able to tell that they were iTaukei. Nor was there any evidence

– whether forensic or fingerprint evidence – which placed Kelepi or the other defendants at the scene. The evidence which implicated Kelepi in the robbery was circumstantial evidence and his confession to his cousin that he had been one of the robbers. What follows is that evidence.

[5] The car which was stolen in the robbery was a red Nissan Navara. It was subsequently found abandoned in the mountains near Naocobau – on the other side of Viti Levu from Malaqereqere. At about 8.00 am on 11 October 2015 – so about six hours after the robbery started – Kelepi was in Namarai, a village not far from Naocobau. From there his uncle took him and three other men to Nabukadra, a nearby village. All four men were carrying bags. They remained in Nabukadra for a while. While they were there, Kelepi saw his cousin, Manoa Dugulele, and Manoa's wife, Siteri Levers.

[6] Manoa's evidence was that Kelepi confessed to him his involvement in the robbery. What Kelepi told him was that they had robbed an Indo-Fijian couple and had left them tied up in their house in Sigatoka. They had taken their car which they had abandoned near Naocobau. They had then been taken by boat from Namarai to Nabukadra. Siteri's evidence was that Kelepi had been wearing a pair of canvas shoes at the time. He had left them outside their house. They had been given to DI Saimoni Qasi the following day. The shoes were Sfida shoes, and were subsequently identified by the male victim of the robbery as his. I do not wish to name him, and I shall refer to him as PW1.

[7] Kelepi and the three other men left Nabukadra by boat later that day for Natovi, which was a small ferry port nearby. While on their way there, they encountered a boat with police officers in civilian clothes on board. When their boat was asked to stop, Kelepi took over the controls. The boat gathered speed, and when it eventually came to a halt, Kelepi and one of the other men escaped into the bush. One of Kelepi's co-defendants, Vereti Waqa, did not get away, and he was arrested. He was subsequently searched, and on him was found a wallet which contained the identification card of one of one of the victims of the robbery. Kelepi's other co-defendant, Tui Lesi Bula, was arrested that evening at Manoa's home along with Manoa, and Kelepi himself was subsequently arrested in Suva.

The defence case

[8] Kelepi elected to give evidence. His defence was alibi. He denied that he had been anywhere near Sigatoka on the day in question. On 10 October 2015 – the morning before the robbery – he had been at his sister's house in Nasinu. His father who lived in Nabukadra had called him while he was there seeking his help to take various things to Nabukadra. Kelepi had agreed to do so, and he and his father had travelled there by bus arriving in Nabukadra in the early evening. He had stayed the night at his father's house.

[9] Kelepi's evidence was that he had woken up too late the following morning to get the bus back to Suva. His father had suggested that he get a boat to take him to somewhere such as Natovi where he could catch another bus for Suva. In the meantime, his father had asked him to get him some benzine, so he had gone to his uncle's home to get some. His uncle had not had any, but he had suggested that Kelepi could get some at Namarai. In Namarai Kelepi had seen Epi Kolinivala, a friend who he had been at school with and to whom he was related. He had asked Epi whether he had any benzine. Epi had said that he did not, but while he had been talking to Epi, a boat belonging to his uncle, Sakiusa Yavala, arrived. While he had been talking to Sakiusa about being dropped off back at Nabukadra, three iTaukei men who had heard that had asked if they could be dropped off at Nabukadra as well, from where they could walk to Nayavutoka where they were heading. Sakiusa had agreed, and had taken Kelepi and the three men to Nabukadra, from where the three men had walked off towards Nayavutoka.

[10] I should add here that much of this was supported by both Epi and Sakiusa, though Epi in his evidence said nothing about three other men being there, and Sakiusa's evidence was that Kelepi had been with the three other men.

[11] Returning to Kelepi's account of that morning, his evidence was that he had met a group of men, some of whom he knew, and they had all gone drinking. They had been joined by three iTaukei men, but it is unclear whether Kelepi was saying that these were the three men who had been on the boat with him or another three men. Whoever the three men were, though,

Kelepi's evidence was that they had asked him to take them to Manoa's home which he had done.

