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

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: AAU0004 OF 2006
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BETWEEN:

ALESI NALAVE
KELERA MARAMA

Appellants

AND:

THE STATE

Respondent

Coram: Pathik, JA
Mataitoga, JA
Goundar, JA

Hearing: Monday 28th July, 2008

Counsel: Mr. A.K. Singh for the Appellants
Ms. A. Prasad for the State

Date of Judgment: Friday 24th October, 2008

JUDGMENT OF THE COURT

[1] Alesi Nalave (the 1st appellant) and Kelera Marama (the 2nd appellant) were jointly charged with one count of murder. The Information by the Director of Public Prosecutions alleged that the appellants on 15 June 2004 at Nadi murdered Xiaolu Li also known as Sheryl Li.

[2] On 31 August 2005, the hearing commenced with a trial within trial to determine the admissibility of the appellants' confessions to the police in the Lautoka High Court.

[3] The 1st appellant was represented by Legal Aid counsel, Ms. J. Nair, and the 2nd appellant was represented by private counsel, Mr. M. Naivalu.

[4] The trial within trial commenced without the assessors being sworn, contrary to the current practice in the High Court. Neither the counsel for the State nor for the appellants took any objection to this procedure. In ***Ajendra Kumar Singh v R,*** Criminal Appeal No. 46 of 1979, 30 June 1980, an objection was taken to a similar procedure on appeal. The Court at p. 8 said:

> In some cases the prosecution relies, as here, almost entirely upon the alleged confession and if the evidence relating to it is rejected there will be no case to go on with. An early decision may therefore save a great deal of time and inconvenience for the Court and the witnesses and for the assessors ....

[5] In ***Singh***, the Court was of the view that a trial commences upon entering of a not guilty plea by the accused at the arraignment of the charge, and that any step taken immediately thereafter is a step in the trial. The reasoning of the Court is in conformity with the provisions of s.277 (previously s. 260) of the Criminal Procedure Code, which states:

> Every accused person, upon being arraigned upon any information, by pleading generally thereto the plea of "not guilty" shall, without further form, be deemed to have put himself upon the country for trial.

[6] We see no good reasons to re-visit the reasoning of the decision in ***Singh***. All we say is that that the trial within trial procedure which was adopted in this case has been recognized by this Court to be in accordance with law, and therefore, the proceedings were valid.

[7] On 2 September 2005, the trial judge ruled the confessions of both appellants admissible in evidence. After the ruling was delivered, counsel for the 1st appellant sought leave to withdraw on the ground of conflicting instructions from her. The learned judge invited the 1st appellant to comment on what her counsel had told the court. The 1st appellant asked the learned judge to give her time to instruct another lawyer. According to the record, the learned judge replied: "[n]o, why should I do that".

[8] The learned judge then of his own motion arranged for Mr. H.A. Shah, a private senior practitioner, to advise the 1st appellant. This was done immediately after Ms. Nair informed the learned judge that she had advised the 1st appellant of the ruling admitting her confession in evidence. Ms. Nair further relayed to the learned judge that the 1st appellant wished to continue with the trial despite Ms. Nair's advice to the contrary. Ms. Nair then sought leave to withdraw. Leave was granted.

[9] According to the record, Mr. Shah appeared and sought an adjournment until the next morning. What is not contained in the record is the transcript of the proceedings in chambers after the court had contacted Mr. Shah. We have received undisputed evidence that the parties met in chambers after Mr. Shah agreed to advise the 1st appellant. What transpired in chambers is contained in the affidavits of Mr. Shah and Mr. Naivalu.

[10] Mr. Shah at paragraphs 2 to 4 of his affidavit deposes:

> That both the abovementioned deponents agreed to consider my advice on the charge before the court. No pressure was brought to bear upon them to accept my advice.
>
> That I confirm that an adjournment application was refused to their former counsel and she withdrew as counsel.

> That it was put to both the deponents by the court that if the matter proceeded to trial and there was a conviction for murder, the court would impose a minimum term with life imprisonment as against a general life term for a guilty plea to murder. (underlining ours)

[11] Similarly, Mr. Naivalu at paragraph 5 of his affidavit deposes:

> That Mr. Shah, Mr. Nand and I met with Justice Connors in his Chambers where Justice Connors advised all counsel present that if the matter proceeded to trial and there was a conviction for murder, that the court would impose a minimum term with life imprisonment as against a general life term for a guilty plea to murder. Hence I took that to mean that the court would not fix a minimum nor a maximum jail term and that both accused could be free under five years. I recall Mr. Nand was looking at a 17 or 18 years jail term if the matter went to trial and if there was a conviction. (underlining ours)

[12] The following day, that is, 2 August 2005, the appellants pleaded guilty to the charge of murder. The facts were read out in court. The appellants admitted the facts which disclosed the charged offence. The appellants were convicted on their own pleas of guilty. The proceeding was adjourned to 6 September 2005 for sentence. On 6 September 2005, after mitigation by counsel, the appellants were sentenced to life imprisonment without any fixed minimum term.

[13] The appellants filed an untimely appeal to this Court and on 18 January 2007, Ward P granted leave to appeal against conviction on ground that the plea was equivocal because it was entered without understanding of the nature of trial within trial, and against sentence on ground that the judge erred in failing to impose a minimum term.

[14] The basis for the appeal against conviction is that the pleas were only entered because of pressure from the court after the appellants' confessions were admitted in evidence.

[15] The 1st appellant in her affidavit at paragraph 5 deposes:

> That I only pleaded guilty after advise from my former counsel and under lot of pressure from the court as the learned Judge refused to allow me to have a counsel who could continue defending me.

[16] The 2nd appellant in her affidavit at paragraph 5 deposes:

> That I also pleaded guilty after advise from counsel and under lot of pressure from the court as the learned Judge refused to allow me adjournment. I confirm that I did not commit the offence of murder and my confession was not voluntary.

[17] We have carefully considered the circumstances in which the appellants pleaded guilty to the charge of murder. We do not consider that counsel pressurized the appellants to plead guilty. Counsel acted upon the trial judge's indication of sentence if the matter proceeded to trial, that is, the appellants were looking at a minimum term with life imprisonment as opposed to a life imprisonment without a minimum term.

[18] In our view the proceedings in chambers was wholly inappropriate because chamber hearing is contrary to the principle of open justice provided by s. 29(4) of the Constitution. What is of a greater concern to us is that the learned judge gave an indication of sentence in chambers during the hearing of trial, knowing the appellants had elected to exercise their trial rights.

[19] Traditionally, a judge would not give an indication of sentence. The rule is relaxed now. The case of ***R v Goodyear*** [2005] EWCA Crim 888 outlines the circumstances in which a court may give an indication of sentence. The guidelines are useful and we adopt them to be the state of law in this country:

- A judge should indicate sentence only if requested by the accused but may remind the defence counsel of the accused's entitlement. If the accused is unrepresented the judge and prosecuting counsel should avoid informing the accused of his or her right as it might be perceived as improper pressure.

- An indication should not normally be sought or provided until there is an agreed, written basis of plea.

- Any advance indication of sentence should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought.

- A judge is not obliged to give an indication and may refuse to do so without giving reasons. Reasons for his refusals to do so may include the belief that doing so would place the accused under unfair pressure to plead guilty or that the request is a tactical ploy by the accused.

- If a guilty plea is tendered by the accused after an indication of sentence but the judge suspects that the accused had been intending to plead guilty anyway and that the request for the sentence was made for tactical reasons the judge may consider that the plea was not made at the first reasonable opportunity.

- An indication is binding on the judge and any other judges who become involved in the case.

- If the accused pleads not guilty the indication ceases to have effect.

- The prosecuting counsel may remind the judge of this guidance and may ask whether the judge is in possession of all the relevant material pertaining to the prosecution's case.

[20] We note that in this case the learned judge gave an indication of sentence when it was not even requested by the appellants and that there was no indication that the appellants were considering changing their pleas to guilty. The position taken by the appellants was quite opposite. The appellants clearly wanted to contest the charge by exercising their trial rights.

[21] It was quite understandable as to why the appellants were contesting the charge. The offence of murder is one of the most serious offences in the Penal Code. The appellants were of a very young age at the time of the trial and if convicted they were facing life imprisonment. They were entitled to a trial as a matter of right.

[22] When Ms. Nair withdrew as counsel for the 1st appellant after the trial within trial ruling admitting the confession, the 1st appellant was completely denied of any

opportunity to instruct another lawyer. Instead of giving the 1st appellant a short adjournment, the learned judge imposed a counsel of his own choice to advise the 1st appellant. The advice was given to the appellants after the new counsel met the learned judge in chambers and after the learned judge had informed counsel that he would be imposing a life imprisonment with minimum term as a matter of aggravation if the appellants were convicted following trial. When the indication of sentence was relayed to the appellants by counsel, they pleaded guilty.

[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] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (***Meissner v The Queen*** (1995) 184 CLR 132).

[24] In ***Maxwell v The Queen*** (1996) 184 CLR 501, the High Court of Australia at p. 511 said:

> The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.

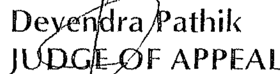
[25] In our judgment the indication of sentence by the learned judge during the hearing of trial, knowing the appellants had elected to exercise their trial rights, could have operated as an unfair pressure on the appellants to plead guilty. The circumstances in which the appellants pleaded guilty raise serious doubts in our

minds about the genuineness of their guilt. For these reasons, we are satisfied that there has been a miscarriage of justice.

[26] We, therefore, conclude that the convictions of the appellants are unsafe. We propose to allow the appeal and order a new trial before another judge. We do not in the circumstances need to consider the appeal against sentence.

[27] We make the following orders:

1. The appeal is allowed.
2. The pleas of guilty are set aside.
3. Convictions and sentences are quashed.
4. A new trial before another judge.
5. The appellants are remanded in custody to appear in the Lautoka High Court on 29 October 2008 for bail hearing.



Devendra Pathik
JUDGE OF APPEAL

Isikeli Mataitoga
JUDGE OF APPEAL

Daniel Goundar
JUDGE OF APPEAL

At Suva
Friday 24th October,2008

Solicitors
Messrs A.K. Singh Law, Nausori for the Appellants
Office of the Director of Public Prosecutions, Suva for the State