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

CRIMINAL APPEAL NO. AAU 0069 OF 2014

BETWEEN	:	**SUBRAMANI NAIDU**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Chandra JA** **Rajasinghe JA** **Hamza JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant** **Mr. L. J. Burney with Ms. S. Lodhia for Respondent**
Date of Hearing	:	**3 July 2018**
Date of Judgment	:	**4 October 2018**

JUDGMENT

Chandra JA

[1] I agree with the reasons, conclusion and the proposed orders in the judgment of Rajasinghe JA.

Rajasinghe JA

[2] The Appellant had been charged in the High Court of Lautoka with one count of Murder, contrary to Section 237 of the Crimes Act and one count of Attempted Murder, contrary to Section 44 and 237 of the Crimes Act. The Appellant was first produced in the Magistrate's Court on the 24th of February 2012. Subsequent to several adjournments in

the Magistrate's Court, the matter was transferred to the High Court on the 20th of December 2012. The Appellant was produced in the High Court on the 4th of January 2013. The Appellant pleaded guilty for the two offences on the 6th of February 2013. The learned Judge then convicted the Appellant and sentenced him to life imprisonment with a non-parole period of 20 years for the offence of murder and 10 years imprisonment for the offence of attempted murder. The learned Judge had further ordered that the two sentences to be served concurrently. Aggrieved with the said conviction and the sentence, the Appellant filed this appeal against the conviction and the sentence on the following grounds, *inter alia;*

Appeal against conviction.

The learned trial Judge erred in law and in fact when he failed to consider the defence of insanity which was available to the Appellant by virtue of the medical evaluation done by the St. Giles Hospital which showed that the Appellant was suffering from a mental illness,

The learned trial Judge erred in law and in fact when he did not properly put the right to have legal representation to the Appellant,

The learned trial Judge erred in law and in fact when he failed to ensure that the Appellant understood the elements of the offences he was charged with.

Appeal against the Sentence,

The learned trial Judge erred in principle and also erred in failing to take into account some relevant considerations resulting in a non-parole period of 20 years which was excessive,

The learned trial Judge erred in principle and in law when he sentenced the Appellant to 20 years non-parole period without taking into account Section 4 (1) (a) and 4 (2) (j) of the Sentencing and Penalties Act.

The learned trial Judge erred in imposing 20 years non-parole period which is in conflict with the penalty provision of Section 237 of the Crimes Act.

[3] The single Judge of the Court of Appeal in his ruling dated 10th of June 2015, granted leave to appeal against the conviction and the sentence. Subsequently, the court directed the parties to file their respective written submissions. The learned counsel for the Appellant informed the court that he would adopt the same written submissions that were filed in the court during the hearing of the leave application. The learned counsel for the Respondent filed his written submissions as per the directions. Subsequently, the court heard the oral submissions of the counsel for the Appellant and the Respondent on the 3rd of July 2018.

[4] Having carefully considered the record of the proceedings in the High Court, the respective written and oral submissions made by the learned counsel of the Appellant and the Respondent, I now proceed to pronounce the judgment of this court as follows.

Factual Background

[5] The Respondent alleged that the Appellant had murdered his nephew on the 17th of February 2012 by striking him with a cane knife. He had then attempted to murder his mother by hitting her with a cane knife. The deceased was two years old at the time when this incident took place.

Second Ground of Appeal

[6] For convenience, I first focus my attention to the second ground of appeal, where the Appellant alleges that the learned trial Judge did not properly give him the right to have legal representation. This ground constitutes two components. The first part is to determine whether the court has properly informed the Appellant about his right to defend himself and the manner he could exercise his right to defend himself. The second part is to

determine whether the Appellant made an informed and considered decision about his legal representation.

[7] Section 14 (2) (d) of the Constitution states that:

> *"Every person charged with an offence has the right;*
> *to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right"*

[8] Section 14 (2) (d) of the Constitution states that every person charged with an offence has the right to defend himself. Therefore, the main right given to the accused under Section 14 (2) (d) of the Constitution is the right to defend himself against the charge for which he has been charged with. Section 14 (2) (d) has further stated the manner in which the accused could exercise this right to defend himself. The accused could defend himself either in person or through a legal practitioner of his own choice and at his own expense. It is an option that the accused could avail of. Section 14 (2) (d) states a further option for the accused if he chooses to be represented by a legal practitioner. The accused could retain the service of a legal practitioner of his own choice. For that the accused has to bear the expenses of retaining the legal practitioner. If the accused has no sufficient means to engage a legal practitioner, he could seek assistance from the Legal Aid Commission to provide him a legal practitioner. The Legal Aid Commission could provide the accused a legal practitioner pursuant to Section 15 (10) of the Constitution, where it states that:

> *"The State, through law and other measures, must provide legal aid through the Legal Aid Commission to those who cannot afford to pursue justice on the strength of their own resources, if injustice would otherwise result."*

[9] Unlike other rights that have been stipulated under Section 14 (2) of the Constitution, Section 14 (2) (d) has specifically required that the accused must be promptly informed about his right to defend himself and the manner in which he can exercise his right to defend, including the right to obtain assistance from the Legal Aid Commission. Accordingly, the accused must be informed not only the right to defend himself, but also the manner in which he could exercise his rights to defend.

