

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

CRIMINAL APPEAL NO. AAU 0062 OF 2023
[Lautoka High Court: HAC 164 of 2022]

BETWEEN : **MELI TUTUDUA** ***Appellant***

AND : **THE STATE** ***Respondent***

Coram : **Mataitoga, P**

Counsel : **Appellant in Person**
Swastika S, for the Respondent [ODPP]

Date of Hearing : **4 February, 2025**

Date of Ruling : **4 March, 2025**

RULING

[1] The appellant [Meli Tutudua] was charged with the following offence as per the information filed by the Director of Public Prosecutions dated 3rd November, 2022:

Statement of Offence

RAPE: contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

MELI TUTUDUA, on 8th day of July, 2022 at Korotogo Village, in the Western Division, penetrated the anus of “E.S” a child under the age of 13 years, with his penis.

[2] The case was first called in the High Court on 28th October, 2022 after the filing and serving of the information and disclosures. The appellant on 21st February, 2023 pleaded guilty.

[3] On 28th March, 2023 the appellant admitted the summary of facts. The summary of facts read by the state counsel is as follows:

- a. The victim and the appellant are known to each and they lived in the same village. In 2022 the victim was 5 years and 4 months and the appellant was 41 years.
- b. On 8th of July, 2022, the appellant was alone at his home when he saw the victim pass by. The appellant called the victim inside his home and took him inside his bedroom. The accused closed the door and removed the victim’s trousers.
- c. Thereafter the appellant undressed himself and inserted his penis into the victim’s anus. The appellant warned the victim not to tell anyone about what he had done. The victim ran home from the appellant’s house.
- d. On 11th of July 2022 the victim informed his mother about what the appellant had done to him. The matter was immediately reported at Sigatoka Police Station. The victim was examined by a Dr. Naidu at the Sigatoka Hospital the same day. The medical examination revealed that there was a perianal ecchymosis due to forceful penetration of the anal canal.

- [4] After considering the summary of facts read by the state counsel which was admitted by the appellant, and upon reading his caution interview the court was satisfied that the appellant has entered an unequivocal plea of guilty on his own freewill. The court was also satisfied that the appellant fully understood the nature of the charge and the consequences of pleading guilty.
- [5] The summary of facts admitted by the appellant satisfies all the elements of the offence of rape. As a matter of caution the trial judge referred the defence counsel to answer 46 of the caution interview, whereby the accused had mentioned that he was assaulted by police. The defence counsel informed the court that the appellant did not wish to challenge his confession which he had given voluntarily. This was also confirmed by the accused in court.
- [6] In view of the above, this court finds the appellant guilty as charged and he was convicted accordingly.
- [7] State counsel filed written sentence submissions and the defence counsel filed mitigation and supplementary submissions for which this court is grateful.
- [8] The appellant's counsel presented the following mitigation:
- i) The accused is a first offender;
 - ii) He is now 43 years of age;
 - iii) Is a person with disability who receives a benefit under the Social Welfare Scheme;
 - iv) Is remorseful of his actions and he seeks forgiveness of the court;
 - v) Pleaded guilty.
- [9] The appellant was found guilty as charged and was convicted accordingly.
- [10] The appellant was sentenced on 11 April 2023 to 14 years imprisonment with a non-parole period of 12 years imprisonment.

The Appeal

[11] The appellant wrote a letter which he submitted to Correction Service officers dated 23 May 2023. The letter is a Notice for An Application for Leave to Appeal against Conviction. There were two grounds of appeal set out in the letter; they are:

- i) That the plea of guilty is equivocal on the grounds of flagrant incompetent advocacy and gross misrepresentation by defense counsel;
- ii) That the guilty was equivocal for the following reasons:
 - Not a trued admission of guilt
 - Made in circumstance of ignorance, mistake or even desire to gain technical advantage;
 - Accompanied by a qualification indicating that the appellant was unaware of its significance;
 - Guilty plea not entered in exercise of free choice

[12] The initial letter was not received in the court registry until 31 July 2023. That is not the fault of the appellant given the fact that he is a prisoner. For this appeal the 23 May 2023 is the date the court accepts as the date the appeal was filed. The appeal is therefor 13 days out of time. Given the obvious constraints the appellant faces in getting his appeal notice to be filed on time, I will treat this appeal as timely.

Assessment of Grounds of Appeal

[13] The two grounds of appeal involve question of law and facts, therefore pursuant to section 21(1)(b) of the Court of Appeal Act, leave is required before appeal may proceed to the full court.

