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

CRIMINAL APPEAL NO.AAU 064 of 2020
[In the High Court at Suva Case No. HAC 312 of 2018]

BETWEEN : **ANIL CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. M. Vosawale for the Respondent**

Date of Hearing : **03 January 2023**

Date of Ruling : **04 January 2023**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of attempted murder contrary to section 44(1) and section 237 of the Crimes Act, 2009 of Sonam Chand and assault causing actual bodily harm on Sheenal Swastika Chand contrary to section 275 of Crimes Act, 2009 on 25 July 2018 at Vatuwaqa in the Central Division.

[2] The appellant had been represented by counsel throughout the proceedings in the High Court. The trial had been fixed for 16 March 2020, however, on 21 February 2020 prior to the commencement of the trial, the appellant had pleaded guilty to both charges and summary of facts had been filed on 10 March 2020 and read over to him which he had admitted. He had been sentenced to mandatory life imprisonment with a minimum serving period of 08 years on 25 March 2020 after the trial judge had satisfied himself that the guilty pleas were unequivocal.

[3] His appeal against sentence is timely. In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[4] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[5] The appellant at the hearing submitted that he would not pursue any of the grounds of appeal set out in his initial notice of appeal against sentence but would only submit that the minimum serving period imposed was harsh and excessive. He admitted that life imprisonment was mandatory in his case.

[6] Following the pronouncements in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) the trial judge had decided that he was inclined to (i) impose a minimum serving period and (ii) that period would be 08 years.

[7] I see no sentencing error in the minimum period of 08 years for this offending and it is not harsh or excessive.

[8] The sentencing order contains a brief summary of facts (the state counsel separately provided to this court the complete summary of facts admitted by the appellant) as follows:

> *4. As per the summary of facts you were in a relationship with the first complainant, Sonam Chand and she was your girlfriend. The second complainant, Sheenal Swastika Chand is the first complainant's younger sister. After two years of relationship the first complainant informed you that she no longer wishes to continue the relationship with you. On 25 July 2018 the first complainant returned to the flat after work. The second complainant was also residing with her in the same flat. At around 7 pm the first complainant was lying on a mattress and you entered her room when she was alone. You sat beside the mattress and started a conversation. Soon it became a heated argument and you suddenly pulled a knife and stabbed the first complainant on her right shoulder. When she resisted, you stabbed her multiple times on her back. The first complainant began to scream for help and you once again stabbed her on the left abdominal area.*
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> *5. The second complainant heard the scream and she entered the room. She tried to push you away. You struck her twice on her left shoulder. The second complainant managed to grab the knife. You pulled the hair of the first complainant when she attempted to escape from the room. You ran after her and pushed her into a drain. Then the neighbours came for her assistance.*
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> *6. You admitted in the summary of facts that you intended to cause death or serious harm to the complainant. According to the medical report of the first complainant she received multiple injuries. The second complainant has also received superficial lacerations on her left arm.*

[9] The appellant's appeal against conviction is out of time by 05 months. The Rules of Court have to be observed and must not be disregarded or ignored [vide **Halsbury's Laws** (4th Ed) Vol 37 para 25; **Revici v Prentice Hall Inc** [1969] 1 All ER 772 (CA); **Samuels v Linzi Dresses Ltd** [1980] 1 All ER 803, 812 (CA)] and in order to justify a court extending time there must be some material before court (vide **Ratnam v Cumarasamy** [1964] 3 All ER 933 at 935) and if no excuse is offered, no indulgence should be granted [vide **Revici v Prentice Hall Incorporated and Others** (supra)].

[10] The discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties which means that such discretion can only be exercised upon proof on the material before court that strict compliance with the rules will work injustice to the applicant [see **Gallo v Dawson** [1990] HCA30; (1990) 93 ALR 479] .

In addition, the practical utility of the remedy sought on appeal, the extent of the impact on others similarly affected, any impact on the administration of justice and any floodgates considerations have to be considered relevantly in exercising the court's discretion (see **R v Knight** [1998] I NZLR 583 at 589).

[11] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[12] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[13] The delay of this conviction appeal is substantial. The appellant had not given any explanation for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[14] The appellant submitted to court at the hearing that he would rely only on the two grounds of appeal set out in his final submissions dated 23 May 2022 and accordingly urged the following grounds of appeal. He emphatically stated that he wold not pursue any of the other conviction grounds of appeal tendered from time to time earlier.

Conviction

1. *That the appellant pleaded guilty on the wrong advice and false hope given by the defense counsel for non-custodial sentence.*

2. *That the learned trial judge erred in law in accepting an equivocal plea in which the appellant pleaded guilty on the wrong advice given by the defence counsel.*

01st and 02nd grounds of appeal

[15] The appellant alleges that his trial counsel gave him false hope for a non-custodial sentence and advised him that the attempted murder charge would be reduced to one of act with intent to cause grievous harm.

[16] Firstly, the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged of it being 'equivocal' [see **Bogiwalu v State** [1998] FJCA 16 & **Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004S (3 April 2009)].

[17] 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** [vide **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132)]

[18] The state counsel who was the prosecutor in the High Court informed court as far as he knew there was no discussion or indication by court that in the case of a plea the appellant's charge would be reduced and he would be given a suspended sentence. The state counsel also stated that at no stage was there an affidavit tendered by the appellant seeking to withdraw his guilty plea as submitted by the appellant. Nor is there any indication to any of the above scenarios in the sentencing order.

[19] The appellant had ample time to decide not only to plead guilty but also to contemplate any change of the guilty plea from 21 February 2020 to 10 March 2020 and then to 25 March 2020. The trial judge had not observed any signs of the pleas being equivocal. Nor is there any 'evidence of equivocation on the record' [vide **Nalave v State** [2008] FJCA 56; AAU 4 and 5 of 2006 (24 October 2008)].

[20] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that

> *'[26] 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).*

[21] In **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021) the Court Appeal discussed 'equivocal pleas' *inter alia* in the context of advice by trial counsel and quoted from **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) as follows.

> *[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an*

affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client……'

[26] Where, as here, the defence counsel indicates to prosecuting counsel that his client will plead guilty, the defence will wish to see the summary of facts. If the facts are accepted by defence counsel's client, the Accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place. If there is acceptance by the prosecution of any material requested by the defence to be deleted from the summary of facts, the plea of guilty can still proceed. Another option is for there to be a Newton hearing held limited to the disputed part of the facts.

[22] In **Masicola** the Court of Appeal further said:

'*….in my view the more relevant question is whether the judge can be satisfied that the summary of facts unequivocally and unmistakably establish the essential elements of the offence with which the appellant had been charged and if not, the guilty plea should be rejected (see **DPP v Jolame Pita** [1974] 20 Fiji LR 5; **Michael Iro v R** [1966] 12 Fiji LR 104 and **Nawaqa v The state** [2001] FJHC 283, [2001] 1 Fiji LR 123)…'.*

[23] Upon an examination of the summary of facts, one cannot say that the ingredients of attempted murder were not made out.

[24] Secondly, no ground of appeal based on criticism of trial counsel would be entertained leave aside being upheld unless the appellant has followed the procedure laid down by the Court of Appeal in **Chand v State (supra)** in pursuing such a ground of appeal as affirmed by the Supreme Court in **Chand v State** [2022] FJSC 28; CAV0001.2020 (27 October 2022). The appellant has failed to do so and therefore both grounds of appeal cannot even be entertained.

[25] Therefore, I see no real prospect of success in both grounds of appeal against conviction.

Orders

1. Leave to appeal against sentence is refused.
2. Enlargement of time to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL