IN THE SUPREME COURT OF FIJI
AT SUVA

Criminal Appeal No. CAV0001 of 2012

[On appeal from Court of Appeal No. AAU0019 of 2007]

[On appeal from High Court Crim. Case No. HAC29.06S]

BETWEEN:	**THE STATE**	***Petitioner***
AND:	**RAJENDRA SAMY**	***Respondent***

Coram: The Hon. Mr. Justice Anthony Gates,
Judge of the Supreme Court
The Hon. Mr. Justice Sathyaa Hettige,
Judge of the Supreme Court
The Hon. Madam Justice Chandra Ekanayake,
Judge of the Supreme Court

Counsel: Mr Pita Bulamainaivalu for the Petitioner
Respondent in Person

Date of Hearing: Friday 10th August 2012

Date of Judgment: 17th May 2019

JUDGMENT

Gates J

[1] The main thrust of the State's petition of appeal is directed at the majority decision of the Court of Appeal which had found that the pleas were equivocal and that the trial judge had erred in accepting the Respondent's plea of guilty to three counts of attempted murder. In addition there is the issue as to what evidence or material could be relied upon in deciding that a plea of guilty is equivocal. Put another way, how much of the prosecution case was an Accused admitting to by entering a plea of guilty? Could the Accused be held to be accepting the statements of the prosecution witnesses served on the

defence as part of the disclosure procedure? This was in contradiction to the summary of facts tendered and which he himself agreed to in the presence of his counsel. How far could an appellate court draw inferences from such statements, unsworn and untested as they were?

[2] Two further issues are raised by the Petitioner. Was the Court of Appeal correct in finding the Respondent had lacked the necessary mens rea or intent to kill in order to found a case of attempted murder? The State also submits the Court of Appeal wrongly applied the statutory defence of provocation which could only apply to a case of murder, not attempted murder: **Whybrow v R** [1951] 35 Cr. App. R. 141; **McGhee v R** (1995) 183 CLR 82. This last ground may have been based upon a misunderstanding of Marshall JA's judgment, for at para. 84 his lordship had said in relation to provocation as a defence to murder "there is no similar rule in respect of liability for attempted murder." Instead quite correctly his lordship considered the provocation evidence could be counted as mitigation and result in a discount of sentence.

Case History

[3] The alleged offences occurred on 7th June 2006. On 27th July 2006 the Director of Public Prosecutions filed an information against the Respondent containing 3 counts of attempted murder against 3 different victims. The attempted murder charges were brought under section 214(a) of the Penal Code. On 26th November 2007 the Respondent pleaded guilty in the High Court at Suva to all 3 counts.

[4] On 29th November 2007 the Respondent was sentenced to 9 years imprisonment on each count concurrent, for which the maximum term was fixed at imprisonment for life. On 7th December 2007 the Respondent sought leave to appeal against conviction and sentence. On 12th December 2008 leave was refused by the single judge [Pathik JA], who concluded there was nothing before the court to convince it that the plea of guilty was other than an unequivocal plea.

[5] Relying on section 35 of the Court of Appeal Act, the Respondent asked to go before the Full Court to obtain leave to appeal. On 30th January 2012 such leave was granted by a majority of the court [Marshall and Wikramanayake JJA, Sriskandarajah JA dissenting].

The majority allowed the appeal "on the basis of mistrial", set aside the convictions and sentences and ordered a retrial.

The Background Story

[6] At the time of the incidents that led to the charges, the Respondent was aged 39. He was a taxi driver, though earlier he had worked as a project manager in the construction industry. He had received education up to Form 7 level.

[7] In 2005 his mother and father lived in California. His eldest sister and youngest brother also resided there. A younger sister Anjula and a younger brother Rakesh lived separately but in next door houses or apartments at Nadawa. In 1995 the Respondent and Rakesh purchased jointly a piece of land, Lot 54 Tiloko Lane, next to his sister Anjula who was residing at Lot 55. Financially the brothers were struggling. After a while the Respondent discovered that only he was making payments towards the housing loan. Rakesh had not paid anything for 2 years.

