

IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0084 OF 2015
[High Court Criminal Case No. HAC 040 of 2015]

BETWEEN : **ETONIA VOSA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Appellant in person**
Mr. Vosawale M. for the Respondent

Date of Hearing : **14 May 2019**

Date of Judgment : **06 June 2019**

JUDGMENT

Gamalath, JA

[1] I have read the judgment in draft form and I agree with its conclusions.

Prematilaka, JA

- [2] This appeal arises from the conviction of the appellant on a single count of attempted murder contrary to section 44 and 237 of the Crimes Decree, 2009. The Amended Information dated 06 March 2015 alleged that the Appellant on 02 January 2014 at Suva in the Central Division attempted to murder Vaciseva Seru.
- [3] On 16 May 2015 the appellant pleaded guilty to the charge in the High Court of Suva. A month later on 16 June 2015, the Learned High Court Judge sentenced him to life imprisonment and fixed a term of 08 years of mandatory minimum imprisonment before the appellant could be considered for parole.
- [4] The appellant had filed a timely application for leave to appeal against the conviction and sentence pursuant to section 21(1) of the Court of Appeal Act along with an application for bail pending appeal. However, at the leave stage the appeal against the sentence had been abandoned. Altogether, 03 grounds of appeal had been urged against the conviction. On 26 January 2018, the single Judge of the Court of Appeal seems to have identified the third ground of appeal as involving a pure question of law requiring no leave and left the other two grounds of appeal based on the alleged incompetence of defence counsel and the ambiguous guilty plea undecided as the full court records were not available at the leave stage. Gounder, JA had remarked that, however, there was a concern that the appellant may not have understood the consequences of his guilty plea which is arguable before the Full Court. The application for bail pending appeal had been refused.

Grounds of Appeal

- [5] The grounds of appeal against the conviction that would be considered at this stage are as follows:
- (i) Incompetency of defence counsel.
 - (ii) Guilty plea was ambiguous.
 - (iii) The admitted facts did not disclose the offence of attempted murder.

Amended summary of facts

- [6] Before considering the grounds of appeal, it would be necessary to read the summary of facts as presented to the High Court by the State and even considered at the leave stage. They are as follows.

“Background

1. *The accused is Etonia Vosa, 28 years, self-employed of Tamavua.*

The complainant is Vaciseva Seru, 29 years, Staff Nurse at CWM hospital, Suva. In January 2015, she resided at 73 Howell Road, Suva.

2. *The accused and the complainant were married in 2007 and have two children, a daughter and a son. In November of 2014, the accused and the complainant divorced. Currently the children are 5 years and 7 years old.*

Offence

3. *On 2 January 2015, between 3.30 pm and 4 pm, the complainant was at her flat at 73 Howell Road, Suva, with her two children. She was lying in bed when the accused woke her. The complainant asked the accused to leave. She could smell liquor on him. She asked not to see the children when he was drunk. The accused asked for food and was served by the complainant. He sat on the kitchen table and ate.*
4. *The complainant went into her bedroom while the accused ate in the kitchen. While the complainant was in her bedroom, the accused went to the kitchen sink, picked up a kitchen knife which was about 30cm in length and went towards the complainant's bedroom. When the complainant was returning to the kitchen, she met the accused, standing at her bedroom door.*
5. *Without saying anything, the accused, attempted, with intent to cause, or was reckless as to causing the death of Vaciseva Seru and stabbed her several times with the kitchen knife, on her upper body. The complainant fell in the bathroom which was next to her bedroom door. She used her arms to defend herself.*
6. *The accused threw a kitchen knife when the blade bent. The complainant pushed the accused away and ran out of the bathroom. As she ran towards the back door, she noticed her children were watching and crying.*
7. *The accused tried to stop the complainant from running out of the house. The complainant got away and ran up a flight of steps and call for help.*
8. *The accused walked away from the complainant's flat. He was put under citizens arrest and escorted to Samabula Police Station in a taxi.*

Annexed and marked at PE 1 is photograph number 22 of the photographic booklet showing the entrance to the bedroom and bathroom.

Annexed and marked as PE 2 is photograph number 24 of the photographic booklet showing the entrance to the bathroom.

Annexed and marked as PE 3 is photograph number 33 and 34 of the photographic booklet showing the kitchen knife.

Report

9. *The matter was reported at the Samabula Police Station on the same day by the accused. The Samabula Police personnel visited the complainant's flat and sealed of the area.*

Medical Findings

10. *The complainant was taken to CWM hospital for medical attention. She was admitted into the Intensive Care Unit (ICU). The complainant's medical report revealed 7 lacerations:
 - i. 2 cm x 0.5 mm on front left forehead
 - ii. 1 cm x 0.1 mm on upper left eyebrow
 - iii. 3 cm x 0.5 mm on upper left arm
 - iv. 4 cm x 0.5 mm on left wrist
 - v. 1 cm x 1 mm on left posterior elbow
 - vi. 2 cm x 0.5 mm on left posterior elbow
 - vii. 2 cm x 0.5mm on left posterior elbow*
11. *The complainant also had a stab wound on her neck which required repair by surgery. She was placed on a ventilator for 14 days. She was discharged from ICU on 17 January 2015 and discharged from CWM hospital on 20 January 2015. She was admitted in hospital for 18 days.*

Annexed and marked as PE 4 is the medical report of the complainant

Annexed and marked as PE 5 is a letter from Dr Karthik Mudliar dated 13 January 2015

Caution Interview and Formal Charge

12. *The accused was caution interviewed on 3 January 2015 at the Samabula Police Station. He made full and voluntary confessions to stabbing the complainant several times with a kitchen knife on 2 January 2015 at 73 Howell Road, Suva. He was then formally charged for attempted murder.*
13. *In the caution interview, the accused said he was at the complainant's house for Christmas and New Years and later left. He returned to meet the children. The night before he returned, he consumed alcohol with others.*

14. *The complainant asked if he drank alcohol and he told her he did. She told him to leave or she would call the police. He sat down to eat food served by the complainant.*
15. *The accused claimed that he had arguments with the complainant and she was swearing at him. He got really angry thinking that he will never see his children again.*
16. *He saw the complainant walking to the toilet and picked a knife from the dish rack and stood outside the toilet to wait for her. **He wanted to injure her.** He stabbed her several times on her upper body when she came out and when he saw the knife had bent, he threw it.*
17. ***He said that this was a learning step for the complainant. He was angry and wanted to teach her a lesson.** The complainant ran out of the house and he ran after her to bring her back in the house so that the problem could be theirs alone.*

Annexed and marked as PE 6 is the record of interview of the accused.

18. *The accused made a further statement during the formal charge. The accused claimed that there were marital problems which led to a divorce. He claimed the complainant has an extra marital affair. He left his job to look after their two children.*
19. *On the day of the incident, the accused claimed the complainant swore at him. He picked up a knife and stabbed her. He stated he felt sorry for his children but is satisfied with what he did. **He said he is happy she will learn a lesson.***

Annexed and marked as PE 7 is the charge statement of the accused.

Dated this 1st day of June 2015

(Signed)

State Counsel”

[7] I shall now proceed to consider the grounds of appeal.

Incompetency of defence counsel.

[8] It appears from the proceedings of 20 March 2015 that representations on behalf of the appellant had been made by the Legal Aid Commission to the Director of Public Prosecutions (DPP) seeking an amendment of the charge with no success. Thereafter, on 19 May 2015 the counsel for the appellant had indicated to court that they were ready to plead to the amended information. Thereafter, the appellant had indicated that his

preferred language is English and the court clerk had read out the amended information to the appellant in English. The trial judge had written in his handwriting on 19 May 2015 that the accused was ready to plead and information was read over to him, and that the appellant had understood the count and pleaded guilty. The following questions and answers have been recorded in the typed transcript.

‘Q: Do you understand the charge that you are being charged with?’

A: inaudible....

Q: Do you plead guilty or not guilty?’

A: Guilty.

Clerk: My Lord, the accused understands the charge and has pleaded guilty.’

- [9] Thereafter, on 01 June 2015 the amended summary of facts had been read out to the appellant by the court clerk in English language and asked the appellant whether he had read and understood the amended summary of facts and whether he admitted them. The following proceedings are found on the record thereafter.

Clerk: My Lord, the accused has read the amended summary of facts and has admitted to the facts, My Lord.

Judge: Yes. I find that he has pleaded guilty and he admitted the Summary of Facts voluntarily. Therefore on his own plea of guilty, I convict him for the offence that he is charged. Right, now Sentencing Submissions and Mitigation?’

- [10] It appears from the record that the State had been ready with the initial summary of facts on 27 May 2015 but whether a copy of it had been served on the appellant or his counsel is not clear. Yet, the narration of facts in the amended summary of facts read out on 01 June 2015 is substantially the same as in the initial summary of facts.
- [11] The appellant’s first complaint before this court is that the defense counsel was incompetent in that she had failed to bring to the notice of court the matters relating to the reconciliation that had taken place between him and his wife.

- [12] There was no affidavit filed by the complainant regarding such a reconciliation prior to the appellant being sentenced on 16 June 2015. An affidavit of the complainant's wife dated 10 June 2015 containing such sentiments had been tendered to the Court of Appeal as part of an application to adduce fresh evidence by the appellant only on 25 October 2016. The application to lead fresh evidence does not seem to have been prosecuted thereafter.
- [13] The counsel for the appellant had submitted very comprehensive sentencing submissions in the High Court and urged the learned trial judge to impose a minimum term of non-parole period as there was no sentencing discretion in the judge to impose any other sentence other than a mandatory life sentence as the head sentence for attempted murder. In the course of the sentencing submissions, the appellant's counsel had referred to his willingness to apologize to his wife and desire to get back to his family, especially the children. I do not think that the defense counsel could have urged more in that respect. There was no material for the counsel to go further and plead any reconciliation between the appellant and the complainant at that stage.
- [14] I also observe that in the timely notice of appeal/ application for leave to appeal filed by the appellant, he had not made the above allegation against his counsel or set out a ground of appeal based on the alleged incompetence of his counsel, which appeared for the first time in the amended grounds of appeal filed in September 2015. Even there, I do not find any complaint that the defense counsel had failed to bring to the notice of the trial judge any reconciliation between the appellant and his wife despite his instructions to do so. In any event the appellant's grievance is a matter affecting the sentence and not the conviction and the appellant does not challenge the sentence before this court.
- [15] The appellant also alleges in his written submissions filed at the leave stage that he was not properly advised and represented by the defense counsel who failed to properly present his case in as much as
- (i) He was not given sufficient opportunity to give full instructions to the counsel concerning the case.