[12] Following another drinking session there, which had turned into a fight involving a number of men, Kelepi had gone by boat to where he could catch a bus for Suva. On the boat were two other men. Kelepi did not say in his evidence who they were, but it looks as if he was saying that they were two of the men he had been drinking with. When the boat was approached by another boat, Kelepi had thought that the men on the boat had been the ones he had been fighting with, which was why he had taken over the controls and had tried to get away from them. He had no idea that they were police officers. He had eventually made his way back to Suva, and had been arrested four days later. It should be added that Kelepi's sister and father gave evidence confirming Kelepi's evidence of his whereabouts on 10 and 11 October 2015.

[13] In the course of his evidence, Kelepi denied that he had ever confessed to Manoa that he had been involved in the robbery. He claimed that Manoa was implicating him in order to exculpate himself since Manoa had himself been arrested. He also denied having had anything to do with the pair of canvas shoes given to the police. He pointed out that he had not been asked anything about them when he was interviewed, that the shoes had not been among the items set out in the charge sheet as having been stolen in the robbery, and that it would not have been possible for PW1 to say whether the pair of shoes which had been given to the police had been the pair of shoes taken in the robbery because there was nothing to distinguish them from any other pair of Sfida canvas shoes of the same style, size and colour.

The focus of the proposed appeal

[14] Kelepi represented himself at his trial and on the appeal. He also represented himself on the current hearing in the Supreme Court. Not being a lawyer, he understandably has little appreciation of the limited role of an appellate court. For example, one of his arguments is that the Court of Appeal fell into error by failing to make an independent assessment of the evidence at his trial. This criticism of the Court of Appeal is based on a misunderstanding

of what Marsoof J was saying in para 80 of the Supreme Court's judgment in *Ram v The State* [2012] FJSC 12:

> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."*

[15] Marsoof J's observation about the appellate court having to evaluate the evidence and independently assess it has to be seen in its context. He was explaining what the appellate court has to do in its "supervisory" role. When the appellate court is independently assessing the evidence, it is doing so to satisfy itself, to use Marsoof J's own words, "that the ultimate verdict is supported by the evidence and is not perverse". In other words, the function of the Court of Appeal is to look at the totality of the evidence, and *assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude* beyond reasonable doubt that the accused was guilty of the charge he faced. It is not part of the Court of Appeal's function to consider for itself whether on the totality of the evidence the accused is guilty. That would be to usurp the function of the trial judge who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused. This has been said many times before[1], but it is worth repeating now and again.

[16] There is another problem with Kelepi's focus on how the Court of Appeal approached his appeal to it. It should not be forgotten that, although the Supreme Court is a second-tier court, its focus is still on what happened in the trial court – just like the Court of Appeal. It has the advantage, of course, of the views of the Court of Appeal on whether things went wrong in the trial court, but what it is ultimately reviewing is the course which the trial took

[1] See, for example, *Rokete and ors v The State* [2022] FJSC 11 at para 109 *per* Keith J.

rather than whether the Court of Appeal's analysis of whether the trial went wrong was correct. Again, that is something which has been said many times before,[2] but it is worth reminding unrepresented litigants of it.

[17] In these circumstances, I have looked with care at the evidence at trial in order to see whether it was reasonably open to the trial judge to conclude beyond reasonable doubt that Kelepi had indeed been one of the men who robbed the couple at Malaqereqere at knifepoint. In summary, the evidence which implicated Kelepi in the robbery was:

(i) his confession to Manoa of his involvement in the robbery,
(ii) his presence in Namarai relatively close to where the car stolen in the robbery had been abandoned,
(iii) the fact that the shoes which Siteri said Kelepi had initially been wearing in Nabukadra were identified as having been taken in the robbery,
(iv) the fact that he had been associating with a man on whom a wallet stolen in the robbery had been found, and
(v) Kelepi's flight from the police and the inference to be drawn from that he had something to hide.

[18] Points (ii) and (iv) were not disputed by Kelepi, and in my opinion the trial judge was entitled to conclude that Manoa had been telling the truth when he had said that Kelepi had confessed his involvement in the robbery to him, that Siteri had been telling the truth when she had said that the shoes which were given to the police were the ones which Kelepi had initially been wearing, that PW1 had accurately identified the pair of canvas shoes which the police showed him as his, and that Kelepi's father had not been telling the truth about Kelepi's whereabouts at the time of the robbery. The trial judge did not rely in his judgment on such inferences as could be drawn from Kelepi's flight, but it was nevertheless reasonably open in my opinion to the trial judge to conclude beyond reasonable doubt that Kelepi had been one of the robbers.

[2] See, for example, *Lesi and ors v The State* [2018] FJSC 23 at para 74 *per* Keith J.

[19] Leaving all this aside, there are three specific grounds of appeal on which Kelepi relies. They are set out in his petition (which he called his notice of appeal against conviction). There were many more grounds of appeal when he appealed to the Court of Appeal, but Kelepi confirmed to us that the only matters which he wanted to raise in the Supreme Court were the ones referred to in his petition. I propose to deal with each in turn, together with some additional points about the pair of canvas shoes which Kelepi brought up in the hearing before us.

The search list

[20] When property relevant to an investigation is seized by the police, the police are required to record the seizure on a form known as a search list. Such a form was completed when the police were given the pair of canvas shoes which Siteri claimed Kelepi had initially been wearing and which PW1 subsequently identified as his. The form referred to the pair of canvas shoes. It was signed by Siteri and was dated 12 October 2015, which was consistent with Siteri's evidence that it had been on the day following the robbery that the shoes had been handed to the police, and with the evidence of DI Qasi to whom the shoes were handed. Siteri initially said that it was she who had given the shoes to the police. Later on in her evidence she said that it was her father-in-law who had given them to the police. However, she ended her evidence by saying that it had indeed been her who had. The form signed by Siteri was exhibit 12 at the trial.[3]

[21] I should add that Kelepi says that when he was first provided with a copy of that form among the disclosures, it had not been signed by Siteri. Indeed, the trial transcript shows that that was what he told the judge in the course of Siteri's evidence.[4] He claims that he provided the judge with his unsigned copy of the form. It is not possible to tell from the trial transcript whether he did that, so we called for the High Court file to see if there was an unsigned copy of the form in it. There was not, though that should not be regarded as decisive.

[3] A copy of this search list is at page 662 of volume 2 of the Record of the High Court.
[4] See page 175 of volume 1 of the Supplementary Record of the High Court.

[22] Having said that, the complaint which Kelepi makes relates to another such form. It also referred to the pair of canvas shoes, but it was signed by Manoa.[5] It was not made an exhibit. Kelepi claims that he did not know of the existence of this form at the time he cross-examined Manoa. That is almost certainly correct. The trial transcript shows that on 1 June 2018 (which was the day on which Manoa gave evidence) the hearing concluded with an acknowledgment by the prosecution that the "relevant search list" had not been disclosed to the defence.[6] The transcript shows that it was then disclosed. No-one clarified whether the search list which was being disclosed at that time was the search list signed by Siteri or the one signed by Manoa. In the circumstances, I think that the safest course to take is to proceed on the assumption that it was the search list signed by Manoa which was being discussed. On that footing, Kelepi did not know about the search list signed by Manoa until after Manoa had completed his evidence.

[23] Kelepi did not spell out what use he would have made of that search list during his cross-examination of Manoa had he been aware of its existence. At first blush, it is difficult to see why he is concerned about it. He had had the original disclosures for at least a couple of years before the trial as the bundle containing them is dated 10 November 2015. Those disclosures included Siteri's witness statement in which she had said that Kelepi had originally been wearing the pair of canvas shoes which PW1 subsequently identified as his. Kelepi did not need to have seen the search list signed by Manoa to know what Siteri's evidence was likely to be, and therefore whether there was anything which he needed to ask Manoa on the topic. In any event, the search list signed by Manoa was simply his confirmation that the pair of canvas shoes had been seized by the police. It said nothing about how they had come to be in Siteri's possession which was the relevant matter.

[24] But that is not quite the end of the story. The fact that Manoa signed a search list dated 12 October 2015 relating to the pair of canvas shoes is very surprising. He had been arrested the previous day, and could not therefore have been present on 12 October when, according to the evidence of both Siteri and DI Qasi, the shoes were handed to the police. When Kelepi

[5] A copy of this search list is at page 666 of volume 3 of the Supplementary Record of the High Court.
[6] See pages 166-167 of volume 1 of the Supplementary Record of the High Court.

asked one of the police officers who subsequently gave evidence how that had come about, the answer was that Manoa had asked to sign the search list for anything found at his house.[7] If that was a truthful explanation, I do not understand why Manoa's request was granted. It should not have been: someone is required to sign a search list to confirm that it was from them that an item was recovered. The shoes were not recovered from Manoa. Although Kelepi never spelt it out, he is presumably saying that the explanation given for Manoa to have signed the search list is untrue, and that he signed it for some other reason altogether.

[25] The late service of the disclosures including the search list which Manoa had signed prevented Kelepi from asking Manoa how he came to sign it. That was unfortunate, especially as Manoa's signing of it obviously called for an explanation. But crucially once Kelepi had the disclosures, he did not ask the judge for Manoa to be recalled, and it is therefore difficult for him to say that it was the late disclosure of the search list which prevented him from questioning Manoa about it. What prevented Kelepi from questioning Manoa about it was his failure to ask for Manoa to be recalled to be questioned about it.

[26] The fact remains that there is a real question over the circumstances in which Manoa came to sign the search list. But crucially the important evidence was that of Siteri, because it was she who said that the pair of canvas shoes which were given to the police had been left by Kelepi. The suspicious circumstances surrounding the search list signed by Manoa do not affect that, and it was that – coupled with PW1's identification of the shoes as his – which was the compelling evidence which implicated Kelepi.

The pair of canvas shoes

[27] In the course of the hearing before us, Kelepi took another point relating to the pair of canvas shoes which had not been mentioned in his petition. It will be recalled that the evidence was that Kelepi had left the pair of canvas shoes outside Siteri's house, and that they were given to DI Qasi the following day. Despite that, when Tui Lesi was interviewed under caution by

[7] See page 215 of volume 1 of the Supplementary Record of the High Court.

the police, he was shown the pair of canvas shoes. He was then asked whether they were the same pair of canvas shoes which had been "recovered from the boat in which you people were trying to run away". He replied that they were. Kelepi says that shows that Siteri was wrong to say that the shoes had been given to the police, and given to them on the following day.

[28] There are three reasons why this cannot be said to undermine Siteri's evidence – or that of DI Qasi whose evidence was that the shoes had been given to him by Siteri. First, the police officer who interviewed Tui Lesi was not DI Qasi. What he had put to Tui Lesi must have been based on what he had understood the position to be. He did not give evidence (save in a *voir dire* which was held to determine the admissibility of the evidence relating to Tui Lesi's interview), and so the source of his information was never explored. But even if he had given evidence that that was what he had been told, it would have been inadmissible as hearsay. Secondly, none of the police officers who gave evidence said that the shoes had been recovered from the boat, nor had it been put to them that they had been. And thirdly, it was never put either to Siteri or to DI Qasi that the shoes had not been given to the police by Siteri on 12 October 2015, but had in fact been recovered from the boat on the previous day.

Fresh evidence

[29] In the Court of Appeal, Kelepi applied for leave to call what he described as "fresh" evidence. The application was refused. Kelepi claims that the Court of Appeal fell into error in that respect.

[30] The application had two strands. The first related to Luisa Kanawale, the mother of his child with whom he claimed to have been staying in October 2015. She had made a witness statement on 19 October 2015, a few days after the robbery. In it, she said that at about 10.00 am on 10 October 2015 Kelepi had said that "he had to go and drop his father at the bus stand to go to the village", and that she did not see him again until 12 October 2015. She did not say which village she was referring to, but I assume that she was referring to Nabukadra where Kelepi's father lived. Although she did not actually say that Kelepi had told her that

he was going to accompany his father to Nabukadra, it could be said that this supported Kelepi's evidence of how he came to be in Nabukadra. Luisa did not give evidence at the trial. Luisa's evidence was one strand of "fresh" evidence which Kelepi wished the Court of Appeal to hear.

