

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

CRIMINAL APPEAL NO. AAU 0031 OF 2015
(High Court Action No: HAC 87 of 2013)

BETWEEN : AIYAZ ALI *Appellant*

AND : THE STATE *Respondent*

Coram : Chandra, RJA

Counsel : Appellant in person
Mr S Babitu for the Respondent

Date of Hearing : 25 February, 2019

Date of Ruling : 31 May, 2019

RULING

- [1] The Appellant was charged with 1 count of Attempted Murder contrary to section 44 and 237 of the Crimes Act, 2009, 1 count of Criminal Intimidation contrary to section 375(2) of the Crimes Act 2009 and 1 count of Damaging Property contrary to section 369 of the Crimes Act, 2009.

- [2] When the case had been taken up on the 10th of November 2014 for Voir dire inquiry, the Appellant had pleaded guilty to the 1st count of Attempted Murder and pleaded not guilty to the two remaining counts. He had agreed to the Summary of Facts read out by the State and he had been convicted.
- [3] On 19th November 2014, the Appellant had been represented by another Counsel and he had moved to file an application to vacate his guilty plea.
- [4] On 26th January 2015 the learned Judge dismissed the application to vacate his guilty plea.
- [5] On 5th of March 2015 the Appellant was sentenced to life imprisonment with a minimum term of 7 years imprisonment.
- [6] On 21st March 2015 the Appellant filed a notice of appeal through his Lawyers setting out 6 grounds of appeal against conviction and 4 grounds of appeal against sentence.
- [7] Subsequently the Appellant filed an amended notice of appeal (received on 22 December 2015) on his own setting out 5 grounds of appeal against conviction and one ground of appeal against sentence, which are as follows:

“Against conviction

1. *That the learned Trial Judge erred in law and in fact in not exercising his discretion judicially when he dismissed the appellant’s application to withdraw his guilty plea before sentence the failure to do so cause a substantial miscarriage of justice. As the constitution of the republic of Fiji Islands it grants every individual the right to a fair trial.*
2. *That the learned Trial Judge erred in law and in fact when he refused the appellant to withdraw his guilty plea before his sentence by not taking into consideration that a change of plea from guilty to not guilty may be entertained at any time before sentence is passed and when it appears to the court. The accused pleaded guilty on the basis of a material, mistake of facts.*
3. *That the learned trial judge erred in law and in fact when refusing the appellant to withdraw his guilty plea before sentence when he failed to consider that “the paramount question of plea application, is whether the plea is unequivocal, and make with a full understanding of the offence alleged and*

its ingredients, in considering the question, the history of the case itself is highly relevant." The appellant's affidavit was set aside was not fully adequately considered by the learned trial judge.

4. *That the learned trial judge erred in law and in fact in not taking into consideration adequately/or in detail in particular the affidavit of the appellant filed in support of his application to withdraw his plea when refusing the appellant to withdraw his guilty plea before sentence, the interest of justice demanded that the accused should be allowed to change his plea to not guilty.*
5. *That the learned trial judge erred in law and in fact in not taking into consideration adequately/or in detail in particular the written mitigation submission which raised the crucial material facts that would lead/persuade the learned judge to enter a plea of not guilty and to vacate the guilty plea, the failure to do so caused a substantial miscarriage of justice.*

Against sentence

1. *That the appellants appeal against sentence being manifestly harsh and excessive ad wrong in principal in all circumstances of the case.*
2. *That the learned trial judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and not taking into account relevant considerations."*

[8] In his Ruling regarding the application to vacate the guilty plea, the learned trial Judge had stated the following:

5. *Applicant pleaded not guilty to all the charges when his plea was first taken on 5.9.2013. He was absent from next day 11.10.2013 and a bench warrant was issued. He was arrested and produced in this Court on 15.7.2014. The Applicant was represented by Legal Aid since 5.8.2014. When the case was to be taken up for Voir-Dire inquiry on 10.11.2014, applicant pleaded guilty to the 1st count and pleaded Not Guilty for 2nd and 3rd counts.*
6. *The summary of facts were admitted by the applicant later on the same day after those were read over to the accused in open Court. The accused was convicted of the 1st count.*
7. *On the next day 19.11.2014 the applicant was represented by another counsel and moved to file application for vacation of guilty plea. Thus this application was filed."*

- [9] The first four grounds of appeal relied on by the Appellant relate to the withdrawal of the plea of guilt. The application to withdraw the plea of guilt was made by the Appellant before sentence was imposed on him. He made his application supported by an affidavit. The Appellant has stated that he had been advised by Counsel from Legal Aid that he should plead guilty to the first count and to agree to the summary of facts outlined in Court and accordingly he had agreed. However, he had later realized after he was convicted that the summary of facts outlined in Court was not correct. He had through a different Counsel made an application to withdraw the plea of guilt.
- [10] The learned trial Judge in his Ruling stated that he considered the plea of guilt to be unequivocal as he had pleaded guilty to the 1st count and not guilty to the 2nd and 3rd counts which demonstrated that he fully understood the nature of the charged and the consequences.
- [11] It is established law that a guilty plea can be withdraw before sentence is imposed. However in considering change of plea, the Court should only accept the change if there was an equivocal plea, or the facts did not disclose the charge or there was prejudice as a result of lack of legal representation. The discretion should be exercised sparingly and judicially. **Heffernan v The State** [2003] FJHC 163; HAA 0051J.2003S (12 December 2003).
- [12] The crucial question therefore in this regard would be whether the Appellant's plea of guilty was equivocal. When he pleaded guilty he had acted on the advice of Counsel from Legal Aid. Subsequently he had realized that the summary of facts which he had agreed in Court was not correct.
- [13] In **State v Seru** [2003] FJHC 189; HAC 0021D.2002S (26 March 2003) it was held that
- "A change of plea from guilty to not guilty may be entertained at any time before sentence is passed. Where an accused has been committed to the High court for sentence and it appears to the Court that the accused pleaded guilty on the basis of a material mistake of fact, the Court may remit the matter to the Magistrate's Court with a direction to proceed on a not guilty plea."*
- [14] In the present case the learned trial Judge ruled that the guilty plea was unequivocal and refused the withdrawal of the guilty plea, on the basis that the Appellant fully understood the nature of the charge against him.

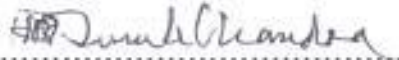
- [15] The Appellant had stated that the summary of facts read out to him in Court was at variance with his caution interview statement and that was the basis on which he stated that the summary of facts read out to him was not correct. This would imply that he had mistaken the facts as read out to him. This could be spelt out on considering the summary of facts and his caution interview statement and if there was a variance as stated by him it would give rise to a position of his plea being equivocal and therefore it would be arguable as to whether the plea was equivocal or not.
- [16] Ground 5 of the grounds of appeal is vague as he speaks of certain crucial facts in his written mitigation submissions which would have persuaded the learned trial Judge to enter a plea of not guilty. There is no merit in this ground as it is not clear as to what the Appellant has intended to state as a ground of appeal.
- [17] In his first ground of appeal against sentence, the Appellant submits that the learned trial Judge erred in setting out a non-parole as there was no Parole Board in existence.
- [18] The sentence imposed on the Appellant was life imprisonment with a non-parole period of 7 years. When a life imprisonment sentence is imposed, the Judge has a discretion in terms of the provisions of Section 18(1) of the Sentencing and Penalties Act, to impose a minimum term and that is what the learned Judge had done by setting out a non-parole period of 7 years. There is no error in the sentencing exercise and therefore this ground is not arguable.
- [19] The Appellant has taken up the position that the learned trial Judge had taken into account irrelevant matters into consideration and not taken into account relevant considerations when sentencing.
- [20] The learned trial Judge when sentencing the Appellant had taken into account the nature of injuries on the complainant as an aggravating factor when sentencing the Appellant.

- [21] The Appellant has submitted that the injuries were not life threatening and therefore the learned trial Judge had thereby erred in considering the injuries as an aggravating factor which the Appellant submitted was an irrelevant consideration.
- [22] The Medical Report had revealed injuries to the head region and hand of the complainant and the Appellant had admitted that he had struck the complainant on the head twice. These injuries were considered as life threatening.
- [23] I can see no error in the sentencing judgment where the learned trial Judge had taken into account the nature of the injuries as an aggravating factor and therefore this ground is not arguable.

Orders of Court

- (1) Leave to appeal against conviction is granted on grounds 1 to 4;*
(2) Leave to appeal against sentence is refused.




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Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL