

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**MISCELLANEOUS JURISDICTION**

**CRIMINAL MISCELLANEOUS CASE NO: HAM 271 OF 2014**

**BETWEEN : AIYAZ ALI**

***Applicant***

**AND : STATE**

***Respondent***

**Counsel : Mr. I. Khan for the Applicant  
Mr. J. Niudamu for Respondent**

**Date of Hearing : 23 January 2015**

**Date of Ruling : 26 January 2015**

**Ruling**

1. The applicant above named had filed an application for vacation of the guilty plea entered by him for the 1<sup>st</sup> count.
2. The information against the applicant is as follows:

**FIRST COUNT**

***Statement of Offence***

**ATTEMPTED MURDER:** Contrary to Section 44 and 237 of the Crimes Decree No. 44 of 2009.

***Particulars of Offence***

**AIYAZ ALI** on the 18<sup>th</sup> of April, 2013 at Nadi in the Western Division, attempted to murder **PRITIKA KUMARI** by striking her with a cane knife.

**SECOND COUNT**  
***Statement of Offence***

**CRIMINAL INTIMIDATION:** Contrary to Section 375 (1) (a) of the Crimes Decree No. 44 of 2009.

***Particulars of Offence***

**AIYAZ ALI** on the 18<sup>th</sup> of April, 2013 at Nadi in the Western Division, without lawful excuse threatened **Police Constable No. 3792 Etuate Nasova** with intent to cause alarm to the said **Police Constable No. 3792 Etuate Nasova**.

**THIRD COUNT**  
***Statement of Offence***

**DAMAGING PROPERTY:** Contrary to Section 369 (1) of the Crimes Decree No. 44 of 2009.

***Particulars of Offence***

**AIYAZ ALI** on the 18<sup>th</sup> of April, 2013 at Nadi in the Western Division, willfully and unlawfully damaged the police uniform of **Police Constable No. 3792 Etuate Waqa Nasova** valued at \$35.00, the property of Fiji Police Force.

3. The state had filed an affidavit in reply from A/D/CPL 2019 Anil Kumar who is the investigating officer of this case.
4. Both parties have detailed written submissions. I have carefully considered those.
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 1<sup>st</sup> count and pleaded Not Guilty for 2<sup>nd</sup> and 3<sup>rd</sup> 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 1<sup>st</sup> 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.
8. In **State v Seru** [2003] FJHC 189; HAC 0021D.2002S (26 March 2003) it was held by Hon. Madam Justice Nazhat Shameem:

*"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 Magistrates Court with a direction to proceed on a not guilty plea: (**R –v- Isleworth Crown Court and Uxbridge Magistrates Court, ex p Buda** (2000) 1 Cr. App. R(s) 538.)"*

*"....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). 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."*

*'.....In all the circumstances, despite the rather unusual circumstances which led to the change of plea, I consider that the accused's pleas were clear and unequivocal."*

9. In **Hefferman v The State** [2003] FJHC 163; HAA 0051J.2003S (12 December 2003) it was held by Hon. Madam Justice Nazhat Shameem:

*"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- Timoci Kauyaca Bainivalu** 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 change or there was prejudice as a result of lack of legal representation. The discretion should be exercised sparingly and judicially."*

10. 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 **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."*

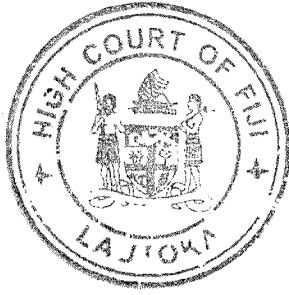
*[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's 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."*

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.
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 2<sup>nd</sup> and 3<sup>rd</sup> 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 1<sup>st</sup> count.
16. The applicant had failed to satisfy Court that his plea of guilty was equivocal.

17. Therefore, application to vacate the Guilty plea for the 1<sup>st</sup> count is dismissed.



  
Sudharshana De Silva  
Judge

At Lautoka  
26 January 2015

Solicitors : Messrs Iqbal Khan & Associates for the Applicant  
Office of the Director of Public Prosecutions for Respondent