- (ii) His counsel failed to explain to the appellant the details of the elements of the offence he was charged with, the seriousness and the complexity of the case and possible sentence and punishment.
- (iii) His counsel failed to request the trial judge to give an opportunity to his wife to speak on 'mitigating factors' on his behalf at the stage of sentencing.

[16] There is nothing to substantiate the allegation that the appellant's counsel had not given him enough opportunity to give instructions on the conduct of the case. On the contrary it appears that the defense counsel had in fact made representations to the DPP in an attempt to get the count on attempted murder reduced to a lesser offence. It would have been impossible for the counsel to do so without obtaining adequate instructions from the appellant. In any event, the appellant had been directly spoken to by the court clerk at the stage of reading out the amended information but he had failed to inform court of any lack of opportunity to instruct his counsel. The appellant had not come out with this allegation in the notice of appeal or the amended grounds of appeal either. Therefore, I consider it to be devoid of any merit.

[17] It is not sufficient for counsel to say that the defendant wishes to plead guilty. The defendant must himself plead (vide **R. v. Heyes** [1951] 1 K.B. 29). The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do what his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).

[18] When the appellant's complaint under paragraph 15(ii) above is viewed in the light of the above judicial pronouncements, I cannot see any material in the record other than his written submissions filed at the leave stage to conclude that his counsel had acted in disregard of the above principles. As I pointed out earlier, the record of proceedings show that the counsel had attempted to get the charge against the appellant reduced by making representations to the DPP because, obviously, she knew that a conviction on a charge of attempted murder would attract a mandatory life sentence and on the facts there was a likelihood to get the charge reduced to a lesser offence. It is unthinkable that she may not have shared that information with the appellant. Further the defense counsel would in probability have informed the appellant that a plea of guilty would be viewed favorably by the trial judge in fixing the non-parole period. Failing to get the charge reduced, it is only logical for the defense counsel and the appellant to have thought of getting a minimum non-parole period upon tendering an early plea of guilty. Therefore, I am extremely reluctant to admit that the appellant was not made aware of the consequences of pleading guilty to the amended information by his counsel. It would be grossly unfair by the defense counsel to draw such an inference in the absence of any material, for she has no opportunity of responding to that allegation in the appeal before this court.

[19] In addition to the stage prior to tendering the plea of guilty, the appellant had another opportunity to state to the trial judge that he had not understood the charge against him and the consequences of his guilty plea when the summery of facts was read over to him. If that was the case he could still, at the discretion of court, have withdrawn the guilty plea before the sentence was imposed (vide **R. v. McNally** [1954] 1 W.L.R 933; 38 Cr. App. R.90) However, he had not raised any concern with the summery of facts at that stage either. It is clear from the proceedings that the trial judge had no reason to doubt that the appellant had not been made aware of the offence which he was charged with and voluntarily admitting the summery of facts. The defense counsel too had acted on the same assumption. In fact the summery of facts included his caution interview and the charge statement. The appellant stated to this court in his submission that he admits both of them. He does not seem to have said anything to the contrary to the single judge of this court at the leave stage either. Further, at the very early stage in the charge statement the police had made it very clear to the appellant that he was facing a charge of attempted

murder of his wife. Further, the appellant's notice of appeal does not contain any averment that he was not explained the gist of the charge and the prospective punishment by the defense counsel. In the circumstances I am not inclined to accept the appellant's allegation under paragraph 15(ii) above.

[20] The appellant also alleges that his counsel failed to request the trial judge to give an opportunity to his wife to speak on 'mitigating factors' on his behalf at the stage of sentencing. There is nothing to infer that there was such a request to the defense counsel by the appellant. In any event, the appellant's wife had no *locus standi* to plead in mitigating on behalf of the appellant. In my view, what the appellant's wife had stated in her affidavit later tendered to this court would have had no impact on the sentence imposed by the trial judge including the non-parole period. It is clear that the defense counsel had included all possible grounds of mitigation in the sentencing submissions and she cannot be said to have been remiss in her duty in that respect. Thus, the appellant's contention under paragraph 15(iii) above is ill-founded.

