IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 59 OF 2023

(Lautoka Magistrates Court Criminal Case No: 283 of 2016)

BETWEEN **MIKAELE LEWENI KOROI**

APPELLANT

AND

STATE

RESPONDENT

Counsel: Ms L. Taukei for the Appellant

Ms R. Uce for the Respondent

Date of Hearing : 01 May 2019

Date of Judgment : 29 May 2019

JUDGMENT

1. The Appellant was charged along with three others at the Magistrates Court at Lautoka with five counts of Aggravated Burglary contrary to Section 313 (1) (a) and five Counts of Theft contrary to Section 291 (1) of the Crimes Act 2009. The counts were based on a series of offences committed in five different places on 4 and 5 April 2016.

2. On 14 November 2016, the Appellant pleaded guilty to the above charges. He was convicted and sentenced on 13 September 2023 to 43 months' imprisonment with a non-parole period of 3 years. Being aggrieved by the said conviction and the sentence, the Appellant filed this timely appeal in person. He later retained a Counsel and filed his written submissions through his Counsel.

3. The Grounds of Appeal

   The grounds of appeal against conviction can be summarized as follows:

   (i) That the plea of the Appellant was equivocal and involuntary. He was pressured into pleading guilty to the offence.
   (ii) That the Appellant mistakenly pleaded guilty under pressure.
   (iii) That the Appellant's affidavit to vacate the plea of guilty was wrongfully refused.

   The grounds of Appeal against Sentence

   (i) That the mitigation filed by the Appellant was not considered.
   (ii) That the sentence is harsh and excessive.

4. All the grounds against conviction can be dealt with together. Section 247 of the Criminal Procedure Act provides that "No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates court, except as to the extent, appropriateness or legality of the sentence". However, the case law recognises that an appeal against conviction following a plea of guilty could be entertained if there is some evidence of equivocation on the record.

5. To understand the notion of equivocation, it is pertinent to examine the case law before embarking on the merits of this appeal.

6. In **Nalave v State**[1] the Court of Appeal observed as follows:

> 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).

7. The onus is on the Appellant to establish that the plea of guilt was not unequivocal. The Fiji Court of Appeal in **Tuisavusavu v State**[2] held that:

> The authorities relating to equivocal pleas make it quit 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.
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> 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);
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> 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

[1] [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008)
[2] [2009] FJCA 50; AAU0064.2004S (3 April 2009)

> 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.

8. In **Singh v The State**[3] Pain J 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.

9. Based on the Magistrates Court Record, let me first examine the circumstances under which the impugned plea was taken. When the Appellant and his co-accused were first produced in Magistrates Court on 7 April 2016, he was served with the disclosures. Having been remanded, they were referred to the High Court because the offence of Aggravated Burglary was indictable. The Appellant was granted bail on 28 April 2016 when the matter was remitted back to the Magistrates Court in extended jurisdiction. Since the Appellant wished to retain a private counsel, the plea was deferred. Upon two adjournments being granted, the Appellant indicated his willingness to retain a counsel from the Legal Aid Commission. On 12 September 2016, he changed his mind and sought a further adjournment to retain a private counsel. After that, on two occasions, he maintained that he wished to represent himself.

10. The court had given the Appellant ample time to engage a legal counsel before the plea was taken. On 14 November 2016, the day the plea was taken, the Court inquired from the Appellant whether he was ready to take the plea. There was no indication from the Appellant that he was not ready for plea although two of his co-accused sought an adjournment to retain a counsel. The charges were read in iTaukei, the preferred language of the Appellant. Having understood the charges, the Appellant pleaded guilty to all ten counts. The Learned Magistrate specifically asked the Appellant if anybody forced, threatened, assaulted, influenced or offered a promise to plead guilty to the charges. The Appellant answered in the negative. Then the Appellant was asked if he fully understood the nature of the charges and the consequences of the guilty pleas. He answered in the positive. Having been satisfied

[3] [1994] FJHC 158; Haa0041d.94s (26 October 1994)

that the pleas were unequivocal, the Learned Magistrate adjourned the matter for Summary of facts. There is nothing on the Record to show that the guilty pleas were equivocal.

11. On December 16, the summary of facts filed by the Prosecution was read over and explained to the Appellant in iTaukei. Having understood, the Appellant admitted the same. However, the Learned Magistrate found the summary of facts to be incomplete as it did not reflect facts separately on each count. So, the matter was adjourned for an amended summary of facts to be filed. Due to various reasons, mainly because the Appellant or his co-accused failed to appear in Court, the matter was adjourned on several occasions. When the amended summary of facts was ready, the Appellant on 23 August 2019 made an application to change his pleas. Having considered the submissions filed by both sides, the Learned Magistrate refused the application to change the pleas of guilty.

12. In the Ruling, the Learned Magistrate had considered the case authorities in relation to vacation of guilty pleas particularly **Hefferman v The State**[4] where Shameem observed as follows:

> A plea can be changed at any time before the sentence. However, in considering change of plea, the court should only allow the change if there was an equivocal plea, or the facts do not disclose the change? (charge) or there was prejudice as a result of lack of legal representation. The discretion should be exercised sparingly and judicially.

13. The affidavit filed by the Appellant dated 23 August 2019 seeking to change the pleas did not disclose any of those grounds. In his affidavit he stated his personal circumstances and his desire to change his pleas. He just cited **State v Seru**[5]. It did not contain any allegation suggesting that the pleas he entered was equivocal.

14. The case he cited (Seru) does not support his application. In that case, Shameem J found the pleas of guilty in the Magistrates' Court were clear, unambiguous and unequivocal and dismissed the application to change the appellant's pleas. Her Ladyship observed:

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[4] FJHC 163, HAA 0051J 2003 S (12 December 2003)
[5] [2003] FJHC 189; HAC0021D.2002S (26 March 2003)

> 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.

15. In **Seru**, the accused was unrepresented when the case was first brought to court. He pleaded not guilty. When the second set of charges was filed, he continued to plead not guilty. The absence of counsel appeared to have made no difference to this position. What did appear to influence a change of mind was the evidence of the complainant.

16. In the case at hand, the Appellant waived his right to counsel and pleaded guilty to all the counts at the first available opportunity. There is no evidence that he was pressured into pleading guilty to the offences. In the written submission filed by the Counsel for Appellant it was stated that the Appellant filed his application to change the pleas on the basis that he was pressured into entering guilty pleas by his co-accused persons. There is nothing mentioned to that effect in his affidavit dated 23 August 2019 filed in the Magistrates Court. The Record indicates that two of his co-accused had in fact maintained their not guilty pleas when the Appellant pleaded guilty. Therefore, the submission from the Bar table that the Appellant was pressured by his co-accused to plead guilty to the charges holds no water. As was stated in **Tuisavusavu v State** (supra), 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.**

17. I do not find any error on the part of the Magistrate when he refused to allow the application to vacate the guilty pleas which was filed three years after he entered the pleas. The belated application to vacate the pleas must have been an afterthought. At page 323 of the decision in **R v Rochdale Justices Ex parte Allwork,** which Pain J cited in **Singh v The State** (supra), it was observed:

> 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. (emphasis added)

18. The statement and the particulars of offence of Aggravated Robbery and Theft were straightforward and unambiguous. They could in no way be mistaken by the Appellant specifically in view of the caution statement in which he confessed to the offences.

19. The Appellant agreed and admitted the amended summary of facts filed on 04 August 2023. The Counsel for Appellant submits that the Appellant admitted the summary of facts 'out of frustration and feeling helpless' because his application to vacate the guilty pleas had been refused. This is not reflected on the Record. The Record shows that the Appellant had courage to dispute the summary of facts on two occasions. When the Appellant disputed the summary of facts on10 November 2020, he was given a copy and time to go through it and inform his position on disagreement on the next day. Again on 17 May 2022 he disputed the summary of facts and therefore was not acted upon. When the matter was called on 04 August 2023, it was stood down for the amended summary of facts to be read in the afternoon. When it was read over and explained, the Appellant understood and admitted the facts and sought time to file written mitigation although he opted not to file mitigation.