[31] In my opinion, the Court of Appeal did not fall into error in declining to hear it. Kelepi had very little to gain if Luisa had given evidence at the trial. If she had given evidence on the lines of her witness statement, it would have meant that Kelepi had had plenty of time to go to Sigatoka in time to take part in the robbery. In any event, her evidence was limited to what she said Kelepi had told her about what he was going to do: it did not relate to what he had actually done. But even if one assumes that Luisa's evidence was of at least marginal assistance to Kelepi, there is, in my opinion, no answer to the point that he could have called her as a witness at the trial had he chosen to. It would have been a very risky thing to do, bearing in mind the very marginal assistance her evidence could have afforded him, and calling her would have exposed her to the risk of damaging his case in cross-examination.

[32] The other strand of the application to call fresh evidence related to Kelepi's interview under caution. In that interview, he exercised his right of silence, declining to answer the questions he was asked. In those circumstances, the prosecution chose not to rely on the interview when it came to trial. Presumably, Kelepi wanted to rely on the fact that he had not been asked any questions about the pair of canvas shoes which had supposedly been stolen in the robbery. But that had already been conceded by the police in the course of the evidence,[8] and there was therefore no need to establish that fact by the production of the record of his interview under caution.

The accuracy of the trial transcript

[33] The trial was audio-recorded, and a transcript was prepared.[9] Kelepi claimed that the transcript is both incomplete and inaccurate, and he asked to be provided with the disc on

[8] See page 217 of volume 1 of the Supplementary Record of the High Court.
[9] The transcript of the recording is at pages 1-288 of volume 1 of the Supplementary Record of the High Court.

which the recording was uploaded and with facilities within prison to enable him to listen to it. He says that before he had had an opportunity to listen to the whole of the disc, the disc was damaged by a prison officer, and that when he listened to the disc, some of the arguments were not on it.

[34] There purports to be a second source of what was said at the trial. They are the trial judge's notes. They were written in hand, and are purported to have been subsequently transcribed.[10] I say "purported to have been" because they are very similar to the transcript of the audio-recording. It is very doubtful that the judge's handwritten notes were as detailed as the transcription of them purports to be. In my opinion, the safest course to take is to put what purports to be the transcription of the judge's notes to one side, and to concentrate on the transcript of the audio-recording.

[35] The transcript of the audio-recording was prepared by a senior secretary within the Judicial Department. It was checked against the audio-recording by a senior court officer who certified it to be "a true copy", which I take to mean that the transcript was complete and accurate. Kelepi has had the transcript for a long time. So far as I can tell, Kelepi had never said what passages in the transcript were inaccurate or where in the transcript passages had been left out, nor had he said in what way the transcript duly corrected would have revealed additional grounds of appeal.

[36] When we put that to him in the course of the hearing, Kelepi referred us to one passage in his written submissions which he had filed in support of his appeal to the Court of Appeal. The submissions were handwritten and ran to 81 pages. At para 1.26, Kelepi claimed that when he put to PW1 in effect that the pair of canvas shoes which he had been shown by the police had not belonged to him, PW1 replied "maybe". That is not correct. We found the relevant exchange in the transcript. In it, the witness is recorded as simply having said "no". To be absolutely sure, I asked to be provided with the disc so that I could listen to it myself. PW1's answer was "no", though he added a couple of words which are not material.

[10] What purports to be the transcription of the trial judge's handwritten notes is at pages 289-544 of volume 2 of the Supplementary Record of the High Court.

[37] In these circumstances, it is just not possible to say that there is even a remote chance that something not apparent on the transcript in its current form caused the trial to go wrong in some way.

Two additional points

[38] Two additional points need to be made. First, Kelepi reminded us that the shoes he had been wearing when he had been arrested were a pair of Asics black and orange canvas shoes. That is irrelevant. The issue was whether the shoes which Siteri said he had left with her had been the shoes taken in the robbery. That had nothing to do with the shoes which Kelepi was wearing four days later when he was arrested.

