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

CRIMINAL APPEAL NO. AAU 031 OF 2015
[High Court Criminal Case No. HAC 087 of 2013]

BETWEEN : **AIYAZ ALI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Nawana, JA

Counsel : **Appellant in person**
Mr. Babitu S. for the Respondent

Date of Hearing : **06 and 10 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath, JA

[1] I have read the Judgment of Prematilaka, JA in its draft form and I agree with the content and conclusions.

Prematilaka, JA

[2] This appeal arises from the conviction and sentence of the appellant on one count of attempted murder contrary to section 44 and 237 of the Crimes Decree, 2009, one count of criminal intimidation contrary to section 375 (1)(a) of the Crimes Decree, 2009 and one count of damaging property contrary to section 369 (1) of the Crimes Decree, 2009. The Information dated 04 July 2013 alleged that the Appellant on 18 April 2013 at Nadi in the Western Division attempted to murder Pritika Kumari and in the same transaction threatened with intent to cause alarm to Police Constable 3792 Etuate Nasova and caused damage to his police uniform, the property of Fiji Police Force valued at $35.00.

[3] On 10 November 2014 the appellant represented by legal aid counsel Ms. Senikavika L. Juita had pleaded guilty to the first count of attempted murder in the High Court of Suva. On the same day the summary of facts had been served and read over to the appellant and he had understood and agreed with the same. However, a different counsel namely Mr. I Khan had appeared for the appellant on 19 November 2014 and moved to make an application. On 21 November 2014 a motion and an affidavit had been tendered to court on behalf of the appellant who was represented by the subsequent counsel. The application of the appellant had been to withdraw the plea of guilty. The State had filed a counter affidavit and both parties had tendered written submissions as well. On 26 January 2015 the learned trial judge had delivered the ruling disallowing the appellant's application to vacate the guilty plea *inter alia* on the basis that the guilty plea for attempted murder was unequivocal. Thereafter, after receiving written sentencing submissions from both parties, the trial judge on 05 March 2015 had sentenced the appellant to mandatory life imprisonment with a non-parole period of 07 years. To hear and determine the other two charges against the appellant, the matter had been sent to the Magistrates Court.

[4] It appears from the copy record that the appellant had unsuccessfully requested the DPP on 15 July 2014 requesting that the charge of attempted murder be reduced to that of grievous harm or serious assault.

[5] The solicitors for the appellant, Ikbal Khan Associates had filed a timely notice of appeal dated 21 March 2015 against the appellant's conviction and sentence. Thereafter, the appellant by himself had filed an amended notice of appeal against conviction and sentence received on 22 December 2015 by the CA registry asking this court to reduce his conviction to grievous harm followed up by written submission received by the CA registry on 31 October 2018 where he had sought a new trial as the relief. The appellant had submitted a hand written version of the same submissions to the registry which had been received on 03 December 2018. He had filed a set of hand written additional submissions which is stamped by the Medium Correction Centre on 29 January 2019 where he had again sought a new trial. The appellant had thereafter filed additional grounds of appeal on the day of the leave to appeal hearing which had not been allegedly considered by the single judge. However, whether the appellant's additional grounds of appeal received by the CA registry at 10.29 a.m. on the day of the leave hearing were available to the single judge is not certain. After the leave ruling was delivered on 31 May 2019, the CA registry had received some hand written additional grounds of appeal tendered by the appellant on 09 October 2019. A set of lengthy hand written submissions by the appellant had reached the CA registry on 24 December 2019 where once again the appellant had prayed for a re-trial. The State had submitted its written submissions on 05 February 2020.

[6] The single judge of this court had considered 05 grounds of appeal against conviction and 02 grounds of appeal against sentence set out in the amended notice of appeal received on 22 December 2015. It appears that most of the grounds of appeal against conviction in the amended notice of appeal received on 22 December 2015 have been repeated by the appellant in his additional grounds of appeal but the latter does contain a distinct new ground of appeal which had not been considered at the leave hearing.