20. There is no evidence on the record to suggest that the Appellant was pressurized to agree to the summary of facts which reads as follows:

> Between 6.00pm on the 04th day of April 2016 to 2am on the 5th day of April 2016 you broke and entered into the following offices and stole therein following items.
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> | | |
> |---|---|
> | 1. Nabua Lodge Office - | 1 x Praktika Camera valued at $600.00 Assorted audio CDs |
> | 2. Paradise Security Office- | Cash of $90.00 2 x Johnny Walker Red Label 40 ounces bottles valued at $200.00 |
> | 3. Western Custom Office - | Cash of $ 953.10 |
> | 4. Roundabout Restaurant - | Cash 4 x 500ml Taruba Juice |
> | 5. Blue Ginger Restaurant - | 1 x Maxton brand radio valued at $300.00 |
> | | 1 x Jameson Whiskey 40 ounces bottle valued at $120.00 |
>
> On the above date, time and place the above mentioned shops were closed for business. Information received that several shops were broken into by a group of youths. D/Cpl 3018 Bimlesh and team were on mobile patrol when they saw a vehicle moving in a suspicious manner. Police followed the said vehicle and stopped

at Dravuni Street where the Police saw the accused with 4 youths in the vehicle. Upon searching the vehicle they discovered the above items in the vehicle:

i. Cash of $213.35
ii. 3 x Bottle Red Label (40oz) (Sealed)
iii. 1 x Bottle Red Label (40oz) (Half consumed)
iv. 1 x Praktika Camera
v. Assorted audio CDs

You were then arrested and escorted to the Police station where you were interviewed under caution and admitted breaking into the above shops and were charged accordingly.

21. It is obvious that the Appellant had already confessed to the offences in his caution interview to which reference was made in the summary of facts. The facts he admitted satisfy all the elements of each count. He had been arrested with the stolen items when he and his co-accused were stopped and searched by a mobile patrol team. There was no indication that the Appellant was threatened or pressured to agree and admit the summary of facts.

22. It was also submitted that the conduct of the Appellant that he filed his appeal on the same day as the sentence and that he refrained from filing his mitigation suggests that the guilty pleas were equivocal. I would not agree. It is possible that he filed his appeal soon after the sentence because he was dissatisfied with his sentence. He in fact indicated that he would file written mitigation for which ample time was granted, although he later changed his mind. His decision not to file mitigation does not necessarily suggest that he pleaded guilty out of frustration or under pressure. It is noteworthy that the Appellant in his grounds of appeal has stated that the mitigation filed by the Appellant was not considered.

23. I find no evidence on the Record that the guilty pleas were equivocal. The Record shows a completely regular procedure in which the Appellant was made fully aware of the nature of the charges and the facts that constituted the offences to which he agreed without any qualification. There was nothing whatever that the Appellant did to raise the slightest suspicion that there was any qualification to his pleas of guilty. The Magistrate therefore rightly proceeded to sentence as he was required by law.

24. The authorities cited above make it quite clear that in these circumstances the Court should not proceed further into the matter and can only consider an appeal against the sentence.

Section 247 of the Criminal Procedure Act applies and this Court can only consider an appeal as to the extent or legality of the sentence.

Ground of Appeal against Sentence

25. It is well settled that a sentence imposed by a lower court should be varied or substituted with a different sentence on appeal only if it was shown that the sentencer had erred in the exercise of his/her sentencing discretion. The Fiji Court of Appeal in **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) observed:

> It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499).

26. In **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal outlined the proper approach to be adopted when called upon to review the sentencing discretion of a court below:

> In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.

27. The Learned Magistrate selected 48 months imprisonment term as the starting point of the "aggregate sentence". The sentence was increased by 24 months for the aggravating factors. The Learned Magistrate considered his good character and his age as mitigation and deducted 6 months from the sentence. The Learned Magistrate deducted 22 months for the

early guilty plea and 1 month for time spent in remand. The aggregate sentence came to 43 months imprisonment.

28. Maximum penalty for Aggravated Burglary is 17 years imprisonment and for Theft it is 10 years imprisonment. The offences were committed in 2016 when the tariff prescribed for the offence of Aggravated Burglary ranged from 18 months to 3 years imprisonment[6]. It was on that basis that the co-accused of the Appellant who pleaded guilty in 2019 had been sentenced by the predecessor magistrate in office.

29. Subsequently in 2022, the Court of Appeal in the case of **Avishkar Rohinesh Kumar & Sirino Aakatawa v State**[7] introduced a new tariff between 1 year to 12 years and provided guidance by way of a table from which, once the level of harm has been identified, the court should pick the corresponding starting point to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty and irrespective of previous convictions.

30. I concede that on the basis of the tariff selected by the Learned Magistrate (18 months to 3 years imprisonment) a starting point of 48 months fell outside the tariff. Technically, the sentencing tariff in force at the time of the sentence should have been followed pursuant to Section 4(2)(b) of the Sentencing and Penalties Act which dictates that the current sentencing practice and the terms of the guideline judgment must be considered.

31. However the Learned Magistrate preferred the tariff that was prevalent as at the date of the guilty pleas as the sentencing process commenced and was set in motion with the Appellant pleading guilty before the new tariff came into operation. His decision was based on the observation made by Kulatunga J in **State v Jona Rokosuku**[8] where His Lordship observed at [12]

> In the present matter, as the commencement of the sentencing process preceded the date of determination of the new tariff, I am of the view that, the applicable sentencing regime

[6] Niudamu v State FJHC 661; HAA 028.2011(20 October 2011)
[7] [2022] FJCA (24th November 2022); AAU 33.18 & AAU 117.19 25 June 2018)
[8] Sentence [2022] FJHC 216; HAC196.2021 (9 May 2022)

> and tariff should be that which prevailed between the date of pleading guilty and the date of pronouncing the sentence. However, if a new tariff was determined during this interim period the accused is entitled to the benefit of the tariff which is more favourable to him/her. Thus, in my view it is just and lawful that retrospective application of sentencing guideline judgments not be extended to Accused persons who have pleaded guilty prior to such guideline decisions were pronounced as their sentencing was pending as at such date.

32. I do not find fault with the Learned Magistrate's decision to follow the old tariff for the reasons he recorded in paragraph 9 and 10 of his Ruling. Since one of the co-accused had been sentenced in 2019 by his predecessor in office based on the old tariff, the Learned Magistrate was legally justified as he was bound by the Constitution, Section 26 of which provides that every person is equal before the law and has the right to equal protection, treatment and benefit of the law.

33. If the Learned Magistrate were to consider the current sentencing tariff as per **Avishkar Rohinesh Kumar & Sirino Aakatawa V State** (supra), he would have selected a starting point of at least of 5 years and a sentencing range of 3-8 years given that the burglaries were committed in five different business establishments in a planned night time joint enterprise.

34. Furthermore, the starting point of 48 months was selected not for a single offence but for a series of offences which included five burglaries and five thefts on the basis of Section 17 of the Sentencing and Penalties Act which permitted the sentencing magistrate to pass an aggregate sentence. Therefore, the Learned Magistrate has not fallen in to an error by selecting a starting point above the starting point which was prescribed and a final sentence outside the sentencing range although he has not given the reasons in his Ruling.

35. The Appellant in my opinion is fortunate to have been given a sentence of 43 months imprisonment with a non-parole period of 3 years to be served concurrently with the current sentence of 1 year and 6 months.

36. For these reasons the grounds advanced by the Appellant cannot be sustained.

37. The following Orders are made:

i. The appeal against conviction is dismissed.

ii. The appeal against sentence is dismissed.

iii. The conviction recorded and the sentence imposed by the Learned Magistrate at Lautoka are affirmed.

38. 30 days to appeal to the Court of Appeal.

Aruna Muthge

Judge

At Lautoka

29 May 2024

Solicitors:

Legal Aid Commission for Appellant

Office of the Director of Public Prosecutions for Respondent