[39] Secondly, an important part of the evidence which implicated Kelepi in the robbery, of course, was Siteri's evidence that Kelepi had left with her the pair of canvas shoes which PW1 subsequently identified as his. There were reasons which might have made the judge wonder whether the police had initially been alive to their significance: as I have said, Kelepi was never asked about them when he was interviewed, and they were not included among the stolen items listed in the charge sheet. In addition, PW1 was never asked why he was sure that the pair of canvas shoes he was subsequently shown were his – in other words, what was it which distinguished them from any other pair of Sfida canvas shoes of the same style, size and colour. And then there was the search list signed by Manoa when he had had nothing to do with their recovery by the police. The suggestion. I imagine, is that the police got Manoa to sign the search list in order to bolster their case that the police had recovered the pair of canvas shoes. The transcript shows that all these points were brought out by Kelepi in the course of the trial.

[40] The judge did not refer to these points in either his summing-up to the assessors or his own judgment. It would have better if he had done so, but it is not possible to say that the judge ignored them. In any event, they did not undermine Siteri's evidence that the shoes had been left by Kepeli, and it would have been very co-incidental if Kelepi had been wearing a pair of Sfida canvas shoes of the same style, size and colour as the ones which had been stolen.

Moreover, the judge was sure that Manoa had been telling the truth when he claimed that Kelepi had confessed his involvement in the robbery to him, having taken into account what he regarded as the satisfactory way in which PW1, Manoa and Siteri had given evidence, which in his view contrasted with the demeanour of Kelepi and his witnesses when they gave evidence. In short, I think that it was reasonably open to the judge to be sure of Kelepi's guilt despite the points which Kelepi made.

The application to reinstate the appeal against sentence

[41] Following his conviction and sentence, Kelepi applied for leave to appeal, not just against his conviction, but against his sentence as well. When those applications came before the single judge, Kelepi sought to abandon his appeal against sentence. An application to abandon an appeal to the Court of Appeal in a criminal case is governed by rule 39 of the Court of Appeal Rules 1949, which provides (so far as is material):

> *"An appellant, at any time after he or she has duly served a notice of appeal … , … shall apply to the Court of Appeal to abandon his or her appeal by giving notice of application to abandon the appeal in the Form 3 of Schedule 2 to the Registrar and to the Respondent."*

[42] That was what Kelepi had done, and the single judge said that the abandonment of the appeal against sentence would be considered at a future date. Accordingly, he limited his consideration of Kelepi's case to the appeal against conviction.

[43] In saying that the abandonment of the appeal against sentence would be considered at a future date, the single judge was acting in accordance with established practice. Where a litigant in person says that they no longer wish to pursue an appeal, it is important to check that they have not been pressurized into doing that, and that the decision is an informed one. As the Supreme Court said in *Masirewa v The State* [2010] FJSC 5 at para 11:

> *"Where written or oral applications are made by an unrepresented petitioner seeking leave to withdraw an appeal, appellate courts should proceed with caution.*

It would be prudent for instance to ask the petitioner, on the day the matter is listed for hearing, why the petition was to be withdrawn, whether any pressure had been brought to bear on the petitioner to do so, and whether the decision to abandon had been considered beforehand. This inquiry should be made of the petitioner personally and recorded even in cases where the petitioner is represented. The purpose of the inquiry is to establish that the decision to withdraw has been made deliberately, intentionally and without mistake. Ideally, the decision should be informed also."

[44] It is for this reason that once an unrepresented litigant in a criminal case has filed a duly completed Form 3, a hearing has to be convened before the Full Court (which can consist of two or three judges) for the court to determine whether the appeal should be dismissed on its abandonment. The convening of the Full Court is necessary because an application to abandon an appeal is not one of the applications which section 35 of the Court of Appeal Act permits a single judge of the Court of Appeal to determine. At that hearing the litigant is asked – or at any rate should be asked – the following questions:

(i) Why is the appeal being withdrawn?