[7] The grounds of appeal considered by the single judge at the leave hearing 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] Leave to appeal had been granted on the first 04 grounds of appeal against conviction and refused against sentence.

[9] At the hearing, the appellant informed this court that he would not renew the appeal against sentence but rely on the 04 grounds of appeal where leave to appeal was granted against conviction and the other additional grounds against conviction that were submitted to the CA registry on 09 October 2019 after the leave ruling. The additional grounds of appeal contained in the appellant's hand written document that had reached the registry on 09 October 2019 are as follows.

> *'1. The guilty plea was not voluntarily made as Defence Counsel did not legally advise me that the charge of attempted murder was inconsistent with my confessions in the police records of interview statements, and defective giving rise to a miscarriage of justice.*
>
> *2. The guilty plea was not voluntarily made as I was pressured by Defence Counsel and to the Court to plead guilty to a defective charge of attempted murder in respect of an advantage of a lesser sentence.*
>
> *3. The learned Trial Judge erred in law in accepting the guilty plea in respect to the charge of attempted murder when it was defective on the basis that I did not confess to the elements of attempted murder as per police record of my confessional interview statements.*
>
> *4. The guilty plea was not made voluntarily, for the reasons that prosecution did not afford me a right to a fair trial by charging me with serious assault and or actual grievous bodily harm. A miscarriage of justice in the circumstances of the case and to me.*
>
> *5. The learned trial judge erred in law when he failed to consider that the admitted facts did not disclose the offences of attempted murder.*
>
> *6. The learned trial Judge erred in law by not giving any reference to questions 38, 39, 41, 42, 43, 44, 45, 51, 56, 57, 58 and 83 of the caution interview and question 11 of my charge statement and the appellant's answers is giving sufficient weight to it whereby the conviction on attempted murder is baseless.*
>
> *7. The learned trial judge erred in law and in fact when he failed to consider the caution interview and the charge statement given the case of provocation that the victim provoked the appellant and the appellant acted in such a way, the summery of facts did not fulfil all the elements of the case by the state counsel.'*

[10] The appellant's grounds of appeal can be broadly articulated under three headings.

(1) The plea of guilty was equivocal.

(2) The learned High Court judge erred in disallowing the appellant's application to withdraw the plea of guilty prior to sentencing.

(3) The summary of facts was incomplete and at variance with the appellant's caution interview; the admitted facts did not disclose all elements of the offence of attempted murder.

[11] When the appeal was taken up for hearing on 06 February 2020 it was found that the copies of the appellant's motion and affidavit along with the counter affidavit tendered on behalf of the State and the written submissions of both parties in respect of the appellant's application to withdraw the plea of guilty were not available in the copy records. This court called for the same from the CA registry and adjourned the hearing to 10 February 2020. The appellant too had requested his affidavit from the registry earlier. However, the CA registry informed court on 10 February that the original record maintained by Lautoka High Court does not have any of those documents while the state counsel appearing at the hearing of the appeal confirmed that even the files kept by the DPP do not have the same. Accordingly, the court inquired from the appellant whether he was prepared to argue the appeal without his affidavit and his answer was in the affirmative. Thus, the court proceeded to hear the appeal.

[12] It is pertinent to refer to the summary of facts dated 10 November 2014 presented by the prosecution at this stage.

> *'On the 18th of April, 2013 (Thursday) at about 5 pm at Nacovi, Nadi, Aiyaz Ali (Accused) (28 years old, self-employed, resides in Nacovi, Nadi) attempted to kill Pritika Kumari (Complainant) (27 years old, Domestic Duties) by striking her with a cane knife. They are in a de-facto relationship.*
>
> *On the above date, time and place, Pritika Kumari went to serve a Domestic Violence Restraining Order on the accused. She was accompanied by Police Constable Number 3792 Etuate Nasova (PW-2) of Nadi Police Station in a private 7 seated vehicle which was driven by Arunesh Kumar (PW-3). The accused received the domestic violence restraining order and acknowledged receipt by signing the document. He was outside the house with Police Constable Etuate when Pritika Kumari went inside the house to pack her clothes.*