[10] Section 14 (2) (d) of the Constitution has not specifically stated as to who has the duty or the responsibility to inform the accused of his right to defend. According to the provisions of the Criminal Procedure Act, the criminal proceedings against a person are instituted in the Magistrates' Court consequent to the filing of charges by the prosecution. In most cases, it is the police Prosecution Office that files charges against the accused persons. Once the matter is transferred to the High Court pursuant to the applicable provisions of the Criminal Procedure Act, the Director of Public Prosecution files information, containing the charges against the accused. In many cases the arrest and charging of the accused occurs in the same transaction. Under such circumstances, the police or the relevant authority who charges the accused could inform the accused his right to defend and the manner he could exercise his right to defend. It is important to understand that the right given to the detainee or the arrested person under Section 13 (1) (c) of the Constitution is not the same rights as stipulated under Section 14 (2) (d) of the Constitution.

[11] Section 13 (1) (c) of the Constitution states that:

> *"To communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission;"*

[12] The purpose of granting the right to the detained or arrested person as stipulated under Section 13 (1) (c) is to provide assistance to the detainee in order to dispel the pressure inhabited in the custodial interrogation and protect his rights during the period of investigation. The right to defend himself against the charge pursuant to Section 14 (2) (d) is based upon the concept of fair trial. The concept of fair trial is fundamentally founded on two basic principles of natural justice. They are *nemo iudex in causa sua* (no man a judge in his own cause) and *audi alteram partem* (hear both sides). The right to defend himself is an integral component of the principle of *audi alteram partem*.

[13] As stated before, most of the criminal proceedings commence with the simultaneous arrest and the charging of the accused. Under such circumstances, the police or the charging authority could inform the accused of his right to defend. However, there are certain criminal proceedings which begin with the issuing of summons to the accused. In such proceedings the accused appears in court upon receiving the summons and is not being produced by the police after he is arrested. Pursuant to Section 198 (1) of the Criminal Procedure Act, the Director of the Public Prosecution or the Deputy Commissioner of the Fiji Independence Commission Against Corruption is required to file the information in the High Court, charging the accused within 21 days of the order for transfer by the Magistrate. Taking into consideration the different modes of institution of criminal proceedings, the court has the utmost responsibility to assure whether the accused is properly and promptly informed of his right to defend himself and also the manner in which he could exercise his right to defend himself. Moreover, the court must be satisfied that the accused has made an informed and considered decision about his right to defend and his legal representation.

[14] The court is the custodian of the rights of the parties in the proceedings. It is the duty of the court to ensure a fair trial. Therefore, the court must vigilantly observe that the parties to the proceedings are given their respective rights in order to ensure that proceedings are conducted in a fair and just manner. Therefore, it is the duty of the court to communicate and explain in detail to the accused about his right to defend himself and the manner he could exercise this right. Moreover, the court must be satisfied that the accused made an

informed and considered decision about his representation in the trial. Therefore, the court must communicate this right to the accused at the most meaningful time of the proceedings that is before the plea is taken.

[15] A mere explanation that the accused has a right to have legal representation or a mere explanation of the three options of legal representation does not satisfy the requirement as stipulated under Section 14 (2) (d) of the Constitution. Pursuant to Section 14 (2) (d) of the Constitution, the right to representation, either in person or through a legal practitioner, is derived from the right to defend himself against the charge. Therefore, the court must first explain to the accused his right to defend himself against the charge for which he or she has been charged with. Having informed the accused his right to defend himself, the court must then proceed to explain to the accused that he has three optional rights in representation in order to exercise his right to defend himself in the proceedings.

[16] Accordingly, it is incumbent on the trial court (including the Trial Judges in the High Court and the Trial Magistrates' in the Magistrate's Court) to inform the accused before the plea is taken, that the accused has the right to defend himself against the charge that he or she has been charged with. The court then proceeds to explain to the accused that he could exercise his right to defend himself in person or through representation of a legal practitioner of his own choice and at his own expenses. If the accused has no sufficient means to engage a legal practitioner, he or she could obtain the service of Legal Aid Commission to obtain the service of a legal practitioner under the legal aid scheme.

[17] In this case, the Appellant was first produced in the High Court on the 15th of January 2013. The record of the proceedings in the High Court pertaining to 15th of January 2013, states that:

> *Court : Right to have legal representation, What do you like to do,*
> *Accused : I defend myself.*

[18] In view of the record of the proceedings in the High Court, it appears that the court has not explained to the Appellant that he has a right to defend himself against the charge and the manner in which he could exercise that right in detail. The court has merely said that the Appellant has a right to have legal representation. Accordingly, I am satisfied that the learned trial judge has not properly informed the Appellant about his right to defend himself and the manner in which he could exercise his right to defend in the hearing as required under Section 14 (2) (d) of the Constitution.

[19] I now draw my attention to determine whether the Appellant has made an informed and considered decision about his legal representation in the proceedings.

[20] The Appellant was first produced in the Magistrate's Court on the 24th of February 2012. The Police Inspector, who appeared for the prosecution has informed the learned Magistrate that the Appellant has a history of mental instability. The learned Magistrate had then ordered for a psychiatric assessment of the Appellant and correctly transferred the matter to the Chief Magistrate. The matter had been mentioned several times before the Chief Magistrate. The Chief Magistrate, on the 26th of July 2012, had ordered that the matter be transferred back to the Nadi Magistrate's Court in order to make an appropriate order to transfer the matter to the High Court, on the ground that the report of the psychiatric assessment states that the Appellant was aware of his acts and understood the consequences of his action of that day. Accordingly, the matter was transferred to the High Court on the 20th of December 2012.

[21] According to the record of the proceedings in the High Court, six psychiatric assessment reports had been tendered in the Magistrate's Court. The first one is dated 21st of March 2012. In this report, the doctor has provided the brief history of the Appellant's condition and requested the court to provide further information in order to provide a complete report. The second report dated 09th of May 2012, states that the Appellant was not fit to take his plea. Moreover, the report has requested the court to provide further information in order to provide a complete report. The third report was made on the 23rd of May 2012. The third report has reiterated the fact that the Appellant was not fit to take his plea and

once again requested the court for further information, in order to provide a complete report. The fourth report, dated 25th of July 2012, stated that the Appellant was not fit to take his plea. The fifth report dated 03rd of September 2012, has not specifically stated whether the Appellant was fit to take his plea. It has discussed the background of the mental condition of the Appellant and its consequences. The last report, dated 7th of November 2012, was a mere repetition of the report dated 3rd of September 2012.

[22] Accordingly, the psychiatric reports dated 9th of May 2012, 23rd of May 2012 and 25th of July 2012 have specifically stated that the Appellant was not fit to take his plea. The last two reports have not specifically stated whether the Appellant was fit to take his plea. Therefore, there is no conclusive evidence before the court that the Appellant was fit to take his plea on the 06th February, 2013, thus creating a doubt whether the Appellant had the capacity to make an informed and considered decision about his legal representation on the 15th of January 2013.

[23] In view of the above discussed reasons, the second ground of appeal succeeds.

First and Third Grounds of Appeal

[24] I now draw my attention to determine the first and third grounds of appeal together. These two grounds are founded on the contention that the learned Judge has failed to properly take into consideration the psychiatric reports done by the St Giles Hospital when the learned Judge convicted and sentenced the Appellant.

[25] In **Rex v Golathan (1915) 11 Cr.App 758, p759)** the Court of Criminal Appeal has discussed the scope of plea of guilty, where Lord Reading C.J. held that:

> *"No man should be convicted upon an ambiguous plea. If there is any ambiguity in a plea it must be treated as a plea of Not Guilty and the trial must proceed in the ordinary way. It is a well-known principle of our law that a man is not to be taken to have admitted that he has committed an*

offence unless he pleaded guilty in plain, unambiguous and unmistakable terms."

[26] Accordingly, the court must satisfy that the accused pleaded guilty in a plain, unambiguous and unmistakable manner. The Fiji Court of Appeal in **Michael Iro v Reginam (1966) 12 FLR 104)** held that:

> *"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 we said by Lord Reading C.J. in Rex v Golathan (supra) at p. 759,*
> *It is 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 unmistakable 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 fully understanding of all that is implies."*

[27] As discussed above, it is clear that the learned Judge has not properly taken into consideration whether the Appellant had the capacity to take his plea. Nor has the learned prosecutor who appeared for the State in the High Court submitted any of the psychiatric reports of the Appellant to the court. Therefore, I am satisfied that the learned Judge has not properly taken into consideration whether the Appellant had the capacity to properly understand the elements of the offence.

[28] It is not clear whether the learned trial Judge was aware of the availability of psychiatric reports of the Appellant until he was sentenced. However, in paragraph 10 of the sentence, the learned trial Judge has taken the psychiatric report dated 2nd of November 2012 into consideration. Accordingly, it appears that the learned trial Judge was aware about the psychiatric report of the Appellant when he proceeded to sentence him.

