IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 11 of 1966

Between:

MICHAEL IRO Appellant

- and -

REGINAM Respondent

Regan for the Appellant
Palmer for the Respondent

JUDGMENT

This is an appeal against conviction before the High Court of the Western Pacific sitting at Gizo, British Solomon Islands Protectorate, on the 23rd March, 1966, on two charges, burglary and attempted rape respectively. The appellant was unrepresented at the trial and was without the assistance of counsel in the preparation of his notice of appeal. The appeal, which is against conviction only and not against sentence, has been brought on a ground which is set out in these words in the Notice of Appeal:

> "It was John Kalo and William Henry Kuloni who forced me to commit these offences. I have been punished and they have been let free. They should be punished also because it was them that made me do it."

At the hearing of the appeal this ground was expressly abandoned by counsel and leave was sought to adduce another ground in these terms:

> "That the learned trial judge erred in law in not complying with section 244 of the Criminal Procedure Code."

Leave was granted by the Court without objection from Crown Counsel.

Section 244 of the Criminal Procedure Code 1961 for the British Solomon Islands Protectorate reads:

> "244. If the accused pleads "guilty" the plea shall be recorded and he may be convicted thereon."

The Record sets out very briefly what took place before the learned trial judge when the plea was taken. It appears in these words:

> "Charge explained to the accused: J.B.
> Accused when called upon to plead says:
>
> FIRST COUNT: Guilty
> SECOND COUNT: Guilty
>
> Court enters a plea of:
>
> FIRST COUNT: Not Guilty.
> SECOND COUNT: Not Guilty."

Counsel contends that although the section makes it mandatory for the trial judge to record the plea, and provides only that a conviction may be entered in accordance with the plea, yet the trial judge has no power to record a plea of guilty and immediately without further reference to the accused to enter a plea of not guilty. The plea of not guilty, in counsel's contention, can be entered only under the provisions of section 245, which for the purposes of this appeal limits the right of the Court to proceed to trial only in the case of a plea of not guilty or of refusal or inability to plead. Counsel contends that as the trial judge entered a plea of not guilty and proceeded to trial after the accused had entered an unequivocal plea of guilty the trial is a nullity and the convictions following the trial must be quashed.

Counsel emphasises that there is no evidence of any "ambiguity' such as that referred to by Lord Reading C.J. in Rex v. Golathan (1915) 84 L.J.K.B. 758 at p.759:

> "If there is any ambiguity in the plea it must be treated as a plea of "not guilty" and the trial must proceed in the ordinary way."

Here in Counsel's submission there can be no question of ambiguity as the Record makes it clear that the learned trial judge had fully explained the nature of the charge to the accused before he was called upon to plead.

Counsel's argument has the merit of originality. An appellate court is seldom called upon to upset a conviction on the ground that the trial judge has leaned too far in the direction of acting in what he considers to be the best interests of the accused. The action of the trial judge in this case cannot be interpreted otherwise than as a practical expression of the court's reluctance to convict an accused person, who is without the benefit of legal advice, of any offence without being satisfied that all the ingredients of that offence have been proved beyond reasonable doubt.

In our view there is a duty cast on the trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what that plea of guilty involves. As was said by Lord Reading C.J. in Rex v. Golathan (supra) at p.759:

> "It is a well known principle that a man is not to be taken to have admitted that he has committed an offence unless he pleads guilty in plain, unambiguous and unmistakeable terms."

To this statement of the law could properly be added that not only should the plea be unambiguous but that it should be given in full understanding of all that it implies: R. v. Vent (1936) 25 Cr. Ap. R.55; R. v. Griffiths (1932) 23 Cr. Ap. R. 153.

Although, perhaps regrettably, the learned trial judge in the present case had not set down as a matter of record the considerations he had in mind when, after he received a plea of guilty, he entered the plea of not guilty, it is we think clear that he must have taken that action in what he considered to be the interests of the accused. The depositions indicated that the accused, while admitting the facts of the entry and of the attempted rape, had put forward two excuses for his conduct: that he had been forced by two boys named John and Henry to go and commit the acts complained of, and further that he had committed these acts when under the influence of liquor. In certain circumstances either of these factors might have amounted to a defence. Although these factors were in the mind of the accused he may well have felt when pleading guilty that all he was admitting was the entry into the house and the attempted rape. We have no doubt that the learned trial judge had this in mind when the plea was taken and that he caused a plea of not guilty to be entered in fairness to the accused, so that every opportunity should be given to the accused to put forward the defences, if such were available, arising from the excuses for his conduct that he had already made.

The obligations on the part of the Court in cases of this character are stated in 10 Hals. 3rd Ed. p.408, para. 742:

> "Plea of guilty. A prisoner is not to be taken to admit an offence unless he pleads guilty to it in unmistakeable terms with appreciation of the essential elements of the offence .....
>
> In the case of an undefended prisoner care must be taken that he fully understands the elements of the crime to which he is pleading guilty, especially if a good defence is disclosed in the depositions."

In the result we are satisfied that the learned trial judge was acting in the best interests of the accused when in the circumstances disclosed he refused to accept a plea of guilty and entered a plea of not guilty. We think that the more usual and the preferable course would have been for the learned judge to explain to the accused the considerations he had in mind and to invite him to alter his plea to "not guilty"; but we are entirely satisfied that no miscarriage of justice occurred as a result of the course he adopted which may have been influenced by doubts as to the ability of the accused fully to understand those considerations.

For these reasons the appeal against conviction fails.

At the hearing of the appeal counsel for the appellant raised the question of sentence and submitted that though no formal notice of appeal against sentence had been given this Court has an inherent power to vary the sentence in appropriate cases. He strongly contended that as the two offences in respect of which the appellant was convicted really formed part of the one offence the sentences should have been made concurrent and not consecutive. There may be merit in this contention; but the appropriate procedure laid down in the Court of Appeal Rules No. 2 1956, made under the Pacific Order in Council 1893, has not been followed. No appeal against sentence has been lodged. No application has yet been made to this Court for leave to appeal out of time. Consequently there is nothing before us upon which we can act in the way of varying the sentences imposed.

For the reasons given the appeal against conviction is dismissed.

C.J. HAMMETT

PRESIDENT.

T.J. GOULD

JUDGE OF APPEAL.

C.C. MARSACK

JUDGE OF APPEAL.

SUVA,

13th June, 1966.