The accused then went inside the house and locked the front door. The accused picked up a cane knife which was in the sitting room and started striking Pritika Kumari saying in Hindustani "AAJ TUMME HUM KHATAM KARDEGA" meaning "I WILL FINISH YOU TODAY". Pritika Kumari was struck on the head and right arm. She shouted for help and then fell on the floor. Pritika Kumari was then taken to Nadi Hospital and later transferred to Lautoka Hospital.

The accused was arrested after the incident by Police Constable No. 3792 Etuate Nasova with the assistance of WPC. 3888 Mereani. He was taken to Nadi Police Station and was caution interviewed by Acting Detective Corporal 2109 Anil Kumar whereby the accused admitted striking the complainant with a cane knife (Refer to Q & A 44 of the original caution interview of the accused which is attached and marked as A-2). Subsequently, the accused was charged for one count of attempted murder contrary to Section 44 and 237 of the Crimes Decree No. 44 of 2009.

[13] I shall now examine the law relevant to the appellant's complaints. Lord Lane CJ in **Regina v Drew** [1985] 1 WLR 914, (1985) 81 Cr App R 190 having considered when a judge should allow a defendant to withdraw a plea of guilty, said

> *'In our judgment only rarely would it be appropriate for the trial judge to exercise his undoubted discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. Particularly this is so in cases where as here the accused has throughout been advised by experienced counsel, and where, after full consultation with his counsel, he has already changed his plea to one of guilty at an earlier stage in the proceedings.'*

[14] A change of plea from guilty to not guilty may be entertained at any time before sentence is passed (vide **R. v. McNally** [1954] 1 W.L.R 933; 38 Cr. App. R.90). 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 Magistrates Court with a direction to proceed on a not guilty plea (vide **R –v- Isleworth Crown Court and Uxbridge Magistrates Court, ex p Buda** (2000) 1 Cr. App. R(s) 538.)

[15] The paramount question on any change of plea application, is whether the plea was unequivocal, and made with a full understanding of the offence alleged and its ingredients. In considering this question, the history of the case itself is highly relevant (vide **State v Seru** [2003] FJHC 189; HAC 0021D.2002S (26 March 2003).

[16] In **Hefferman v The State** [2003] FJHC 163; HAA 0051J.2003S (12 December 2003) Justice Nazhat Shameem said

"The law on the subject of change of plea was clearly set out in ***S (an infant) –v- Recorder of Manchester and Others*** *(1971) AC 481 by the House of Lords. I applied those principles in* ***State -v- TimociKauyacaBainivalu*** *HAC0006 of 2002. A plea can be changed at any time before sentence. However in considering change of plea, the court should only allow 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."*

[17] In **Tuisavusavu v State** [2009] FJCA 50; AAU 0064.2004S (3 April 2009) the Court of Appeal held:

"[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see ***Bogiwaluv State*** *[1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (****Liberti****(1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*

[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in ***Meissner v The Queen*** *[1995] HCA 41; (1995) 184 CLR 132);*

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

[18] It is clear that the appellant was brought before the Magistrates Court of Nadi *inter alia* on a charge of attempted murder. Thereafter, when he appeared in the High Court he had legal representation from time to time. The information was filed on 05 July 2013 and from 17 October 2014 until the appellant pleaded guilty to the first count of attempted

murder on 10 November 2014, Ms. Jiuta, a counsel from the Legal Aid Commission represented him. In fact the same counsel had filed the first set of written submissions in mitigation as well. The proceedings in the High Court on 10 November 2014 shows that the appellant had changed his plea, pleaded guilty to the count on attempted murder and not guilty to the other two counts. Thereafter, summary of facts had been read over to him in English and he had agreed with it having understood it.