[21] In Ensor [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial later appears to have been mistaken or unwise. This would be the case even if the decision or action was contrary to the accused's wishes. Taylor J said in Gautam [1988] Crim LR 109

' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'

[22] Therefore, errors by counsel can only rarely form the basis for a successful appeal. One exception is the case of **flagrantly incompetent advocacy** on the part of the accused's counsel which would vitiate the conviction. O' Corner LJ said in Swain [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate it would quash the conviction.

[23] However, it should be borne in mind that some other exceptions also have been recognized in addition to ‘flagrantly incompetent advocacy’. For example in **Irwin** [1987] 1 WLR 902, though doubted in **Swain**, the error of the defense counsel in taking a snap decision not to call *alibi* evidence arguably occasioning a material irregularity and in **Boal** [1992] QB 591 where the appellant pleaded guilty on the basis of his counsel’s mistaken understanding of the law, despite having a defense which was likely to have succeeded, were regarded as grounds of appeal though not being cases of ‘flagrantly incompetent advocacy’.

[24] Having considered all the material before us in the light of the legal authorities as stated above, I do not think that the appellant’s complaint of incompetence of his counsel has merit. Nor does it in any event reach the threshold of ‘flagrantly incompetent advocacy’ or come within any other exceptions judicially recognized to the general principle propounded in **Ensor**. Therefore, I reject this ground of appeal.

Ground 2

Guilty plea was ambiguous.

[25] **Archbold Pleadings, Evidence & Practice in Criminal Cases** 39th Edition at page 157 on the strength of several authorities states

‘It is important that there should be no ambiguity in the plea, and that where the defendant makes some other answer than Not Guilty or Guilty, as the case may be, care should be taken to make sure that he understands the charge and to ascertain to what the plea amounts. Where the plea is imperfect or unfinished, and the court of trial has wrongly held it to amount to a plea of guilty, on appeal the Court of Appeal may order that a plea of not guilty be entered and that the appellant be tried on the indictment; or that the appellant be sent back to plead again to the indictment ; or may merely quash the conviction without sending the appellant back for trial In the case of an undefended defendant who pleads guilty care should be taken to see that he understands the elements of the crime to which he is pleading guilty, especially if the depositions disclose that he has a good defense....’

[26] **Blackstone's Criminal Practice 1993** at page 1173 states on ambiguous pleas as follows.

'If an accused purports to enter a plea of guilty but, either at the time he pleads or subsequently in mitigation, qualifies it with words that suggests he may have a defence (e.g., 'Guilty, but it was an accident' or 'Guilty, but I was going to give it back'), then the court must not proceed to sentence on the basis of the plea but should explain the relevant law and seek to ascertain whether he genuinely intends to plead guilty..... Should the court proceeds to sentence on a plea which is imperfect, unfinished or otherwise ambiguous, the accused will have a good ground of appeal. Since the defect in the plea will have rendered the original proceedings a mistrial, the Court of Appeal will have the options either of setting the conviction and sentence aside and ordering a retrial or of simply quashing the conviction..... If the former course is chosen (i.e., there is to be a retrial), the court may either then and there direct that a not guilty plea be entered or order that the accused be re-arranged in the court below.....'

[27] On involuntary pleas **Blackstone's Criminal Practice 1993** at page 1173 states that

'A plea of guilty must be entered voluntarily. If, at the time he pleaded, the accused was subject to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty', then his plea is a nullity (Turner [1970] 2 QB 321). On appeal the Court of Appeal will have the same option as it has when a plea is adjudged ambiguous.....'

[28] The Court of Appeal in ***Turner*** (supra) also directed that *'the accused having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty..... - plea of guilty under pressure, accordingly all that follows thereafter was a nullity...'*

[29] In **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64 the appellant had pleaded to all three counts and Calanchini P sitting as a Single Judge considering leave to appeal against conviction said

*'[3] The only ground of appeal against conviction relates to the defence of provocation. The ground involves consideration of two principles. The first principle is 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 (**Nalave v The State** [2008] FJCA 56; AAU 4 and 5 of 2006, 24 October 2008). Equivocation may be evidenced by ignorance, fear, duress, mistake or even the desire to gain a technical advantage (**Maxwell v R** [1996]) 184 CLR 501. The second principle is that it is the duty of a trial judge in Fiji to decide whether on the evidence he should direct the assessors and*

himself on the availability of any alternative defence or verdict that is not raised by the defence (**Praveen Ram v The State** [2012] 2 Fiji LR 34.

'[4] However those two principles must be considered in the context of the particular circumstances of the present application. At the trial the appellant pleaded guilty to all three counts. He was represented by Counsel. With both the appellant and Counsel present in court the prosecution read out a detailed summary of the facts. Through his counsel the appellant admitted the summary of facts.'

'[9] It does not follow that a judge is necessarily prevented from assessing whether a plea of guilty is equivocal when an accused person is represented by counsel. Furthermore it does not follow that a plea of guilty by an accused person who is represented by counsel should be regarded always as an unequivocal plea.'

