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IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0006 OF 1998S
(High Court Criminal Appeal No. HAA007 of 1996)

BETWEEN: KURUKA BOGIWALI
and
IFEREIMI NAKAUTA

Appellants

AND: THE STATE

Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Hon. Justice I.R. Thompson, Justice of Appeal
The Hon. Justice D.L. Tompkins, Justice of Appeal

Hearing: 11 May, 1998

Counsel: Ms F. Munam for the Appellants
Ms N. Shameem, Director of Public Prosecutions
for the Respondent

Date of Judgment: 15 May, 1998

JUDGMENT OF THE COURT

The Appellants have appealed to this court against the decision of the High Court dismissing their appeals against the convictions entered and the sentences imposed on them in the magistrates' court.

The sequence of events

Both Appellants, and a third accused, were charged in the Ba magistrates' court on 4 January 1996 with two counts of robbery with violence alleged to have been committed on 1 January 1996. The record of the magistrates' court is to the effect that

both Appellants and the third accused elected magistrates' court trial, that each understood the charges, and that each pleaded guilty to the charges. The Appellant Nakautu was also charged with throwing a stone, in respect of which it is also recorded that he elected magistrates' court trial, understood the charge, and pleaded guilty.

On 8 January 1996, the Appellant Bogiwalu was sentenced to 3 years on each charge, cumulative, a total of 6 years. On the same day the Appellant Nakautu was sentenced to 2 years on each of the robbery charges, cumulative, and to a further year on the third charge of wilfully throwing a stone, also cumulative, a total of 5 years. Both Appellants were also ordered to receive six strokes.

They appealed against their convictions and sentences. In support of these appeals, they filed an affidavit by the Appellant Bogiwalu, sworn on 16 February 1996. Those appeals were dismissed by Lyons J in a judgment delivered on 26 March 1996. From that decision the Appellants have appealed to this court against their convictions and against their sentences.

The right of appeal

Section 22(1) of the Court of Appeal Act, Cap 12 provides:

"Any party to an appeal from a Magistrates' Court to the (High) Court may appeal, under this Part, against the decision of the (High) Court

in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence)"

As was pointed out by Tikaram P in *Alice, Hung & On v The State* Criminal Appeal No AAU13/97S, on a second appeal, a ground of appeal involving a question of law only can be urged against conviction. There is an absolute prohibition against an appeal on severity of sentence, unless the sentence passed was beyond the jurisdiction of the court, in which case the sentence would be a nullity: *Prem Chand and anor v R* (1976) 22 FLR 100. No issue of jurisdiction arises in this case.

In the course of submissions, Ms Munam accepted that this court has no jurisdiction to entertain the appeals against the sentences.

The appeal in the High Court

There was some doubt whether the Appellants were represented in the magistrates' court. The record shows that, after the pleas of guilty were taken "Mr Udit wishes to withdraw from representing all accused." In his affidavit filed after the sentences were imposed in the magistrates court but before the hearing in the High Court, the Appellant Bogiwalu has denied that he gave any instructions to Mr Udit to represent him before the Magistrate. Despite the clear indication to the contrary from the record, Lyons J, in our view generously, accepted for the purpose of his decision that the Appellants were unrepresented. Ms Shameem for the Respondent

challenged this acceptance. However, we too will give the Appellants the benefit of the doubt for the purposes of this appeal, and assume that they were unrepresented.

In his judgment, the judge reviewed the record relating to the pleas of guilty. He found that the record on the face of it shows that the pleas were unequivocal, referring expressly to *R v Iro* (1966) 12 FLR 104. He also referred to the evidence from the Appellant Bogiwalu in his affidavit asserting that they did not assault the complainant or take anything, and that he only pleaded guilty because they were assaulted by police. After reviewing the submissions made by the Appellants in mitigation, he found that they represented an admission of guilt in a quite unequivocal manner. He commented on the lack of evidence from others involved such as Mr Udit. He rejected the claim in the Appellant Bogiwalu's affidavit that the Appellants had been assaulted by police. He held, in our view correctly, that it was for the party asserting that the record shows an irregularity to bring forth evidence to support that assertion. For this and other reasons expressed in his judgment, he concluded that the pleas had been properly taken and recorded.

Do the appeals involve a question of law?

The first ground of appeal was that the pleas of guilty were not freely given.

Section 309 (1) of the Criminal Procedure Code, Cap 21 provides:

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a magistrates' court, except as to the extent or legality of the sentence."

However, in *R v Iro*, this court said:

"In our view there is a duty cast on the trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what that plea of guilty involves. As was said by Lord Reading, CJ in R v Golathan (1915) 84 LJKB 758 at 759:

"It is a well known principle that a man is not to be taken to have admitted that he has committed an offence unless he pleads guilty in plain, unambiguous and unmistakable terms"

To this statement of the law could properly be added that not only should the plea be unambiguous but that it should be given in full understanding of all that it implies: R v Vent (1935) 25 Cr.App.R. 55; R v Griffiths (1932) 23 Cr.App.R. 153"

If it can be demonstrated that an unrepresented accused has pleaded guilty in a manner that is in any way equivocal or uncertain, or that the accused entered the plea when he did not have a full understanding of the effect of the plea, namely that he was admitting that he committed the offence with which he has been charged, an appeal against conviction may be entertained despite the guilty plea. In that event, s 309 (1) will not apply, because there has not been an effective and binding plea of guilty.

Whether a plea of guilty is effective and binding will be a question of fact to be determined by the appellate court ascertaining, from the record and from any other evidence tendered, what occurred at the time the plea was entered. The onus will be on the Appellant to establish the facts on which the validity of the plea is challenged.

Ms Munam challenged the judge's findings relating to the taking of and recording the guilty pleas. We do not need to examine her submissions in detail, because we are satisfied that no question of law has been shown to have arisen under this ground. She did not submit that the judge applied a wrong test or otherwise made any error of law. On the contrary, the judge applied correctly the test set out in *R v Iro*. Whether, in the circumstances as the judge found them to be, the plea had been properly taken and recorded, are all matters of fact, in respect of which there can be no right of appeal to this court.

To illustrate the distinction between questions of fact and questions of law, if on the facts as found, an accused's plea is equivocal, or he did not clearly understand the effect of his guilty plea, and the judge in the High Court held there to be no right of appeal against conviction because of the guilty plea, that would be an error of law, which this court could correct on appeal.

Other grounds submitted

Ms Munam submitted that the magistrate failed to comply with the obligation imposed by s 206 of the Criminal Procedure Code Cap 21. The relevant parts of subss (1) and (2) provide:

“(1) The substance of the charge...shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence...unless there shall appear to it sufficient cause to the contrary.”

Thus the obligation to record as nearly as possible the words used by the accused person who pleads guilty is an obligation imposed by the law. Whether on the facts as found, there has been compliance with this requirement is therefore a question of law.

There was no evidence to establish that the magistrate did not comply with this requirement. The Appellant Bogiwalu did not, in his affidavit, claim that, when pleading guilty, he said anything other than that which the magistrate recorded. The judge, after examining the magistrate's notes in the record, concluded that he was not persuaded to uphold the appeal on this ground. Nor are we.

Ms Munam next submitted that, as a matter of law, the prosecution should have put before the magistrate the statements of the Appellants in which, so she told us, the Appellants had denied their involvement in the offences. This, she submitted, should be done to enable the magistrate to decide whether the pleas of guilty should be accepted. We were advised by Miss Shameem that these statements are not now available.

We do not accept this submission. Where, as here, there is clear evidence that the accused understood the charges and pleaded guilty to them, there is no reason for the prosecution to be required to place before the court statements in which the accused assert their innocence. It is commonplace for accused persons to deny involvement in their initial statements to the police, then in Court to admit their guilt by pleading guilty. Ms Munam relied on the decision of the Court of Appeal in England in *R v Tottenham Justices, ex parte Rubens* [1970] 1 All ER 879, where Bridge J, delivering the principal judgment, referred at 883 to the proposition that the material before the court which may indicate that a plea is equivocal includes not only what is said in court after the plea, in mitigation or otherwise, by or on behalf of a defendant, but also a statement made by a defendant prior to that plea and presented to the court as part of the prosecution case by the prosecution. That is not the position here. Not only were the pleas themselves unequivocal, that they were intended to be clear admissions of guilt was confirmed by what each Appellant said in mitigation.

Decision

The appeals against conviction and sentence by both Appellants are dismissed.

Moti Tikaram

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**Sir Moti Tikaram
President**

I.R. Thompson

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**Justice I.R. Thompson
Judge of Appeal**

D.L. Tompkins

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**Justice D.L. Tompkins
Judge of Appeal**

Solicitors:

**Messrs H.A. Shah & Esq. for the Appellants
Office of the Director of Public Prosecutions for the Respondent**