[19] The appellant's application to vacate his guilty plea had coincided with change of counsel on 19 November 2014 where Mr. I. Khan had taken over his defence. The matters that the appellant's affidavit contained in support of his application to withdraw the guilty plea could only be gathered from the ruling of the learned High Court Judge. They are as follows.

> *'11 The position of the applicant is that the Legal Aid counsel advised him to change his plea to Guilty. He had further stated in his affidavit that he did not understand as to what he was agreeing to when he was advised by his former counsel to plead guilty. He was advised by his former counsel to agree to the summary of facts and accordingly he had agreed.*
>
> *12. Then he had realized that summary of facts outlined in the Court was not correct. He was advised by his present solicitor that state did not bring to the attention of Court the circumstances under which a knife was used. The caution interview would demonstrate to this Court that the summary of facts cannot be accepted and that the caution interview would demonstrate that a Not Guilty plea ought to have been entered in the circumstances.'*

Counsel's duty

[20] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if

appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496). In **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in **Gautam [**1988] Crim. LR 109 CA (Crim Div)

> *' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*

[21] Yet, O' Corner LJ said in **Swain** [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In **Boal** [1992] QB 591 where the appellant pleaded guilty on the basis of his counsel's mistaken understanding of the law, despite having a defense which was likely to have succeeded, was regarded as grounds of appeal though not being a case of 'flagrantly incompetent advocacy'.

[22] Therefore, the appellant's position that he had not understood what he was agreeing to but on the advice of his counsel agreed to the summary of facts and the learned trial judge's decision to dismiss his application to withdraw the plea of guilty should be considered in the light of the above judicial pronouncements. The appellant's subsequent solicitor is said to have pointed out that the circumstances under which he had used the knife on the complainant had not been highlighted in the summary of facts.

[23] The learned High Court judge in his ruling on 26 January 2015 had dismissed the appellant's application to vacate the plea of guilty stating *inter alia*

> *'13.The main question that this Court had to decide is whether the Guilty plea of the applicant for the first count is equivocal.*
>
> *14.When this Court convicted the applicant for the first count on 10.11.2014, this Court convicted the applicant after carefully considering whether the plea was unequivocal. The fact that the applicant pleaded not guilty to the 2nd and 3rd counts demonstrates that the applicant pleaded guilty after fully understanding the nature of the charge and the consequences. According to the summary of facts*

admitted by the applicant he had struck his wife with a knife on the head and right arm saying 'I will finish you today'. This was witnessed by a police officer who went to serve a DVRO to the applicant.

15.Therefore, I am satisfied that summary of facts discloses sufficient facts to establish all elements of the 1st count.

16.The applicant had failed to satisfy Court that his plea of guilty was equivocal.'

[24] I cannot see how and why the learned High Court judge's decision to dismiss the appellant's application to vacate the plea of guilty should be overturned, for there is nothing to show from the record that the plea was equivocal but it is clear that it had been made with a full understanding of the offence alleged and its ingredients. The appellant had not been mistaken that he was pleading to a charge of attempted murder. This is proved by the fact that the appellant pleaded guilty only to the count on attempted murder but not the other two counts. It is clear that the appellant had not on the totality of material available to the trial judge discharged the burden of establishing the basis of his application to vacate the guilty plea *i.e.* he had not understood the charge or the summary of facts. The trial judge cannot be faulted for not exercising his discretion in favor of the appellant which he was bound to carry out sparingly, judicially and with caution bordering on circumspection. An application to vacate a plea of guilty will not be entertained lightly.

[25] On the other hand, Ms. Jiuta who represented the appellant at the time of the guilty plea, in the written submissions tendered in mitigation dated 12 November 2014 had not mentioned any lack of understanding on the part of the appellant in the charge he pleaded guilty to and specifically stated that he had understood the seriousness of the offence. The counsel had, however, pleaded in mitigation that the complainant had been harsh and rude on the appellant and uttered nasty things about him and he had reacted on the spur of the moment out of anger and used the cane knife on her. Later, it is said that realising the gravity of his actions, he had attempted to commit suicide in the police cell.

