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

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 119 OF 2007
(High Court Cr. Case No. HAC 029 of 2006)

BETWEEN : RAJENDRA SAMY s/o Krishna Samy

Appellant

AND : THE STATE

Respondent

Coram : The Hon. Justice Devendra Pathik
Judge of Appeal

Counsel : Mr. Iqbal Khan for the Appellant
Ms. N. Tikoisuva for the Respondent

Date of Hearing : 17 November 2008

Date of Judgment: 12 December 2008

JUDGMENT
(Leave to Appeal)

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[1] (a) The appellant Rajendra Samy father's name Krishna Samy seeks leave of the Court of Appeal under **section 22(1)** of the Court of Appeal Act against his conviction and sentence on 29 November 2007.

(b) He was sentenced to 9 years imprisonment to be served concurrently on his own plea of guilty.

[2] The appellant was charged on three counts: on the first count with attempted murder contrary to section 214(a) of the Penal Code Cap.17; on the second count with act with intent to cause grievous bodily harm contrary to section 224(a) of the Penal Code and on the third count with intent to cause grievous bodily harm contrary to section 224(a) of the Penal Code.

Appeal grounds on conviction

[3] The grounds of his appeal against conviction are as follows (as in the Amended Grounds of Appeal dated 24 April 2008):-

> *"(a) **THAT** the Honourable Judge erred in Law and in not advising the appellant the nature of the allegations against him.*
>
> *(b) **THAT** the Learned Honourable Judge erred to explain to the Appellant the ingredients of the offence.*
>
> *(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."*

Appeal grounds on sentence

[4] The grounds of his appeal against sentence is as follows:-

> *" (f) **THAT** the sentence is too harsh and excessive.*
>
> *(g) **THAT** the Learned Trial Judge erred in law in taking into consideration irrelevant considerations.*
>
> *(h) **THAT** the sentence passed by the Learned Trial Judge is contrary to the principles of sentencing."*

Consideration of Appeal

[5] In this application for leave to appeal both parties were represented by counsel. As ordered written submissions were filed.

[6] After several adjournments due to appellant's counsel's fault the hearing commenced on 17 November 2008. Mr. Iqbal Khan who had the conduct of the case instructed Mr. Samad to appear for him and to argue the leave application.

[7] The appellant's counsel told the Court that he relies on submissions filed by him and he cannot add anything further to what is already there.

[8] (a) The counsel for the respondent referred the Court to her written submission.

(b) On the grounds advanced by appellant she submitted that the appellant was represented by counsel and he pleaded guilty. The Judge did not have to explain the ingredients of the offence.

(c) She further submitted that there was no evidentiary material which demonstrate the grounds advanced. No such evidence was forthcoming in this application for leave.

(d) (i) I am fully in agreement with the Respondent's Counsel's submission. Mr. Khan who had the conduct of the case was well versed with the circumstances of the case. Mr. Samad, whom he instructed knew nothing about the case and could not say anymore than what was in the submission which did not in itself establish any of the grounds of appeal.

(ii) Ms. Tikoisuva referred to the case of **The Queen v Alich Charles Green** (C.A. No. 364/94 – Court of Appeal, Queensland) where at p4 it is stated:

> **"The mere fact that valid criticisms can be made of counsel's conduct of the trial does not mean that the case has been a miscarriage of justice or that an appeal against conviction should be set aside."**

[9] (i) The case of **Green** (supra) states quite clearly the circumstances in which judgment could be set aside.

(ii) There the Appeal Court refers to the case of **R v Birks** (1990) 19 NSWLR 677 where **Gleeson CJ** at p.685 said:

> **"2 As a general rule an accused person is bound by the way the trial is conducted by Counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by Counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence."**

(iii) The Court in **Green** (supra at p5) goes on to say:-

> **"In our opinion, the second paragraph in that passage (above) should read as indicating no more than that such conduct by counsel will not automatically entitle an accused person to a retrial in every case; it does not mean that such conduct will never have that result; whether or not a new trial should be ordered will depend on the circumstances of each case; a new trial will generally not be appropriate unless incompetent or improper conduct by counsel deprived the person convicted of a significant possibility of acquittal, such as for example when the accused is deprived of the opportunity to present his defence (Sankar v Trinidad and Tabago [1995] 1 WLR 194).**

(iv) It is also pertinent to note the following passage from the judgment in **Green** (supra at p6):-

> **"This test will not be satisfied, other than in "wholly exceptional circumstances", by reference to decisions made in the conduct of the trial which might have involved both advantages and disadvantages for an accused person; e.g. whether or not to call a particular witness or ask a particular question or follow a particular line of inquiry. Sometimes, the course which should have been followed will be obvious: e.g., Koorts. However, the possibility of an unfair trial is not demonstrated by a guilty verdict or other subsequent event which suggests that the impugned decision or advice by counsel did not produce the hoped-for result; that does not even establish that the decision was erroneous, and even decisions revealed by hindsight to be wrong do not necessarily indicate that the trial miscarried. Whether or not a failure or refusal to follow instructions is a sufficiently exceptional circumstance to entitle a convicted person to a retrial need not be decided on this occasion, but we tentatively incline to the view that it would be necessary for an appellant to prove disobedience of a specific instruction on a matter of substantial importance, i.e. which was directly material to the proper conduct of the defence and might have affected the outcome of the trial."**

[10] As far as this application is concerned there is no evidence before the Court to show where the learned Judge was in error in dealing with the Appellant's case.

[11] On sentence, the appellant makes bald assertions of error, unsupported by particulars. There is no evidence of what irrelevant consideration the learned judge took into account.

[12] (i) The learned Judge made specific findings stating that the appellant attempted to kill his *" mother Ram Kuar, and your two 19 year old nephews Amit Raj Sami and Ashneel Aman Chand. On 6th of June you recorded in your diary a plan to execute your mohter, brother,*

sister and brother-in-law, and then to commit suicide" (sentencing remarks p1).

(ii) Further the learned Judge stated '*your counsel has mitigated on your behalf and tendered written references*'.

(iii) The learned Judge stated quite clearly how she arrived at the sentence imposed on the appellant on the three counts. Counsel did not say where the learned Judge went wrong in arriving at the sentence.

Conclusion

[13] The learned counsel for the appellant by adopting the bald assertions as grounds of appeal for leave without any supporting material in the record or submission cannot expect to succeed on this application.

[14] In fact I find that it is a frivolous application devoid of any merits. The application has been very badly presented as no evidentiary material was drawn to the Court's attention for its consideration. What has been put before the Court is a sheer waste of Court's time.

[15] On an application of this nature one should argue the matter by drawing the Court's attention to written record to convince the Court as to where the learned Judge erred.

[16] This is a case where the appellant had pleaded guilty while being represented by counsel.

[17] On a plea of guilty the Court of Appeal in **Alesi Nalave, Kelera Marama v The State** (Crim. App. No. 4/06 – 24.10.08) stated:

> ***"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) 81 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)."***

[18] Further in **Maxwell v The Queen** (1998) 184 CLR 501, the High Court of Australia at p511 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."***

[19] There is nothing before the Court to convince it that the plea of guilty was other than an unequivocal plea.

[20] For the above reasons, I conclude that the appellant has been lawfully convicted and sentenced and that there is no merit in the application for leave to appeal.

[21] The application is therefore dismissed.

Devendra Pathik

Judge of Appeal

At Suva

Friday, 12th December 2008