[10] The issue in this application is whether the judge, on the basis of the agreed summary of facts, was entitled to conclude that the guilty plea was unequivocal. A trial judge is required to address the defence of provocation if there is evidence that raises the issue of provocation. In my judgment there is no reason why that obligation should not apply when a judge is required to determine whether a plea of guilty is unequivocal based on an agreed summary of the facts presented by the prosecution.

[11] If the agreed summary of facts suggests that the plea of guilty may be equivocal due to mistake or ignorance then the judge is, in my opinion, at the very least required to raise the issue with Counsel for the accused

[30] Gates J, (as His Lordship then was) in **State v Saukova** [2000] FJLawRp 1; [2000] 1 FLR 135 (6 July 2000) in exercising revisionary powers examined the caution interview of the appellant and stated

*'It is essential that there be no equivocation in the Accused's admission of the truth of the facts relied upon by the prosecutor in support of the charge see **Abdul Aziz Khan v. Reginam** [1967] 13 FLR 79at 81G. The plea should be in clear, unambiguous, and unmistakable terms **R v. Golathan** (1915) 11 Cr. App. R 79; **R v. Le Comte** [1952] NZLR 564*

[31] I have quoted the segments of proceedings relating to the appellant's plea of guilty in court and do not find anything to suggest that the appellant's plea of guilt was ambiguous or involuntary weighed against the above authorities though the trial judge had not specifically inquired from the defense counsel or the appellant whether plea of guilty was unequivocal. In any event the appellant does not allege that his plea was involuntary. The trial judge in the sentencing order dated 26 June 2015 had stated that he found the appellant's plea of guilty to be unequivocal. The defense counsel in the sentencing

submissions dated 10 June 2015 had stated that the appellant pleaded guilty freely and voluntarily. There are no facts except the written submissions of the appellant filed at the leave stage to substantiate his allegation that he had been influenced by some police officer and the defense counsel to plead guilty in the expectation of a lenient sentence.

[32] **Archbold Pleadings, Evidence & Practice in Criminal Cases** 39th Edition at page 158 states that ‘ *If the defendant pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded, and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment.* ’. It is clear that what the trial judge had done was exactly that and he cannot be faulted.

[33] Accordingly, I am not convinced that the appellant’s plea of guilty is caught up within the legal definitions of ambiguous, equivocal or involuntary pleas. Thus, I reject the second ground of appeal for want of merit.

Ground 3

The admitted facts did not disclose the offence of attempted murder.

[34] Gates J, (as His Lordship then was) in *Saukova* also held as follows

It is essential that a Magistrate be satisfied that an Accused is admitting facts which amount to all of the legal elements that go to prove the charge in question. Where the Accused is represented by counsel, the Magistrate's task is easier. Where the Accused is unrepresented a more onerous burden is cast on the court. But the Magistrate should ensure that the Accused is not simply pleading guilty out of a feeling of remorse for being involved in a result as opposed to causing a result. In Michael Iro v. Reginam [1966] 12 FLR 104 at 106 the Court of Appeal said:

"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".

See R. v. Griffiths (1933) 23 Cr. App. R 153; R. v. Blandford JJ, ex p. G (an infant) [1967] 1 QB 82 DC

The Iro case referred to 10 Halsbury 3rd Edit. p. 408 para. 242:

"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." (emphasis added)

*It is essential that there be no equivocation in the Accused's admission of the truth of the facts relied upon by the prosecutor in support of the charge see **Abdul Aziz Khan v. Reginam** [1967] 13 FLR 79 at 81G. The plea should be in clear, unambiguous, and unmistakable terms **R v. Golathan** (1915) 11 Cr. App. R 79; **R v. Le Comte** [1952] NZLR 564.*

*Where, as here, an Accused after pleading guilty makes a statement in mitigation indicating innocence or lack of fault, a plea of not guilty should be entered otherwise the conviction may be a nullity as in **R. v. Durham Quarter Sessions; Ex parte Virgo** [1952] 2 QB 1. If the Accused adds to his plea of guilty a qualification which, if true, might indicate he is not guilty of the charge, his plea of guilty is to be held equivocal and the court should enter a not guilty plea and proceed to hear the evidence at trial: **P. Foster (Haulage) Ltd. v. Roberts** [1978] 2 All ER 751; **DPP v. Jolame Pita** [1974] 20 FLR 5 at 6E.*

- [35] Avory J's statement in **R v. Forde** [1923] 2 KB 400; (1924) 17 Cr.App.R.99 as to when an appeal may be entertained notwithstanding a guilty plea is widely considered the *locus classicus* on this area of law. His Lordship said at page 403

'A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged.'

- [36] However, Ackner LJ said in **Lee** [1984] 1 WLR 578 at 583E that Avory J's dictum is not an exhaustive statement of when a convicted person may be allowed to appeal notwithstanding a guilty plea.

- [37] Both **Archbold** (supra) and **Blackstone** (supra) confirms the principle of law expressed in **Forde** and **Blackstone** at page 1444 further states that under heading (1) (*i.e.* that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, as for example in **Phillips** [1982] 1 All ER 245) may be brought also cases where the accused had pleaded guilty as a result of improper pressure from the judge (as in **Turner**) or where a plea of guilty or change of it had flowed from a wrong ruling by the judge on a point of law as in **Clarke** [1972] All ER 219 and **Hunt** [1986] QB 125.

- [38] **Blackstone** also states that the occasions anticipated under heading (2) (*i.e.* that upon the admitted facts he could not in law have been convicted of the offence charged as for example in **Boal** and **Whitehuse** [1977] QB 868) will be rare since it implies that both the prosecution and defense had been mistaken as to the true elements of the offence charged.
- [39] I have already concluded under the first ground of appeal that the appellant's allegation that could potentially be considered under heading (1) of Avory J's statement in **Forde** has no merit and therefore, cannot succeed. I am not convinced that the appellant has satisfied this court that he did not appreciate the nature of the charge or did not intend to admit he was guilty of it.
- [40] The only issue still left to be considered in this appeal is whether the appellant's complaint could be considered under heading (2) of Avory J's statement in **Forde** namely whether upon the admitted facts he could not in law have been convicted of the offence charged.
- [41] In order to resolve that issue one needs to necessarily look at carefully the amended summary of facts admitted by the appellant and even more crucially his caution statement and the charge statement which were part and parcel of the summary of facts. The single judge of this court had considered both at the leave stage in granting leave to appeal. It is apt to quote from both these statements.
- [42] The amended summary of facts *inter alia* states that the accused attempted with intent to cause or was reckless as to causing the death of Vaciseva Seru and stabbed her with the kitchen knife. In the caution interview the following questions and answers can be found.

'Q93: Can you tell me what happened when you entered the house?

A: I played with my two children inside the house and I realized the Vacisava was missing so I went to see her room and saw her sleeping. She woke up and asked me if I was drinking last night and I told her that drank grog and beer. I told her that I came to see the kids and I am going back home. She stood up and told me as to why I am here as I had told you to go away from here.

Q94: Can you tell me was she angry when she was talking to you?

A: I think so

Q96: Can you tell me what happened after that?

- A: *I told her that I only came to see the children and she told me that I will prepare a summons for you not to come and see the children and she started swearing at me. I asked her if I could eat and she told me that to eat and fxxx off from the house. I sat in the kitchen and I heard Vaciseva swearing at me and she told me that to fxxx off from the house or she will call the police.*
- Q97. *What happened thereafter?*
- A: *I was really angry at what she was saying and thinking about my kids that I will never see them again because I know she will make a summons in court. I saw Vaciseva walked into the toilet and I went to dish rack and pulled a kitchen knife. I stood outside the toilet and waited for her.*
- Q98: *Can you tell me why you pulled a kitchen knife?*
- A: *I was really angry and I wanted to injure her as she was swearing at me.*
- Q99. *I heard the toilet door opened and I stood face to face with her and started stabbing her stomach, breast and head. I looked at the knife and it had bended so I threw the knife away. I saw her bleeding from her body, neck and face.*
- Q100. *Can you tell me how you felt when you saw blood on her body?*
- A: *I was telling myself that this is the learning step for her.*
- Q101. *Can you tell me how you felt when you stabbed her?*
- A: *I was angry.*
- Q102. *Can you tell me what came to your mind when you were stabbing her?*
- A: *For her to learn a lesson.*
- Q108. *Can you tell me why you stabbed Vaciseva so many times?*
- A: *I tried to injure her so that she may learn to behave and to be a good hearted woman towards me.*
- Q:109. *If you wanted to teach her a lesson why you did not punch her?*
- A: *I had already used my hand on her but she still got that strong sprit inside her.*
- Q: *Can you tell me why you used a knife knowing that it will cause serious injuries to her?*
- A: *It came to my mind to use the knife so that it may injure her.*
- Q:111 *Was it your intention when you stabbed her?*
- A: *I just one (want) her to hurt.'*

[43] The appellant has said in his charge statement as follows

'On Friday when I came to Howell road from Tamavua, Vaciseva started swearing at me. I just couldn't take the swearing and just picked up kitchen knife and stabbed her just to shut up. I do feel sorry for my children but I am satisfied with what I have done because the first time I hit her she treated me like a house girl. I am happy now she will learn her lesson. That all.'

[44] Thus, though the appellant had admitted in the amended summary of facts that he attempted with intent to cause or was reckless as to causing the death of Vaciseva Seru and stabbed her several times with the kitchen knife on her upper body, what he had stated in his caution interview and the charge statement do cast a reasonable doubt about the fault element required in the offence of attempted murder.

[45] Section 237 of the Crimes Act, 2009 defines the offence of murder as follows

‘ A person commits an indictable offence if —

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

*(c) the first-mentioned person **intends to cause, or is reckless as to causing, the death of the other person by the conduct.***

Penalty — Mandatory sentence of Imprisonment for life., with a judicial discretion to set a minimum term to be served before pardon may be considered.

[46] Section 44(3) of the crimes Act, 2009 states

*‘Subject to sub-section (7), for the offence of attempting to commit an offence, **intention and knowledge** are fault elements in relation to each physical element of the offence attempted.*

[47] Thus, for the offence of murder the fault elements are intention or recklessness while for attempted murder it is intention and knowledge. Intention, knowledge and recklessness are defined in section 19, 20 and 21 of the Crimes Act, 2009 respectively. However, in terms of section 21(4) if recklessness is a fault element for a physical element of an offence proof of intention, knowledge or recklessness will satisfy that fault element. Thus, the fault element in the offence of murder can be proved by the proof of intention, knowledge or recklessness while for the offence of attempted murder the fault element should be either intention or knowledge.

[48] The trial judge had in the sentencing order dated 16 June 2015 stated as follows

*‘You asked her for food and you ate the food that was served by her in the kitchen. The complainant was in her bedroom. You picked up a kitchen knife and when the complainant was coming towards the kitchen you stabbed her several times on her upper body **with the intention to kill** her. She used her arms to defend herself and she fell in the bathroom. You threw the kitchen knife when the blade bent. The complainant then pushed you and ran away and she noticed the children watching and crying. You tried to stop the complainant from running out*

of the house by grabbing her arm. The complainant ran and called for help. You walked away from the complainant's flat and you were put under citizen's arrest and were escorted to police station in a taxi

[49] Thus, it is clear that the trial judge had proceeded on the fault element of ‘intention to cause death’ and does not appear to have considered the appellant’s caution interview and the charge statement attached to the amended summery of facts to see whether the facts in the caution interview and the charge statement unequivocally satisfy the fault element of intention to cause death. In my view, when the appellant’s caution interview and the charge statement were part and parcel of the amended summery of facts, the trial court could not have ignored what the appellant had stated in those two statements completely and acted merely on the statement in the amended summery of facts that the appellant attempted with intent to cause or was reckless as to causing the death of Vaciseva Seru. The single judge of this court had referred to the appellant’s position in his caution interview and the charge statement in the leave to appeal ruling.

[50] Having considered all the material available to the High Court Judge, particularly the amended summery of facts, appellant’s caution interview, his charge statement and the medical reports, I am of the view that one cannot draw an unequivocal inference of an intention to cause the death of the victim by the appellant. Though there are seven injuries, only the stab wound on the victim’s neck appears to be grievous which required repair by surgery and keeping the victim on a ventilator in the ICU for 14 days. Five of the injuries on the left arm appear to be defense injuries. The appellant had not come to Vaciseva’s house armed. He had picked up the kitchen knife from the kitchen rack at her house. No premeditation or preplanning could be inferred from the material available. The totality of the evidence before the trial court was more consistent with an intention to do some grievous harm to the victim on the part of the appellant in an attempt to teach her a lesson or tame her than an intention to cause her death.

[51] Though the appellant had said that he got angry leading to his assault on the victim with a kitchen knife due to his wife’s swearing using some foul language, in my view, it falls short of provocation defined in section 242(2) of the Crimes Decree, 2009 for lack of evidence on loss of power of self-control. In fact the appellant admits to have wanted to injure her and was happy to have taught the victim a lesson to be of good behavior

towards him in the future by causing such injuries to her. Thus, on his own account the attack on the victim was not the result of the appellant having lost control of himself.

[52] Therefore, in all circumstances of the case scrutinized by me, I believe that this is a fit case for this court to act on section 24(2) of the Court of Appeal Act which reads as follows.

‘(2) Where the appellant has been convicted of an offence, and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

[53] Therefore, I would substitute for the conviction of attempted murder entered by the trial judge a verdict of guilty of the offence of ‘Act with Intent to Cause Grievous Harm’ under section 255 (a) of the Crimes Act, 2009 which states as follows.

‘A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—

(a) unlawfully wounds or does any grievous harm to any person by any means; or

(b)

Penalty — Imprisonment for life.

[54] I shall now proceed to decide on the sentence that should be passed upon the offence under section 255 (a) of the Crimes Act, 2009. In **State v Vakalaca** HAC027 of 2018: 31 May 2018 [2018] FJHC 455 Gounder J said

‘[13] The offence of Act with Intent to Cause Grievous Harm is punishable by discretionary life imprisonment. The tariff for this offence is between 6 months imprisonment to 5 years imprisonment, and in cases where a weapon is used, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon (State v Mokubula [2003] FJHC 164; HAA0052J.2003S (23 December 2003).’

[55] In **State v Tuigulagula** HAC031 of 2010: 15 March 2011 [2011] FJHC 163 where the offence under section 255(a) involved domestic violence in which the victim was left with only a thumb on each hand, had injuries to her scalp and had been traumatized by the attack, the High Court said

*'[11] The maximum penalty for this offence is life imprisonment and the Court of Appeal has said in **Shaukat Ali** (1976) 22 FLR 87 that for this offence a custodial sentence is inevitable. The offence is akin to section 224 of the old Penal Code and so the authorities pertaining to that section are relevant. In the case of **Mokubula** (2003) FJHC 164, Shameem J set out several cases of assault intending to cause grievous bodily harm and came to the conclusion that the then prevailing "tariff" was between 6 months imprisonment to 5 years imprisonment, but stressing that where a weapon was used the starting point should be 2 years.'*

[56] However, in **Tuigulagula** the trial judge imposed 06 years of imprisonment with a minimum of four years before the accused is eligible for parole and remarked that short of loss of life or loss of a whole limb, he could imagine few circumstances of grievous bodily harm worse than those sustained in the case. The judge took a starting point of sentence of five years imprisonment, added 04 years for aggravating features and reduced 03 years for mitigating circumstances. The Court of Appeal refused leave to appeal against the sentence in **Tuigulagula v State** AAU0070 of 2011: 21 March 2012 [2012] FJCA 18.

[57] **State v Rabia** HAC074 of 2011: 22 February 2012 [2012] FJHC 877 the High Court remarked

*'11. 'In the case of **State v Mokubula** HAA0052 of 2003S, Shameem J on the basis of authorities cited, set the tariff for sentences for the offence of Act with intent to cause grievous harm to be 6 months to 5 years imprisonment. In a case of an attack by a weapon, the starting point should range from 2 years imprisonment to 5 years depending on the weapon. The learned Judge said, that the aggravating factors would be:*

1. *Seriousness of the injuries;*
2. *Evidence of premeditation or planning;*
3. *Length and nature of the attack;*
4. *Special vulnerability of the victim.*

Mitigating factors would be:

1. *Previous good character;*
2. *Guilty plea;*
3. *Provocation by the victim;*
4. *Apology, reparation or compensation.*

[58] Needless to say that the list aggravating and mitigating circumstances set out in **Mokubula** is not exhaustive. In **Rabia**, the nature of the injuries to the first complainant was very serious and his hand was severed as a result of the accused striking with the cane knife when the victim was 3 months pregnant. Her head was also injured where large amount of tissues were cut. The trial judge imposed a sentence of 06 ½ years with a non-parole period of 05 years taking 05 years as the starting point and adding 05 years for aggravating features and deducting 3 ½ years for mitigating factors.

[59] **State v Nalulu** HAC 155 of 2010: 23 July 2013 [2013] FJHC 358 the High Court stated

*[19] The maximum penalty for act with intent to cause grievous harm contrary to Section 255(a) of the Crimes Decree 2009 is life imprisonment. Despite the accepted tariff being between 6 months and 5 years (as set by Shameem J in **Mokubula** (2003) FJHC 164) much higher sentences have been passed when the circumstances dictate. In **Tuigulagula** HAC 81 of 2010 this Court passed a sentence of six years on a husband who did very serious harm to his wife. The penalty being life imprisonment, it is to be regarded as a very serious offence indeed and sentences of up to 8 years would not be out of order.*

[20] In the instant case, the act of hitting the security guard/caretaker over the head with an iron rod is not a trivial act. Attacks to the head, which is a very vulnerable part of the body should attract additional aggravating penalty of 18 months to 2 years on top of the sentence being contemplated

[27] The assault with intent to do grievous harm was dangerous and deliberate. I take a starting point of 6 years and add 2 years to that for an attack to the head which is a serious aggravating feature.'

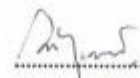
[60] Considering the sentences imposed on the above cases under section 255(a) of the Crimes Act, 2009 as some form of guidance, subject of course to the different aggravating and mitigating circumstances prevalent in those cases, I think in all the circumstances of this case including the aggravating and mitigating factors considered by the trial judge, a sentence of 05 years of imprisonment on the appellant would be appropriate. In terms of section 19(1) read with section 18(1) of the Sentencing and Penalties Act, 2009 I propose to fix a period of 04 ½ years of imprisonment during which the appellant would not be not eligible to be released on parole.

Bandara, JA


[61] I concur with the judgment of Prematilaka, JA and agree with the reasons given and orders proposed.

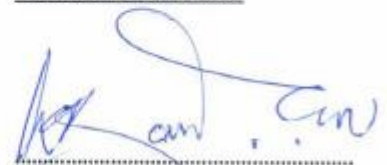
The Orders of the Court are:

1. Conviction for attempted murder is quashed.
2. Conviction for the offence of ‘Act intended to cause grievous harm’ under section 255(a) of the Crimes Act, 2009 is entered against the appellant.
3. Sentence of mandatory life imprisonment with the minimum serving period of 08 years is quashed.
4. Sentence of 05 years of imprisonment is imposed on the appellant to run from 16 June 2015 with a period of 04 ½ years of imprisonment during which the appellant would not be not eligible to be released on parole.
5. The permanent Domestic Violence Restraining Order imposed by the High Court on 16 June 2015 is affirmed.


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Hon. Justice S. Gamalath
JUSTICE OF APPEAL




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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL


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Hon. Justice W. N. Bandara
JUSTICE OF APPEAL