[26] However, the appellant's subsequent counsel, Mr. I Khan in the second set of mitigating submissions dated 16 February 2015 (after the impugned ruling of the High Court Judge) appears to have 'improved' upon the appellant's affidavit by stating that the caution

interview had not been voluntary, the appellant had not understood properly what was explained to him by his previous counsel in English on the nature of the offence and the plea of guilty but only understood when explained in Hindi later. It had been further pleaded that the appellant was provoked by the complainant and he had no intention to kill her.

[27] It is clear that the appellant had chosen English language to conduct his caution interview and said that he could read and understand English well. He had once again selected English language to conduct the charge statement. They were recorded on 19th and 20th April 2013 respectively. All the grounds of appeal submitted by him are in English. The appellant expressed no hindrance in making submission in English at the appeal hearing when inquired by this court. Therefore, the alleged poor understanding of English on the part of the appellant appears to have been an afterthought.

[28] The appellant himself has embellished his case further in his subsequent grounds of appeal and written submission tendered to this court by *inter alia* stating that he was pressured by his counsel who advised him to plead guilty to do so. It is true that the Court of Appeal in ***Turner*** (supra) said *'the accused having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty…… - plea of guilty under pressure, accordingly all that follows thereafter was a nullity…'*. The appellant also submitted at the appeal hearing that the counsel from Legal Aid Commission told him that he would get a very short sentence if he pleaded guilty to attempted murder. However, the counsel concerned has been afforded no opportunity of responding to this and other patently belated allegations leading to the plea of guilty. It appears that this allegation too is clearly an afterthought on the part of the appellant.

[29] Moreover, this court in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) has already set out the judicial guidelines to follow in challenging a plea of guilty based on criticism of former counsel without which an appellate court would not entertain such a complaint. Thus, the appellant's criticism of his counsel remains an unsubstantiated allegation which this court would not act upon.

[30] Therefore, I hold that the first and second grounds of appeal fail to succeed and should be rejected.

[31] However, the matter does not end there. I think that careful consideration has to be given to the third ground of appeal namely that admitted facts did not disclose the offence of attempted murder.

The admitted facts did not disclose the offence of attempted murder.

[32] The appellant's position is that he could not have been convicted of attempted murder in the light of his caution interview. The following questions and answers are most relevant in that regard.

Q41: What happened after that?

A: Pretika went inside the house and started packing her cloths and in the process she threw few of my clothes on the floor.

Q42: What happened after that?

A: She started swearing at me saying I was a Bajaru "Bitch".

Q43: What did you do after that?

A: There was exchange of swear words and she threatened me by saying she will have me sent to Prison.

Q44: What happened after that?

A: I got very angry when she slapped me and I picked the cane knife from the siting room after closing the main door and struck Pritika.

Q45: How many times did you strike her with the cane knife.

A: I struck her twice.

Q51: What part of Pritika's body were you aiming for when you struck her with the cane knife?

A: I was aiming for the hands.

Q56: What did you mean when you told Pritika in Hindustani "AJJ TUME HUM KHATAM KARDEGA" translated in English as I will finish with you today?

A: I did not say anything like that.

Q57: Why did you strike Pritika with the knife.?

A: I was very angry.

Q58: I put it to you that you wanted to kill Pritika that's why you struck her with the cane knife. What do you have to say about this?

A: I only wanted to harm her hand and not the head.

Q59: What would happen if someone struck you with a cane knife? Do you think your life would be threatened?

A: Yes.

Q60: Do you admit striking Pritika with the cane knife twice?

A: Yes.

Q61: Do you admit that you struck Pritika twice with a cane knife being aware that it could endanger her life?

A: Yes.