[8] Accordingly, the Respondent telephoned his mother Ram Kuar in the States and discussed how the payments could be made and the property not lost. Some time later the mother arrived in Fiji. She visited the Housing Authority with the Respondent and paid off the full amount on the loan. She had the property transferred into her name. She told the two sons that they could continue to live on the land indefinitely. But a year later the mother asked them to assist her daughter Anjula by each paying $50 per month to her as rent. It was said that this money was for repairs to the property which they were occupying. The Respondent felt the monies were being used by Anjula in the construction of her house. The brothers stopped paying.

[9] The father died in California in 2005. Eventually the mother aged 67 returned saying she would settle back in Fiji, and build a separate room for herself. This time she asked the 2 sons to pay the $50 each directly to her. Even before the first payment was due she increased it to $100 each per month.

[10] In the Summary of Facts tendered in the High Court, it was stated that the Respondent went to his mother's apartment in the morning between 10 and 11 on 7th June 2006. He said he was not well and asked for some rasam to be prepared. Rasam is a tamarind

drink popular in the South Indian community. Ram Kuar began to prepare the requested tonic. Meanwhile the Respondent asked his nephew Amit to go to the shop to buy a copy of the Fiji Times.

[11] The Respondent went back to his mother's apartment, and then went across to his own apartment. He returned, according to the summary, "with a chopper in his hand." As he approached his mother, she asked what he was doing, and he replied that he was going to chop her.

[12] The summary continued:

> "The Accused then raised his right hand in which he held the chopper to strike Ram Kuar. Ram Kuar quickly grabbed both the Accused hands and was facing the Accused person. This struggle continued and the Accused then managed to go behind Ram Kuar and grab hold of her long hair and wrap the hair in a bundle in his left hand. By doing this the Accused was also able to grab and hold Ram Kuar's head from behind facing upwards. The Accused while standing behind Ram Kuar and holding her by her hair wrapped into his left hand in a bundle started striking Ram Kuar's face with the chopper. Ram Kuar was struck in the face, head and neck. (Refer to Doctor's Statement from Dr Luisito Madayag) Ram Kuar yelled for help and this was heard by her grandson Amit Raj Sami.
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> Amit Raj Sami whilst on his way to the shop to buy Fiji Times heard his grandmother Ram Kuar yelling for help and returned to see what was the(n) happening. When he entered the flat he noticed the Accused striking his grandmother with the chopper. Amit Raj Sami immediately picked up a piece of timber and hit the Accused. The Accused then turned around and struck Amit Raj Sami with the same chopper and Amit Raj Sami thereby received injuries on his forehead, neck and at the same time his two fingers were chopped. (Refer to Doctor's Statement from Dr. Joel Trazo). Amit Raj Sami called his cousin Ashneel Aman Chand for help
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> Ashneel Aman Chand s/o Suresh Chand who stays just on the next block of land rushed to assist his cousin Amit Raj Sami. When Ashneel Chand arrived inside Ram Kuar's house he saw the Accused was striking Amit Sami who was lying on the floor. The Accused then had a struggle with Ashneel Chand and also struck him with the same chopper on the head. Amit Sami managed to escape and ran away to inform Police. Ashneel Chand struggled with the Accused and held the chopper from the Accused and they both fell down. Ashneel Chand then managed to get hold of the

> chopper outside in the compound and ran away with the chopper to the main road away from the scene and handed the chopper to a passing Police vehicle
>
> The Accused then left the scene and went to his taxi, which was parked next to his flat. He picked the rope, axe and the file from his taxi, which he had earlier bought and went into his flat. He closed the front door of his flat and attempted to commit suicide inside his flat in the sitting room."

[13] When the Police arrived, the Respondent opened the back door to his apartment, and surrendered. He was taken to the Valelevu Police Station and interviewed. A notebook was subsequently discovered at his home in which he had detailed a plan to execute 4 of his relatives at Nadawa including his mother. That list did not include the 2 nephews who were attacked with the chopper on 7th June. All three victims were seriously injured. At one time there was concern at the hospital that the mother's condition would deteriorate. All have some residual medical deficit.

[14] In his interview statement the Respondent said: [Q & A 112]

> "In my mind I still had that if reconciliation does not work then execution is there. I bought a file from Suncourt Nabua, an axe from R.C Manubhai Grantham Road and a rope from Vinod Patel Centrepoint whilst doing job."

[15] He also said it was when the mother was cutting the garlic with the kitchen knife she first struck him with that knife. One of his fingers was injured. This account is not borne out in the mother's statement. She did not say for instance that she noticed his aggressive stance and tried to defend herself by lashing out first with her knife. The order of events is significant. Rajendra's plan came first, and he had thought about it enough to write it down. When he was asked, after the caution "what do you have to say to the above allegation put to you?" he immediately replied "I did the above in self defence after trying to reconcile with my mother on her conditions. Her demands were exorbitant." It was not clear what the reconciliation attempt had consisted of.

Whether Plea Equivocal

[16] On 1st April 2006, whilst represented by private counsel [Mr Raza] the Respondent pleaded not guilty. Private counsel Mr Fa subsequently took over the defence but withdrew at a time when the matter was a stand-by fixture between 17 September – 23 October 2007. There were several attempts to secure alternative Legal Aid counsel. The mother was originally due to return to the States on 18th November 2007.

[17] On Friday 23rd November 2007 private counsel Mr. Diven Prasad eventually appeared for the Respondent. He said he had just received instructions and needed to advise his client. The court asked if he could advise the court on the plea by the following Monday. The court said: "If no change of position, trial will proceed on Monday" (the 26th November). There was sufficient time therefore to ascertain what the client's instructions would be, on the circumstances of the case, and on his plea to the charges.

[18] The record at p.72 has the following:

> "**D/P:** My client will plead guilty today. I then wrote the letter. Now he has changed his mind and has sacked me. He wants to represent himself – he is ready for trial. I have given him full advice.
>
> **Accused:** I didn't understand what he told me last week. I want to proceed but want to engage another lawyer.
>
> **Court:** The main witness due to leave the country this weekend.
>
> **Accused:** I didn't know that.
>
> **Court:** That occurred in your presence.
>
> **Accused:** Yes, I agree.
>
> **Prosecutor:** We are ready for trial. We are concerned – this is a deliberate delaying tactic – if any further adjournment we will lose our witnesses. The main witness Kaur leaves on the 30th.
>
> **Court:** Will give Accused and counsel [time] to have a discussion.
>
> **D/P:** My difficulty is that I can't do a trial – my views are that he has no option – and I wrote the letter on that basis. How can I represent him now? I was prepared to mitigate.

> **Accused:** I did understand what he said. I did agree but I need some clarification – I need concrete answers.
>
> **Court:** Stand down for counsel and Accused to discuss the matter."

[19] The Respondent and his counsel return to court within an hour, and the following exchange is noted in the record at p.73:

> "**D/P:** Have explained everything to my client. He now understands the position. I have not pressured him at all.
>
> **Accused:** I confirm that I want to plead guilty.
> **D/P:** I will need time to prepare mitigation.
>
> **Prosecutor:** Could we have 2 hours to make a new summary of facts.
>
> **D/P:** Can I mitigate on Thursday?
>
> **Court:** Yes, all right.
>
> Assessors in.
>
> Information read to the Accused.
>
> Count 1: Guilty
> Count 2: Guilty
> Count 3: Guilty
>
> **Court:** Assessors discharged.
>
> 12 noon for facts. Adjourn to then."

[20] The next part of the proceedings dealt with the sentencing process following the pleas of guilty. The prosecution tendered the facts [Summary of Facts] and 2 Exhibits. Though his counsel said "We agree with the summary of facts" the judge asked the Respondent specifically and he said "I agree with the facts." The court was informed he was a 1st offender. The case was adjourned for mitigation to the Thursday, some 3 days later. If there were any second thoughts on what his plea should be the Respondent had both time to reconsider, and time to speak for longer with his counsel. Marshall JA had said that there was no evidence of his lawyer having visited him in prison to take instructions. The record of proceedings was lengthy, but at p.45 of the record in the sentencing

submissions consisting of 6 pages Mr Diven Prasad referred to his consultation with his client at Korovou Prison the day before. There was no reason therefore to infer Mr. Prasad had not acted entirely properly and fully in commitment towards his client's interests and to the taking of informed instructions.

[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. As Srikandarajah J observed [at para 22] in his judgment the Petitioner had appeared in person in the appeal and did not make complaint against his lawyer that he was misled by the lawyer in relation to the charges or the plea. "Appellant is the best person who can speak to this fact rather than an appeal court going on a voyage of discovery looking into the case record and drawing inferences."

[22] There is nothing inherently improbable in the pleas of guilty even when considering the Respondent's account to the police investigators in an unchallenged interview. Taking the plan set out in the diary together with his determination as confessed to carry out "the execution of the unreligious four", he was asked [Q & A 85]

> Q. What do you mean by the execution?
> A. Killing all 4 people.

[23] This did not include the two nephews. But his admitted anger on that morning could probably and plausibly have switched to anyone who might get in the way of his primary plan to kill the mother. The intention to seek reconciliation first as he explained might not so easily be believed either. The weapon used, the ferocity of the attacks on the two young nephews, and the parts of the body where they were injured, make it probable and likely that the Respondent had intended that they had to be killed also and it was a reasonable inference be drawn to that effect. Those of course are trial court issues. By

pleading guilty to the charges the Respondent demonstrated his acceptance of those intentions. The respondent was an intelligent person as is clear from his letter of mitigation, the words used in clear English to the police in interview, and his ability to control his defence. There are elements of bizarreness and irrationality in his plan and actions. That is another matter. But there seemed no lack of understanding of the issues and of what was going on in the proceedings.

[24] Such points 'might' comprise relevant issues in a trial. But these proceedings were not contested. The contest was concluded by the entering of pleas of guilty to attempted murder. It is likely the Respondent realised the consequences of that morning's use of the chopper on the 3 victims. For at Q & A 145 he said:

> "I then went and cut the rope and I then decided not to hang myself since I did not kill anybody. (Emphasis added)

Was it the realization that they would die after his choppings that made him go to his room to hang himself? Does that not have bearing too on his intent as also the severity of his attack on all 3, and the use of the weapon chosen for the execution plan?

[25] The majority decision of the court below, was over-reliant on the prosecution disclosure statements of witnesses, persons who were not called to give evidence. They were, without a trial, unsworn, and untested by cross-examination. Indeed in a trial, a witness though disclosed along with his or her statement, may in the end not be relied on by the prosecution and not be called by the prosecution to give evidence. The evidence they may have to give as a witness is not adduced, and therefore cannot – unless an agreed fact – be taken into consideration. Procedurally upon a plea of guilty no formal evidence is taken. An exception would be if medical evidence were required to be called or if significant parts of the case were disputed, though not involving the essential elements of the offence. A *Newton* hearing to resolve the dispute could then be held: *R v Newton* (1983) 77 Cr. App R. 13. Such a hearing may be important when the Accused wishes to shift some of the blame from him or herself: see too *Beswick* [1996] 1 Cr. App R (S) 343; *R v Gardener* [1994] Crim LR 301. At the time sentence was passed in this case there existed a general power provided by section 306 of the Criminal Procedure Code [now

section 244 Criminal Procedure Act] for the court to receive such evidence as it thinks fit in order to inform itself as to the appropriate sentence to be passed.

[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.

[27] As Sriskandarajah JA noted [page 55 para 3 of the Court of Appeal judgment] "one has to caution himself before drawing conclusions." Disclosure statements can be relied on by the sentencing judge or by the appellate court, but great care must be exercised not to incorporate into the Summary of Facts, matters not necessarily accepted by the Accused when he or she entered a plea of guilty. After all, accounts of incidents such as these, sometimes vary in some important respects. The inconsistencies remain unresolved. One must be cautious too in accepting one untested account in favour of another similarly untested account, and then drawing inferences.

Grounds of Appeal in the Petition

[28] There were 5 grounds filed by the State. They were:

> "(1) The Court of Appeal erred in finding that the learned High Court Judge had erred in accepting the 'guilty plea' and convicting the Respondent accordingly.
>
> (2) The Court of Appeal erred in referring and relying substantially on the statements to the police of the following witnesses namely:
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> (i) Ram Kuar – 19 June 2006;
> (ii) Amit Raj Sami – 8 June 2006;
> (iii) Ashneel Aman Chand – 8 June 2006;
> (iv) Reshmi Lata – 7 June 2006; and
> (v) Artika Devi – 7 June 2006,
>
> which statements were never formally tendered in the High Court, to substantiate its decision on the issue of equivocal plea.