[29] The psychiatric report dated 2nd of November 2012 has specifically stated that the Appellant was aware of his actions and understood the consequence of his action on the date of this alleged offences, though he was mentally unwell. It has further stated that his medical illness will deteriorate if he stops taking his prescribed medications. The Doctor has found in his report that the Appellant had not been taking his medication for years prior to the alleged incident.

[30] Having referred to the psychiatric report dated 2nd of November 2012, the learned trial Judge has given certain orders in respect of the treatment of the Appellant. Therefore, it is clear that the learned trial Judge has accepted and acted upon the said psychiatric report as he gave certain orders about the mental condition of the Appellant in his sentence.

[31] The Fiji Court of Appeal in **Michael Iro v Reginam (supra)** found that the decision of the learned trial Judge to enter a plea of not guilty and proceeding to trial, when the accused pleaded guilty, has not caused any miscarriage of justice. In that case the accused had pleaded guilty for the offence, but explained the excuse for his conduct. The learned trial Judge had disregarded the plea of guilty and entered a plea of not guilty.

[32] In this case, there are six psychiatric reports before the learned trial Judge to suggest that the Appellant was not fit to take his plea. The contents of those psychiatric reports further suggest that the Appellant was not mentally well at the time that the alleged offence took place and his medical condition had been deteriorated as he had not been taking his prescribed medication for years prior to the committing of this alleged offence. This information further suggests the availability of the defence of insanity. If the learned trial Judge had properly taken into consideration these psychiatric reports, he would have definitely concluded that the Appellant was not fit to take his plea. Moreover, the learned trial Judge would have concluded that the plea of guilty was not unambiguous and plain as the psychiatrist reports suggest the availability of the defence of insanity.

[33] Having taken into consideration the above discussed factors, I find that the Appellant's plea of guilty was an ambiguous and mistaken plea, therefore the conviction entered against the Appellant cannot stand. I accordingly allow the first and third grounds of appeal.

[34] In view of my above conclusion in respect of the conviction, I do not wish to proceed to determine the grounds of appeal against sentence.

Re-Trial

[35] Having concluded that a substantial miscarriage of justice has occurred in relation to the conviction, I now turn to discuss whether an order of re-trial would serve the ends of justice in this case.

[36] The Fiji Court of Appeal in **Azamatula v State (2008) FJCA84; AAU0060.2006S (14 November 2008)** held that:

> *"As was said by the Privy Council in Au Pui-kuen v Attorney-General of Hong Kong ([1980] AC 351) 'no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it' (see also Ting James Henry v HKSAR [2007] HKCFA 71). The overriding consideration in the exercise of the power is the interests of justice (Aminiasi Katonivualiku v. The State (CAV 0001/1999S; 17 April 2003).*
>
> *In the case of Au Pui-kuen the Privy Council went on to say that the exercise of discretion to order a retrial requires the consideration of a number of factors, some of which may weigh in favour of a retrial and some against. The Privy Council said that the interests of justice are not confined to the interests of either the prosecutor or the accused in any particular case. They also include the interests of the public that people who are guilty of serious*

crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge below. One factor to be considered is the strength of evidence against an accused and the likelihood of a conviction being obtained on a retrial. The weaker the prosecution case, the less likely a retrial would be ordered. Another factor would be identifiable prejudice to an accused whilst awaiting a retrial such as might cause him to be unable to get a fair retrial. It has also been said that a retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Togara v. State (by Majority) [1990] FJCA 6)."

[37] The conviction was entered against the Appellant upon his plea of guilty and not after the conclusion of a full hearing. I am mindful of the fact that this incident took place nearly seven years ago and the Appellant had already spent nearly five years in prison. However, this is an incident involving the murder of a two year old child and severely wounding an old lady. The interest of justice demands a full and complete hearing of this matter according to the correct procedure. Therefore, I do not find that an order of re-trial would cause any prejudice to the Appellant. I accordingly order a re-trial in this matter.

Hamza JA

[38] I have read in draft the judgment of Rajasinghe JA and I agree with his reasons and conclusions.

[39] *The orders of the Court are:*

a) *Appeal against the conviction dated 12th of February 2013 is allowed,*
b) *The conviction entered against the Appellant on the 12th of February 2013 is set aside and the sentence dated 14th of March 2013 is quashed,*
c) *A re-trial is ordered before another Judge of the High Court,*
d) *The case to be listed before the High Court of Lautoka on the 18th of October 2018 to take appropriate steps for a re-trial,*

e) *The Appellant is remanded in custody.*

Hon. Mr. Justice Suresh Chandra
JUSTICE OF APEAL

Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Hon. Mr. Justice R. Hamza
JUSTICE OF APPEAL