[14] For a timely appeal like this one, the test for test for leave to appeal against conviction is **'reasonable prospect of success'** see: **Caucu v State [2018] FJCA 171**; **Navuki v State [2018] FJCA 172** and **State v Vakarau [2018] FJCA 173**; and **Sadrugu v The State [2019] FJCA 87**.

[15] The two grounds of appeal submitted by the appellant will now be considered.

Incompetent Counsel

[16] The first ground which the appellant submit is his claim that his counsel was incompetent as an advocate. The court pointed out to the appellant that unless he is able to show that he has followed the procedure laid out in **Nilesh Chand v State [2019] FJCA 254** (AAU 078 of 2013) for dealing with a claim of incompetent counsel, this ground of appeal will not be allowed.

[17] This ground has no reasonable prospect of success.

Equivocal Plea

[18] The second ground of appeal is that the guilty plea was equivocal and the basis of this claim are:

- The guilty plea was made in circumstance of ignorance, mistake or even desire to gain technical advantage;
- Accompanied by a qualification indicating that the appellant was unaware of its significance;
- Guilty plea not entered in exercise of free choice.

[19] To understand the notion of equivocation, it is pertinent to examine the relevant case law.

[20] In **Nalave v State [2008] FJCA 56**; (AAU 004 of 2008) the Court of Appeal observed as follows:

*“[23] It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (**Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v. Vent (1935) 25 Cr. App. R. 55**). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (**R v Murphy [1975] VicRp 19; [1975] VR 187**). A valid plea of guilty is*

one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132)."

[21] The onus is on the appellant to establish that the guilty plea was not equivocal. The Court of Appeal in **Tuisavusavu v State [2009] FJCA 50**; (AAU 0064 of 2004s) held that:

"[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 Bogiwalu v 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."

[22] In **Singh v State [1994] FJHC 158** (HAA 0041 of 1994) the observed:

"For a plea of guilty to be equivocal, it must be made in circumstances that show it is not a complete admission of guilt to the charge. The Court is concerned with what occurred at the hearing before the Magistrate. Something must have occurred to

indicate that there was something doubtful or ambiguous in the plea given. It was expressed in the following words at page 323 of the decision in the R v Rochdale Justices Ex parte Allwork that I have earlier mentioned:

"It is a plea which must be equivocal. In other words, the equivocality must be shown by what went on before the Magistrates Court. As Lord Parker CJ. pointed in the Maryle Bone Justices case (supra). The fact that the Defendant has subsequently thought better of the plea or has in some ways changed his mind is not sufficient on its own. It must be apparent to the Justices that the Defendant is saying, "I am guilty but": for instance, "I plead guilty to stealing but I thought the article was mine," that type of situation. If there is no such evidence, then that is the end of the matter. The issue of equivocality has gone and the Crown Court will proceed to deal with the appeal against the sentence."

[23] In light of the above statements of the legal principles, I now consider the circumstances at the trial of the appellant relating to his pleading guilty. The sentencing judge made the following observation:

"4. After considering the summary of facts read by the state counsel which was admitted by the accused, and upon reading his caution interview this court is satisfied that the accused has entered an unequivocal plea of guilty on his freewill. This court is also satisfied that the accused has fully understood the nature of the charge and the consequences of pleading guilty. The summary of facts admitted by the accused satisfies all the elements of the offence of rape. As a matter of caution, I had referred the defence counsel to answer 46 of the caution interviews whereby the accused had mentioned that he was assaulted by police. The defence counsel informed the court that the accused did not wish to challenge his confession which he had given voluntarily. This was also confirmed by the accused in court."

[24] The submission raised by appellant does not address the critical issue that the appellant's guilty plea was equivocal. For that to happen he must refer to something that took place at his trial which cast doubt on his guilty plea. There was no suggestion in the appellant's submission that there was promise made about sentence he may get if he pleaded guilty or some other kind of advantage. There was some mention about his mental state to take the plea but that was not raised as a ground of appeal, most likely because his Psychiatric Report concluded he was not only fit to plead he was

also able to meaningfully participate in the court proceedings i.e. he was able to engage in meaningful conversations and explain himself.

[25] In my assessment this ground of appeal has no reasonable prospect of success.

ORDER:

1. Appellant leave to appeal against conviction is refused.



Hon. Justice Isikeli U. Maitoga
PRESIDENT, COURT OF APPEAL