(ii) Was any pressure brought to bear on the litigant to withdraw the appeal?

(iii) Was the decision to withdraw the appeal considered carefully?

(iv) Had legal advice been sought and given?

(v) Does the appellant realize that once the appeal has been abandoned, the appeal is unlikely to be reinstated if the appellant has a change of mind?

[45] It was because the decision to permit Kelepi to abandon his appeal against sentence could only be made by the Full Court that the single judge informed Kelepi that it would be considered at a later date. However, it was not. We have looked through the Court of Appeal file, and it is apparent that no steps were taken to list Kelepi's application to abandon his appeal against sentence. We do not know why. It probably was just overlooked.

[46] That is the background to the application which Kelepi made to re-instate his appeal against sentence. His application was made to the Court of Appeal after his appeal against conviction

had been dismissed. The application was refused by a single judge of the Court of Appeal. The judge said:

> *"Under Rule 39 of the Court of Appeal Rules once an abandonment is entered by the appellant acting in his own deliberate judgment and without under pressure from anyone, and the relevant Form is attended to, the abandonment is deemed to be an Order of the Court of Appeal. It cannot be resurrected by a single judge."*

[47] The single judge's approach was problematic in two respects. First, there had not been any consideration by the court of whether Kelepi's decision was an informed one and that he had not been pressurised into making it. Secondly, it was wrong to say that the abandonment was deemed to be an order of the Court. That had been the effect of rule 39 before it had been amended in 2018. The earlier version of rule 39 which the single judge had in mind read as follows (so far as is material):

> *"An appellant, at any time after he has duly served notice of appeal … , … may abandon his appeal by giving notice to the Registrar, and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal."*[11]

[48] The amendment to rule 39 in 2018 changed all that. In the past an appellant in a criminal case simply filed a *notice* abandoning their appeal, and the appeal was treated as having been dismissed. However, since 2018, the appellant has to file an *application* to abandon an appeal. That application has to be considered by the Court of Appeal at a hearing of the kind envisaged by the Supreme Court in ***Masirewa***, and the Court of Appeal will only allow the application if it is satisfied that the decision to abandon the appeal was an informed one and had not been made under inappropriate pressure.

[49] Both Kelepi and the single judge assumed that the appeal against sentence could only proceed if it was re-instated. That was wrong. Although Kelepi had applied for his appeal against sentence to be dismissed on its abandonment, it never was. That is why, there having been

[11] Other jurisdictions have adopted this approach. An example is England and Walesd: see rule 36.13 of the Criminal Procedure Rules 2015.

no order of the court permitting Kelepi to abandon his appeal against sentence, it is still extant. No question of him having to apply for it to be re-instated arises.

[50] So what should happen now? His appeal against sentence has not been considered by the Court of Appeal. Can we in the Supreme Court nevertheless decide to hear and determine his application for leave to appeal against sentence, now that Kelepi's case is before us? I do not think that we can. Our appellate jurisdiction is limited by section 98 of the Constitution to hear and determine final judgments of the Court of Appeal. We do not have jurisdiction to hear and determine final judgments of the High Court. Accordingly, now that Kelepi no longer wishes to proceed with his application to abandon his appeal against sentence, I would direct that his appeal against sentence be considered by the Court of Appeal in the usual way – that is, by a single judge of the Court of Appeal determining whether leave to appeal should be granted. In view of the delay, I would order that the hearing of that application be expedited and listed to be heard no later than 6 weeks from today.

Conclusion

[51] For these reasons, I would refuse Kelepi leave to appeal against his conviction, but I would make the orders referred to in the previous paragraph in respect of his appeal against sentence.

Goddard, J:

[52] I have read the judgment of Keith J and concur with the reasoning and conclusion.

Orders of the Court:

(1) Leave to appeal against conviction refused.

(2) The applicant's application for leave to appeal against sentence be heard and determined by a single judge of the Court of Appeal, and be listed for hearing within 6 weeks from 29 April 2025.

The Hon. Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Lowell Goddard
Judge of the Supreme Court

Solicitors:

Petitioner in person
Office of the Director of Public Prosecution for the Respondent