(3) The Court of Appeal erred, in relation to Ground (1) above, by holding the disclosures filed by the Office of the Director of Public prosecutions as committal papers when as matter of law the committal process was abolished pursuant to section 224 of the Criminal Procedure Code 9cap. 21) (now repealed) which then came into effect on 13 October, 2003 while the charges of Attempted Murder against the Respondent were filed in June 2006 and subjected to the new transfer process.

(4) The Court of Appeal erred in deciding that the Respondent lacked the necessary *mens rea* for the offence of Attempted Murder that is 'the intention to kill' when he attacked in particular Amit raj Sami and Ashneel Aman Chand.

(5) The Court of Appeal erred in referring and relying substantially on the mitigation submission re ndered by the Respondent's Counsel in the High Court to discern the availability of provocation as a defence to the offence of Attempted Murder when strictly as a matter of law substantiated by relevant and cogent facts such defence is only available to the effect of reducing murder to manslaughter but not to defeat the charge(s) of Attempted of Murder."

Ground 1 – Equivocal Plea

[29] Where an Accused who pleads guilty is not represented a court ought to satisfy itself that he confesses the full offence charged in the information: **Golathan** [1915] 11 Cr. App. R. 79. In that case Lord Reading LCJ said:

> "It appears to be quite plain from reading the shorthand note that at the most he admitted entering the premises, but added that he did not do so for the purpose of stealing."

His lordship continued (at p.80):

> "In our view this man's plea was not a plea of guilty at all, and no man is to be convicted on a plea which is ambiguous. If there is any ambiguity it is to be taken as a plea of not guilty, and evidence given against him in the ordinary course. He must not be taken to have admitted his guilt unless he does so in unmistakable terms."

[30] **Rhodes** (1914) 11 Cr. App. R. 33 is authority for stating the court may look at all the facts to decide whether an Accused really did understand the effect of his plea. The Appellant appeared for himself. He said:

> "I pleaded guilty to taking books out of a house that was on fire, but I took them out at the request of a man who said he was the foreman."

However the foreman gave evidence at the police court and stated that he did not give the appellant authority to remove the books, and he was not cross-examined.

[31] A.T. Lawrence J summarized the position (p.33):

> "In this case the appellant was charged with larceny of books of account, stamps, pliers and other things which he took from a house that was on fire. On arraignment he pleaded guilty and handed in a written statement; the question is whether that statement shews clearly that the appellant in pleading guilty did so under a mistake. If that is so there is authority for saying that the case should be remitted for trial. [Ingleson, above.p.21] We think that the rule in such cases must be that the Court must be satisfied that there really has been a mistake, and when we look at the document that was handed in we do not think there was any mistake. We agree with Mr. Oliver that it was really a plea in mitigation. It begins: "I am sorry for what I have done." If the appellant took the things out of the house to save them from destruction he performed a laudable act. He says: "I did not mean to take the books away," and it may be that he intended to draw a distinction between the books and the other property, and to say that he did not mean to take away the books, which would not have been easily convertible into cash. There is no sufficient evidence to satisfy the Court that there has been any mistake, so the appeal must be dismissed. The sentence imposed was not excessive."

[32] This early case demonstrates the necessary approach of the appellate court. The court must be satisfied on the facts, and satisfied as to the Accused's understanding. When not represented the Accused's statement in evidence or in written form, purportedly in mitigation, should be examined.

[33] In all that he or she does the Accused must not be taken to plead guilty if in reality his plea is one of "I am guilty but ..." and he then provides an explanation which is a complete exculpation. In **Ingleson** [1914] 11 Cr. App. R. 21 the Accused handed up a statement of that nature.

[34] Sometimes the facts read out in a guilty plea do not support all of the essential elements of the offence charged. Upon appeal the matter must be remitted to the lower court for a trial de novo, the plea of guilty being rejected: **DPP v Jolame Pita** [1974] 20 Fiji LR 5; **Michael Iro v R** [1966] 12 Fiji LR 104, **Nawaqa v The State** [2001] FJHC 283, [2001] 1 Fiji LR 123.

[35] The Court below rightly indicated other circumstances in which appellate courts have intervened and held the proceedings to have been a miscarriage. One example was where the Accused who did not understand English did not have the evidence of the prosecution witnesses translated to him during the trial: **Li Kuen v R** (1916) 11 Crim. App. R. 293. A miscarriage was declared and the matter sent back for retrial.

[36] In the lead majority judgment the learned appellate judge has placed great reliance on the statements of witnesses in the disclosure bundle. The judge has made a meticulous examination of the tensions and relationships of the witnesses. However as can be seen in the sworn evidence in mitigation not all of those issues were certain or agreed. Much has been speculated about them, and unfortunately inferences drawn on conclusions which are in themselves merely inferences not proven facts. Therein lies the difficulty in the approach of the majority in the Court below.

[37] Sriskandarajah JA [in dissent] had referred to the need for caution in relying on this approach (p.55):

> "3. This case had not proceeded for trial and the case was concluded with the plea of guilt hence there is no evidence led in this case. The facts available in relation to this case are from statements made by witnesses and the Appellant to persons in authority and these statements were neither given on oath nor the veracity of these statements were tested by cross-examination, therefore one has to caution himself before drawing conclusions relying on these statements."

[38] In **R v Sorhaindo** [2006] EWCA Crim. 1429 a plea was held to have been entered after erroneous advice. After certain submissions were made at the close of the prosecution case the Judge directed an acquittal on 2 of the 5 charges. There was then a plea of guilty

to the remaining 3 counts and the basis of the plea was reduced to writing and handed to the judge.

[39] Gage LJ said (at para 12):

> "[12] The judge then went on to take the view that, in the absence of a valid basis of plea, he would sentence the Appellant on the basis of the prosecution case, namely that the money found was connected with drugs. However, before sentencing the Appellant, an application was made on his behalf to withdraw his guilty plea. It was made on the basis that it was clear from the purported basis of plea that the Appellant did not accept the Crown's version of events and therefore did not intend to plea guilty on that basis."

and at para 15:

> "[15] There is no doubt that a judge has a discretion to permit a Defendant to change his plea of guilty, even when he has been found guilty by a jury having himself tendered such a plea. However, for obvious reasons, the discretion to allow a Defendant to vacate a guilty plea must be exercised sparingly and circumspectly."

[40] Gage LJ referred to the decision of Mantell LJ in **R v Sheikh and Others** [2004] EWCA Crim. 492 when his lordship giving the judgment of the court said [para 16]:

> "It is well accepted that quite apart from cases where the plea of guilty is equivocal or ambiguous, the court retains a residual discretion to allow the withdrawal of a guilty plea where not to do so might work an injustice. Examples might be where a Defendant has been misinformed about the nature of the charge or the availability of a defence or where he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt. It is not possible to attempt a comprehensive catalogue of the circumstances in which the discretion might be exercised."

[41] In **Sorhaindo** the appellant had only changed his plea to guilty as a result of the legal advice he had received (and which circumstance and advice was clearly before the judge from whom he sought to obtain leave to vacate his guilty plea). The judge refused leave.

[42] The appeal court said it was one of those rare cases where not to allow a defendant to change his plea might work an injustice. The conviction was quashed. It was clear the defendant had only pleaded guilty to counts 3-5 on the basis of counsel's advice which was known and which was held to be erroneous.

[43] The advice of counsel in the instant case is not known. It would be mere speculation, which was unfortunately the approach taken in the Court below, to infer counsel had tendered erroneous advice on the elements of the offence of attempted murder.

[44] The charge read out to the Accused at the arraignment is after all quite simple to understand. The main gist is that the Accused:

> "attempted unlawfully **to cause the death of** ……"

There is no suggestion that he was charged with intending to cause grievous harm only. Counsel might well have asked his client "did you intend to cause the death of …. X, Y & Z?"

[45] It was not for the court to contend, as expressed in the majority, that the charges are wrongly framed, and that instead of the charge of attempted murder a charge of committing grievous bodily harm should have been brought against the Appellant. The majority had concluded that the conviction and sentence of the Appellant for the offence of attempted murder of Amit and Ashneel could not be held valid in law.

[46] In the amended notice of appeal to the Court of Appeal of 21.4.08 the relevant grounds against conviction were:

> "(c) that the Appellant pleaded guilty to all the charges after being told by his Counsel that if he pleaded guilty he would not go to the Prison as he was the first offender and that he would get a suspended sentence.
>
> (d) That the Appellant pleaded guilty to the charge after being advised/pressurized by his Counsel and whom the Appellant now says that the said Counsel was incompetent and as a result the Appellant suffered a miscarriage of Justice."

[47] Ground (c) would carry no weight at all. It was a scurrilous accusation and a most unlikely assertion. There was no affidavit or other evidence put forward to lay such a foundation.

[48] Ground (d) alleges that the Petitioner pleaded guilty as a result of counsel's

(i) Advice
(ii) Pressurizing
(iii) Incompetence

Again appellate courts have been careful in assessing such allegations. The evidence is neither indicated nor produced that would provide a proper path for reaching such conclusions, nor was the ground actually argued by the Respondent (the Appellant) before the Court of Appeal. Apart from what was in the notice of appeal the basic and reliable facts for such assertions was not provided.

[49] The learned High Court judge had conducted the handling of the possible change of counsel, the time for further advice and consideration of plea fairly and properly. At the end of the day the Accused freely entered his pleas to the 3 counts of attempted murder. His conduct was informed and voluntary and there was no "Guilty but …" situation or ambiguity.

[50] Unfortunately as Sriskandarajah J described, the theories of the majority had allowed themselves to go off on a voyage of discovery rather than to let the circumstances of the record speak for themselves. Ground 1 succeeds.

[51] Ground 2 also succeeds since too much reliance had been placed on disclosure statements, not part of the summary of facts, to which the Respondent had pleaded guilty. His plea cannot be taken as an admission of the bundle of disclosure witness statements. This reasoning covers Ground 3, in that disclosure statements are not the same as committal papers, which were abolished by the 2003 amendments to the Criminal Procedure Code.

[52] Ground 4 succeeds. The Court of Appeal was in error in deciding the Respondent lacked the necessary mens rea for the offence of attempted murder. His plea, held to be voluntary and informed, completed any doubt on his intent. There were other supportive factors contributing to that conclusion which I have set out in the course of this judgment.

[53] Ground 5 fails. At the end of the day a proper reading of Marshall JA's judgment is not to be taken as stating that the defence of provocation was available on a charge of attempted murder. The majority held it to go to mitigation only. The court was therefore not in error in that respect.

Leave to appeal : the criteria

[54] Pursuant to section 98(4) of the Constitution an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[55] In addition in relation to a criminal matter leave is not to be granted unless the Petitioner can bring his or her case within the provisions of section 7(c) of the Supreme Court Act.

[56] The Court of Appeal relied on conjecture and inference in arriving at its findings of procedural unfairness. Leave is to be granted therefore on the basis the error of the Court of Appeal has given rise to a substantial and grave injustice.

[57] In the result the following orders are made:

(i) Leave to appeal is granted.
(ii) The petition succeeds.
(iii) The orders of the Court of Appeal are quashed.
(iv) The convictions and sentences of the High Court are re-instated.
(v) The Respondent is to be returned immediately to the Corrections Department for him to serve the remainder of his 3 concurrent terms of 9 years imprisonment not yet served.

Hettige J:

I have perused the Judgment in draft and I agree with the reasoning, conclusion and Orders made in the judgment of His Lordship Gates J.

Ekanayake J:

I have read the draft judgment of His Lordship Gates J, and I concur with His Lordship's reasoning, conclusions and orders proposed.

Gates J:

Orders accordingly.

.....
Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

.....
Hon. Mr. Justice Sathyaa Hettige
Judge of the Supreme Court

.....
Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

Solicitors

For the Petitioner: Office of the Director of Public Prosecutions, Suva
For the Respondent: In Person