[33] In his charge statement he had said as follows

> *'I admit that I strike my wife with a cane knife. I got very angry when she came with the DVRO. I did not mean to kill her but only I wanted to injure her on her hand. I was also angry because my wife left my daughter at home unattended. I am really sorry for what I did. I seek apology from court.'*

[34] Avory J's statement in **R v. Forde** [1923] 2 KB 400; (1924) 17 Cr.App.R.99 as to when an appeal may be entertained notwithstanding a guilty plea is widely considered the *locus classicus* on this area of law, though Ackner LJ said in **Lee** [1984] 1 WLR 578 at 583E that Avory J's dictum is not an exhaustive statement of when a convicted person may be allowed to appeal notwithstanding a guilty plea. Avory J said at page 403

> *'A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged.'*

[35] **Blackstone's Criminal Practice 1993** at page 1173 states that the occasions anticipated under heading (2) (*i.e.* that upon the admitted facts he could not in law have been convicted of the offence charged as for example in ***Boal*** and **Whitehuse** [1977] QB 868) will be rare since it implies that both the prosecution and defense had been mistaken as to the true elements of the offence charged.

[36] In **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64 the appellant had pleaded to all three counts and Calanchini P sitting as a Single Judge considering leave to appeal against conviction upon a plea of guilty said

[10] The issue in this application is whether the judge, on the basis of the agreed summary of facts, was entitled to conclude that the guilty plea was unequivocal. A trial judge is required to address the defence of provocation if there is evidence that raises the issue of provocation. In my judgment there is no reason why that obligation should not apply when a judge is required to determine whether a plea of guilty is unequivocal based on an agreed summary of the facts presented by the prosecution.

[11] If the agreed summary of facts suggests that the plea of guilty may be equivocal due to mistake or ignorance then the judge is, in my opinion, at the very least required to raise the issue with Counsel for the accused.'

[37] The Court may allow a change of plea where it is arguable that the prosecution could not establish the essential ingredients of the offence (**R –v- Bournemouth JJ, ex p. McGuire** (1997) COD 21 DC (cited in Archbold 2003 4:187).

[38] It appears that one cardinal mistake the learned trial judge had done is to simply reiterate the summary of facts as presented by the prosecution without giving his mind to the contents of the appellant's caution interview which was attached to the summary of facts. Had the learned trial judge done so, he would not have repeated in the sentencing order the statement allegedly uttered by the appellant in Hindi that 'I will finish you today' as mentioned in the summary of facts, for the appellant had in fact denied having said so in the caution interview. Further, there is no mention of the appellant's position in the summary of facts or the sentencing order that he acted under some sort of provocation in attacking the complainant but had no intention to cause her death. I think the summary of facts presented by the prosecution had not reflected a fair and balanced account of the facts of the case and the learned trial judge had erred in acting on them without any scrutiny.

[39] Therefore, only issue still left to be considered in this appeal is whether the appellant's complaint could be considered under heading (2) of Avory J's statement in ***Forde*** namely whether upon the admitted facts he could not in law have been convicted of the offence charged. On a reading of the caution interview it is at least arguable, debatable or open for consideration by the assessors and the judge in a trial whether the appellant could be held liable for the offence of attempted murder. To that extent there is a doubt whether he could have been unequivocally convicted of attempted murder on the admitted facts including the caution interview.

[40] Thus, though the appellant had admitted in the summery of facts that he attempted to cause death of Pritika Kumari by striking her with the cane knife, what he had stated in his caution interview and the charge statement do cast some doubt about the fault element required in the offence of attempted murder.

[41] Section 237 of the Crimes Act, 2009 defines the offence of murder as follows

> *' A person commits an indictable offence if —*
>
> *(a) the person engages in conduct; and*
> *(b) the conduct causes the death of another person; and*
> *(c) the first-mentioned person* ***intends to cause****, or* ***is reckless as to causing****, the death of the other person by the conduct.*
> *Penalty — Mandatory sentence of Imprisonment for life., with a judicial discretion to set a minimum term to be served before pardon may be considered.*

[42] Section 44(3) of the crimes Act, 2009 states

> *'Subject to sub-section (7), for the offence of attempting to commit an offence,* ***intention and knowledge*** *are fault elements in relation to each physical element of the offence attempted.*

[43] Thus, for the offence of murder the fault elements are intention or recklessness while for attempted murder it is intention and knowledge. Intention, knowledge and recklessness are defined in section 19, 20 and 21 of the Crimes Act, 2009 respectively. However, in terms of section 21(4) if recklessness is a fault element for a physical element of an offence proof of intention, knowledge or recklessness will satisfy that fault element. Thus, the fault element in the offence of murder can be proved by the proof of intention, knowledge or recklessness while for the offence of attempted murder the fault element should be either intention or knowledge.

[44] The learned trial judge in the sentencing order dated 05 March 2015 does not appear to have given his mind to the elements of the offence of attempted murder in the backdrop of the factual scenario of the case, particularly whether in the light of the appellant's assertion that he was acting under provocation the fault element in the charge of attempted murder could be sustained. Having considered all the material available to the High Court Judge, particularly the summery of facts and the appellant's caution interview, I am of the view that it cannot be helped that some doubt may arise whether

one can draw an unequivocal inference of an intention to cause the death of the complainant by the appellant.

[45] On the other hand, though the appellant says that he aimed two blows at the complainant's hand, the injuries sustained by her could well be defense injuries and instead of two there could be multiple injuries. This aspect cannot be fully ascertained as the MEF in the copy record is not legible and the copy available in the CA registry file is no better. As result a clear description of the complainant's injuries are not available to this court. Moreover, had the police constable Etuate not forced open the door of the house (which the appellant locked from inside) on hearing the complainant's cries and overpowered the appellant preventing him from delivering more blows on the complainant, one would not know what would have been the plight of the complainant. The appellant also admits that he was about to swing the cane knife at the complainant one again when the police officer intervened. The appellant in his caution interview further admits that he knew that the strikes he delivered on the complainant with the cane knife could have been life threatening.

[46] In addition, the appellant's counsel had stated in the written submissions dated 16 February 2015 that his client maintained that the caution interview was not voluntary and even *voir dire* grounds challenging the confession had been filed in court.

[47] Moreover, Though the appellant had said that he got provoked by the complainant's behavior leading to his assault on her with a cane knife, in my view, whether it falls within the legal term of provocation based on loss of power of self-control defined in section 242(2) of the Crimes Decree, 2009 is a matter of evidence and cannot be determined at this stage.

[48] **Archbold Pleadings, Evidence & Practice in Criminal Cases** 39th Edition at page 157 on the strength of several authorities states

> *' Where the plea is imperfect or unfinished, and the court of trial has wrongly held it to amount to a plea of guilty, on appeal the Court of Appeal may order that a plea of not guilty be entered and that the appellant be tried on the indictment … ……; or that the appellant be sent back to plead again to the indictment …. ; or may merely quash the conviction without sending the appellant back for trial …… '*

[49] Therefore, I hold that the appellant's third ground of appeal should be upheld and I would set aside the plea of guilty and the conviction and in the above circumstances send the appellant back to the High Court to plead again to the information or to the amended information, if tendered by the State and depending on his plea, the appellant is to be tried on the information or such amended information. It is pertinent to mention that on record there had been bench warrants for the appellant's arrest from 11 October 2013 to 15 July 2014 after being enlarged on bail on 26 June 2013.

Nawana, JA

[50] I agree with the reasons, conclusions and orders as proposed by Prematilaka, JA.

The Orders of the Court are:

1. Appeal against conviction is allowed.
2. Plea of guilty is set aside.
3. Conviction for attempted murder is quashed.
4. Appellant is to be taken back to Lautoka High Court to plead to the information or to any amended information within two weeks by the Correction Authorities.
5. The permanent Domestic Violence Restraining Order imposed by the High Court on 05 March 2015 should continue to operate unless remove by the High Court.

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL