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

CRIMINAL APPEALS NO.AAU 073 of 2015
[In the High Court at Suva Case No. HAC 081 of 2014S)

BETWEEN	**:**	**JOELI MASICOLA**
		Appellants
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Guneratne, AP**
	:	**Prematilaka, JA**
	:	**Bandara, JA**
Counsel	**:**	**Mr. S. Waqainabete for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**07 April 2021**
Date of Judgment	**:**	**29 April 2021**

JUDGMENT

Almeida Guneratne, AP

[1] I agree with Justice Prematilaka's reasoning and conclusion that this appeal should be dismissed.

Prematilaka, JA

[2] The appellant had been charged in the High Court at Suva on one count of murder contrary to section 237 of the Crimes Act, 2009, one count of attempted murder contrary to section 44 and 237 of the Crimes Act, 2009 and acts intended to cause

grievous harm contrary to section 255(a) of the Crimes Act, 2009 committed on 21 February 2014 at Nasinu in the Central Division.

[3] The appellant had pleaded guilty on 13 February 2015 and the High Court judge on his plea had convicted the appellant on 17 April 2015 on all counts. The trial judge had then proceeded to sentence the appellant on 05 June 2015 as follows.

> *'(i) Count No. 1: Murder : :Mandatory life imprisonment , 19 years to be served before parole may be considered.*
>
> *(ii) Count No. 2 : Attempted murder : Mandatory life imprisonment , 14 years to be served before parole may be considered.*
>
> *(iii) Count No. 3 :Act intended to cause grievous harm :04 years imprisonment*

[4] The appellant had been represented by counsel except for the first two days *i.e.* 10 and 27 March 2014. He had pleaded not guilty to all counts on 02 May 2014 but informed court on 17 November 2014 that he wanted to plead guilty and consult his counsel. On 13 February 2015 the appellant represented by his counsel for the Legal Aid Commission had pleaded guilty to all three charges. The court had directed the prosecution to prepare the summary of facts, previous convictions, victim impact report and sentencing submissions. The appellant too had been directed to settle submissions in mitigation of the sentence.

[5] When the matter had come up on 27 February 2015, the High Court judge had directed the defense counsel to consult the appellant carefully on the charges he had pleaded guilty to. Summary of facts had been tendered to court on 17 April 2015 and the defense too had received the same. On the same day, the appellant's counsel in respect of each count had admitted the physical and fault elements of respective offences as set out in the summary of facts. Thereafter, the trial judge had proceeded to find the appellant guilty and convicted him of all three counts. Antecedent report and the victim impact report also had been admitted by the defense. Both parties had relied on their respective submissions in the matter of sentence. Having postponed once on 01 May 2015 the High Court judge had pronounced the sentence on 05 June 2015.

[6] The appellant had appealed against conviction and sentence in a timely manner on 03 July 2015 but filed an application to abandon his sentence appeal on 22 March 2019. The counsel for the appellant neither pursued the sentence appeal nor the application to abandon the sentence appeal at the hearing before the full court.

[7] The appellant's only ground of appeal before the single Judge had been in relation to provocation. The single Judge had considered this ground on the basis of two principles namely 'evidence of equivocation on the record – **Nalave v State** [2008] FJCA 56; AAU 4 and 5 of 2006 (24 October 2008)' and 'availability of an alternative defense on the evidence though not raised by the defense – **Praven Ram v The State** [2012] 2 Fiji LR 34'.

[8] The single judge had then considered the summary of facts presented by the prosecution and admitted by the defense. As appearing in the sentencing order they are as follows:

> *"...The defendant is Joeli Masicola (33 years old in 2014) and he was residing at Sakoca Settlement, Nasinu in 2014. He is legally married to Tavenisa Lewavavai (aged 28 years in 2014) and they have been legally married for about 4 years but they do not have any children.*
>
> *In December 2013 Tavenisa did not stay with her husband anymore and separated from him. She then went to stay with her aunty namely Karalaini Loaloa (aged 40) at Kilikali Settlement along Ratu Dovi Road, Nadera in Nasinu.*
>
> *Tavenisa became involved in a relationship with a man named Jone Nabaisila (aged 38 years) and they both stayed with her aunty at Kilikali Settlement, Nadera in Nasinu.*
>
> *On 21st February 2014 at about 1am, the defendant was at Kilikali Settlement, Nadera in Nasinu asking for a cane knife. The defendant had approached a resident there but was informed that they did not have one.*
>
> *The defendant then went to another settlement namely Veirasi Settlement, Nadera which is 1 – 2 kilometers away. It was about 2am now on the 21st of February 2014. At Veirasi Settlement, the defendant managed to obtain a cane knife from a house there and then left the area without saying anything to anyone.*

Between 2am to 3am on that same day, the defendant returned to Kilikali Settlement and entered the house belonging to Karalaini Loaloa who was sleeping at the time. Tavenisa Lewavavai and Jone Nabaisila were also asleep inside the house at the time in the sitting room.

When the defendant entered the house, he struck Tavenisa Lewavavai first with the cane knife. She was still lying down when she was struck. The defendant struck Tavenisa with the cane knife on the right side of her face, the back of her left shoulder and the right hand amputating or severing her small right finger (or "pinky" finger).

The defendant then turned his attention to Jone Nabaisila who was also lying down. The defendant struck Jone Nabaisila several times namely on the left side of his head, left arm, left hand, abdomen, back and left leg.

Karalaini Loaloa (the aunty) woke up to the voice of her niece Tavenisa saying "Joeli don't". The aunty stood up enquiring what happened and this was when the defendant swung the cane knife at her. When the knife was swung at her by the defendant, Karalaini Loaloa lifted her right hand to defend herself and the knife landed on her right hand. Her right pinky finger was severed or amputated as a result of the cane knife landing on her hand and she also received a cut as well to her right ring finger.

The defendant then ran away from the house thereafter.

Tavenisa Lewavavai, Jone Nabaisila and Karalaini Loaloa were all bleeding as a result of the attack by the defendant. Particularly for Jone Nabaisila, his intestines were protruding because of the cut he received to his abdomen and he was moaning in pain.

The police were called a few minutes later and secured the scene. Tavenisa Lewavavai and Karalaini Loaloa had to go to Colonial War Memorial (CWM) hospital because of their injuries. For Jone Nabaisila, it was noticed as if he was "giving his last breath" or struggling to breathe. He did not say a word. He too was taken to the hospital minutes after the attack but passed away later on the same day at about 3am. The cause of death for Jone Nabaisila in the view of the pathologist Dr. James Kalougivaki was excessive blood loss due to multiple slashed (cut) injuries to the deceased. The post mortem was conducted on 22nd February 2014.

Tavenisa Lewavavai was medically examined on the same day at around 4am at the Colonial War Memorial Hospital by Dr. Timoci Qereqeretabua. The doctor found that there was a deep laceration across the right side of her face from the ear to the mouth; an incisional wound on her left shoulder; and a partial amputation of her right small finger. The injuries were consistent with the use of a sharp knife.

Karalaini Loaloa was medically examined on the same day too at around 4.30am at the Colonial War Memorial Hospital by Dr Timoci Qereqeretabua

as well. The doctor found that she had a partial amputation of her right little finger and laceration of her right ring finger. The injuries were consistent with the use of a sharp knife.

At about 4am on that same day after having attacked Tavenisa Lewavavai, Jone Nabaisila and Karalaini Loaloa with a cane knife at Kilikali Settlement, the defendant returned to Veirasi Settlement and informed one of the residents that he is going to the Police Station and that the cane knife he had used is in a cassava patch at Kilikali Settlement.

Later, the defendant then surrendered himself voluntarily to Police at the Valelevu Police Station on the same day 21st February 2014 at about 4am. He informed the police officer who was on duty at the time namely Mikaele Ratuvou that his wife was having a de-facto relationship and he "stabbed them". He was immediately placed under arrest. He also informed the police that he had thrown the cane knife he used near the road side at Kilikali Settlement.

At the scene, a search was made by police and the cane knife with a brown handle was found on the same day on 21st February 2014 at around 5am at Kilikali Settlement in a drain. It was later identified on 22nd February 2014 to police by Tui Safata (a resident at Veirasi Settlement, Nadera) that it had gone missing earlier because the defendant had taken it.

After surrendering to police, the defendant Joeli Masicola was interviewed under caution at the Valelevu Police Station commencing on the same day on 21st February 2014 in the Itaukei language. He was allowed to speak to his pastor in the beginning of the interview. He understood his rights and admitted that he is married to Tavenisa Lewavavai for more than 3 years and they do not have any children. He said that he is not suffering from any sickness. He said that his wife had gone to stay with her aunty at Kilikali Settlement 2 weeks before the 20th of February 2014. He said that he gave his wife permission to stay at Kilikali. He admitted calling his wife on 20th February 2014 at around 11pm on his phone. His wife answered and asked him what he wanted and the defendant replied, asking her when she will return home. He said that his wife then told him not to disturb her as it is midnight and she turned off the phone. He called her again but a "male person" picked up the phone and told him not to disturb them and not to call again. He requested the male person to give the phone to his wife and when the defendant's wife answered, his wife told him not to call them as they are having sex. The defendant told police that he heard his wife moaning and having sex and when this was happening the phone was on for a while and then it went off. The defendant told police that he called a third time and asked his wife whether it was true and the wife replied saying "what else" and the phone was turned off. He tried calling her again but there was no answer. The defendant told police that he made up his mind to see them and find out the truth and if he finds them sleeping together he will kill them both. So he walked from Sakoca to Kilikali Settlement and that was about 12 midnight. He reached Kilikali and went to the house where his wife was. He said that he

climbed up the window of the house on a used fridge and when he drew the curtain he saw the man sleeping between his wife and Karalaini. The man was wearing shorts but no shirt and his wife was wearing her clothes. When he saw them he wanted to look for a knife. He went to a house at Veirasi, Qarase Road and he took a knife from a house there. He told police that the knife had a small blade and wooden handle. When police showed him a knife during the interview, he agreed that it was the same one. He admitted trying to get a knife from Kilikali Settlement but he couldn't and so he went to Veirasi Settlement. He returned to Kilikali where his wife was with a knife, he saw that they were still sleeping. He managed to open the door to the house and when he entered, started striking his wife first with the knife who he said was closest to the door. He doesn't know which part of her body he struck with the knife because he said that he was really angry. He struck his wife twice and then he struck the man 4 times. He also does not know where he struck the man. Whilst he was striking them he was saying that they now know the consequence of having extra marital affairs. He also admitted striking "Kara" with the knife. He then left the house and ran to the road where he threw the knife into a drain. During the scene reconstruction, he showed police the route he took to Kilikali, the window he looked through, the house where he got the knife from, how he struck his wife, the place where he threw the knife and the route he took to the Valelevu Police Station. He admitted that when he reached the police station he told them that his wife was having an affair with another man and he had struck them with a knife. He said that he did it because he was "heartbroken". He said that his wife has had extra marital affairs with other men 3 times. In his interview, he also sought forgiveness for what he had done..."

[9] Having considered the summary of facts, the single Judge had then remarked:

'[8] There is no indication in the sentencing decision that the learned Judge considered it necessary to raise any issue with either counsel. The judge appears to have considered the appellant's agreement with the summary of facts as decisive and immediately proceeded to convict and sentence the appellant on all three counts.

[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.

[12] The issue is significant on the basis that under section 242 of the Crimes Act provocation is a defence that reduces the offence that would otherwise be murder to manslaughter. Similarly section 44(6) provides that the same defence applies to an offence of attempting murder.

[10] Finally, in allowing leave to appeal against conviction the single Judge had stated:

[13] I have concluded that in this case it is arguable that the learned judge should have raised with counsel whether the accused had received advice on the issue of provocation based on the very detailed summary of the facts presented by the prosecution. Whether this happened can only be resolved by examining the record of proceedings in the court below. Leave is granted on that basis.

[11] At the hearing of the appeal, the appellant's counsel urged the sole ground based on 'defense of provocation' in respect of which leave to appeal had been granted and relied on the written submissions dated 15 March 2018 filed at the leave stage. The state filed written submissions on 22 April 2020.

[12] I shall first consider the question whether there was any basis for the defense counsel to have advised the appellant on the issue of provocation and for the trial judge to have raised the same with the defense counsel based on the summary of facts.

[13] The Court of Appeal in **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) examined the past decisions and principles relating to provocation and stated as follows:

*'[10] In **Regina v. Duffy** [1949] 1 All E.R. 932 the gist of the defence of provocation was encapsulated by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury:*

"Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary ***loss of self-control*** *, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."*

[11] The counsel for the appellant heavily relies on the decision in ***Tapoge v State*** *[2017] FJCA 140; AAU121.2013 (30 November 2017) in support of the sole ground of appeal. In* ***Codrokadroka v State*** *[2008] FJCA 122; AAU0034.2006 (25 March 2008) the Court of Appeal in relation to section sections 203 and 204 of the Penal Code dealing with provocation has engaged in an exhaustive analysis and come out with the approach that should be taken as follows:*

'1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.

2. There should be a ***"credible narrative"*** *on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*

3. There should be a "credible narrative" of a resulting ***loss of self-control*** *by the accused.*

4. There should be a "credible narrative" of an attack on the deceased by the accused which is ***proportionate*** *to the provocative words or deeds.*

5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a ***sudden loss of self-control*** *depends on the fact of each case. However cumulative provocation is in principle relevant and admissible.*

6. There must be an evidential link between the provocation offered and the assault inflicted.'

[12] The Supreme Court in ***Codrokadroka v State*** *[2013] FJSC 15; CAV07.2013 (20 November 2013) adopted the above propositions as accurately reflecting the approach that should be taken by a trial judge to the issue of provocation.*

[13] In ***Tapoge*** *the Court of Appeal had applied both the CA and the SC decisions in* ***Codrokadroka*** *to section 242 of the Crimes Decree and further observed as follows:*

'[15] Provocation is not a complete defence to an unlawful killing. It is a partial defence. Killing with provocation reduces culpability from murder to manslaughter. This lesser culpability is the effect of section 242 of the Crimes Act 2009.

***'**[16] There is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial. The scope of that duty in relation to provocation was explained by Lord Devlin in **Lee Chun Chuen v R** (1963) AC 220 as follows:*

*'Provocation in law consists mainly of three elements – the **act of provocation**, the **loss of self-control** , both actual and reasonable, and **the retaliation proportionate to the provocation**. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.'*

[14] The summary of facts reveals that in December 2013 the appellant's wife Tavenisa Lewavavai had, upon separation, left their Settlement at Sakoca and gone to stay with her aunt Karalaini Loaloa at Kilikali Settlement. He had called his wife at about 11.00 p.m. on 20 February 2014 on his phone and asked her when she would return but she had asked him not to disturb and terminated the call. The appellant had called again, this time to be answered by a male who had asked him not to disturb and call again. The appellant had asked the male to give the phone to his wife who had said that they were having sex and not to call her. He had heard his wife moaning whilst having sex as the phone was on for a while before going off. The appellant had phoned her for the third time and asked her whether it was true and she had replied in the affirmative and turned off the phone. At that point, the appellant had admittedly made up his mind to see them and if what she had told was true and found them sleeping together to kill both of them.

[15] Accordingly, the appellant had set out from Sakoca Settlement to reach Kilikali Settlement by foot around 12 midnight. Upon reaching Karalaini Loaloa's house in Kilikali Settlement the appellant had seen through a window and observed a man sleeping between his wife and her aunt. When he saw them he had wanted to look for a knife and tried to get one from Kilikali Settlement but failed. He had then gone to a house at Veirasi and obtained a knife from one of the houses. He had come back, entered the house where his wife, her aunt and the male were sleeping and attacked all

of them who were fast asleep with the knife causing the death of the male and serious injuries to his wife and her aunt. While carrying out the assault the appellant was admittedly uttering that 'they' would now know the consequences of extra marital affairs.

[16] Therefore, even on the most favorable view of the appellant's version as revealed in the summary of facts, I do not see a credible narrative of an act of provocation, loss of self-control, both actual and reasonable, and an act of retaliation proportionate to the provocation as expected by law relating to the partial defense of provocation. The appellant had clearly intended and pre-planned the attack on three people in the course of events that lasted for several hours. It was a calculated assault on all inmates of the house but not an act of cumulative provocation. The deceased does not seem to have offered any provocation to the appellant by words or deeds. There was no temporary and sudden loss of self-control to any extent that the appellant was not the master of his mind. The appellant had ample time to cool down. His attack on the deceased was so brutal that some minutes after the attack the deceased had died on the way to hospital.

[17] This explains why the defense counsel may not have felt the need to advise the appellant on a possible defense of provocation which could bring his criminal liability down from murder to manslaughter. It can certainly be understood, therefore, why the trial judge also had not thought it fit to raise such a possibility with the defense counsel. The evidential basis for running the defense of provocation simply did not exist on the summary of facts.

[18] In **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1 November 2018) Keith, J said as follows, *inter alia*, in the context of section 104 of the Criminal Procedure Act, where the appellant had attempted to argue in appeal that the plea of guilty was equivocal on the basis of diminished responsibility but where she had pleaded guilty to all counts and where those pleas were unequivocal:

> *'[32].....The difficulty for the petitioner is that such a defence cannot get off the ground without a medical or psychiatric report addressing the state of her mental health when the killings took place. At present, no such medical*

report has been prepared. Her counsel merely asserts that such a report may provide a basis for arguing that her mental health at the time may have afforded her a defence to the two counts of murder – the defence of diminished responsibility not being available in a case of attempted murder. ***The evidential basis for running the defence of diminished responsibility simply does not exist at present.***

'[33] The basis on which the petitioner's counsel put the proposed appeal against conviction was that the trial judge should himself have raised the question of the petitioner's mental health, and then caused it to be investigated. That in effect is to argue that the judge has a duty to raise and investigate a defendant's mental health even when the defendant's legal team has not asked him to do that. As a matter of principle, I doubt that this is correct. It is inconsistent with a criminal trial being an adversarial process. In our system of criminal justice, the judge merely holds the ring, and leaves it to the parties to decide what avenues need to be investigated and what evidence should be called. Indeed, none of the materials on which the petitioner's counsel relied support the proposition she was seeking to advance. They were (i) section 104 of the Criminal Procedure Act 2009, (ii) the judgment of the Supreme Court in Bonaseva v The State [2015] FJSC 75 and (iii) the judgment of the Supreme Court in Nauru in CRI029 v The Republic [2017] NRSC 75.'

'[34] ……The fact that the legislature may exceptionally have imposed a duty of inquiry on the judge in one specific context does not mean that, absent any legislative provision about it, a similar duty is cast upon the judge for other purposes.'

[19] Therefore, I hold that there are no merits in the sole ground of appeal in respect of which leave to appeal had been allowed and accordingly, the appeal should stand dismissed.

[20] Though not directly in issue in view of my above conclusion, I shall briefly discuss the concerns raised by the state on the trial judge's duty to raise with the defense counsel any concerns the judge might have had regarding available defenses before accepting a plea. The relevant paragraphs in the single Judge ruling are as follows:

'[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

[13] I have concluded that in this case it is arguable that the learned judge should have raised with counsel whether the accused had received advice on

the issue of provocation based on the very detailed summary of the facts presented by the prosecution.'

[21] The single Judge appears to have simply applied the duty of a trial judge to decide whether on the evidence he should direct the assessors and himself on the availability of any alternative defense or verdict that is not raised by the defense (vide **Praveen Ram v The State** [2012] 2 Fiji LR 34) to a situation where an accused pleads guilty and opinioned that there is no reason why a similar 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.

[22] Rather than the question whether the trial judge should raise with the defense counsel any concerns the judge might have had regarding available defenses before accepting a plea, in my view the more relevant question is whether the judge can be satisfied that the summary of facts unequivocally and unmistakably establish the essential elements of the offence with which the appellant had been charged and if not, the guilty plea should be rejected (see **DPP v Jolame Pita** [1974] 20 Fiji LR 5; **Michael Iro v R** [1966] 12 Fiji LR 104 and **Nawaqa v The state** [2001] FJHC 283, [2001] 1 Fiji LR 123). If, however, the trial judge feels that the facts and circumstances disclosed in the summary of facts may reasonably give rise to a complete or partial defense he may either not accept the plea of guilty or allow the withdrawal of the guilty plea (for e.g. **R v Sheikh and Others** [2004] Crim. 492).

[23] However, I do not think that a trial judge, being the ultimate arbiter of the guilt or otherwise of an accused, is totally barred from consulting trial counsel for both parties for any clarifications in the process of dealing with a guilty plea before deciding to accept or refuse to accept the guilty plea. Needless to say, that this kind of situation would be the exception rather than the norm, particularly when the accused is represented by counsel. When the accused is unrepresented the trial judge should be more vigilant to satisfy himself that the guilty plea is unequivocal and unambiguous (see **Nalave v State** [2008] FJCA 56; AAU 4 and 5 of 2006 (24 October 2008), **Golathan** [1915] 11 Cr. App. R 79, **R v Griffiths** (1932) 23 Cr. App. R 153 and **R v Vent** (1935) 25 Cr. App. R. 55) or that it is not offered under a mistake (see **Ingleson**

[1914] 11 Cr. App. R 21) or that any other miscarriage of justice would not occur (see **Li Kuen v R** (1916) 11 Crim. App. R. 293).

[24] The single Judge had correctly remarked in the Ruling as quoted below because a guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (see **R v Murphy** [1975] VR 187) and a valid plea of guilty is one that is entered in the exercise of a free choice (see **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132).

> *'[9] .....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.'*

[25] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court while examining the issue whether the pleas had been equivocal asked itself the following questions:

> *(i) What evidence or material could be relied upon in deciding that a plea of guilty is equivocal? Put another way, how much of the prosecution case was an accused admitting to by entering a plea of guilty?*
>
> *(ii) Could the Accused be held to be accepting the statements of the prosecution witnesses served on the defence as part of the disclosure procedure? This was in contradiction to the summary of facts tendered and which he himself agreed to in the presence of his counsel.*
>
> *(iii) How far could an appellate court draw inferences from such statements, unsworn and untested as they were?*

[26] The Supreme Court had then held that the primary source of a guilty plea is the summary of facts:

> *'[26] Where, as here, the defence counsel indicates to prosecuting counsel that his client will plead guilty, the defence will wish to see the summary of facts. If the facts are accepted by defence counsel's client, the Accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place. If there is acceptance by the prosecution of any material requested by the defence to be deleted from the summary of facts, the plea of*

guilty can still proceed. Another option is for there to be a Newton hearing held limited to the disputed part of the facts.

[27] Nevertheless, the Supreme Court had approved limited use of disclosure statements (without, however, going on a voyage of discovery looking into the case record and drawing inferences) but disapproved over reliance on them as they are, without a trial, unsworn and untested (unless an agreed fact) and also because, procedurally, upon a plea no formal evidence is taken and the plea cannot be taken as an admission of the bundle of disclosure witness statements:

'[27] ……..Disclosure statements can be relied on by the sentencing judge or by the appellate court, but great care must be exercised not to incorporate into the Summary of Facts, matters not necessarily accepted by the Accused when he or she entered a plea of guilty……'

[28] The Supreme Court also had usefully referred to the role of the defense counsel and the trial judge *vis-à-vis* a guilty plea in the matter of a plea as follows:

'[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client……'

[29] Earlier in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that:

*'[26] 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 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).*

[30] 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 which later appeared to have been mistaken or unwise. Taylor J said in **Gautam [**1988] Crim. LR 109 CA (Crim Div):

' ... 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.'

[31] In **Samy v State** [2012] FJCA 3; AAU0019.2007 (30 January 2012) the Court of Appeal quoted from 20th Edition of Blackstone at paragraph [56] as follows:

*'**D12.96 Defence Counsel** - It is the duty of counsel to advise his client on the strength of the evidence and the advantages of a guilty plea as regards sentencing (see, eg., **Herbert** (1991) 94 Cr App R 233 and **Cain** [1976] QB 496). Such advice may, if necessary, be given in forceful terms (**Peace** [1976] Crim LR 119):*

*Where an accused is so advised and thereafter pleads guilty reluctantly, his plea is not ipso facto to be treated as involuntary (ibid). It will be involuntary only if the advice was so very forceful as to take away his free choice. Thus, in **Inns** (1974) 60 Cr App R 231, defence counsel, as he was then professionally required to do, relayed to the accused the judge's warning in chambers that, in the event of conviction on a not guilty plea, the accused would definitely be given a sentence of detention whereas if he pleaded guilty a more lenient course might be possible. This rendered the eventual guilty plea a nullity.'*

[32] Yet, O' Connor 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 result of flagrantly incompetent advocacy by his advocate it would quash the conviction. 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, was regarded as grounds of appeal though not being a case of *'flagrantly incompetent advocacy'*.

[33] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132):

> *"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

[34] Therefore, it is clear that trial judges have to navigate the journey of accepting or refusing to accept a plea of guilty within the above legal parameters and unless any one of the legally accepted grounds for challenging a guilty plea is established by the appellant no appeal against a guilty plea would succeed merely on the trial judge's alleged failure to raise a possible defense with the defense counsel or the appellant. The appellate court would examine the record to see whether primarily on the summary of facts and sparingly and exceptionally on disclosure statements such a defense had indeed been available. In doing so the appellate court would exercise great care in taking into account matters not admitted by the appellant when he entered the guilty plea.

[35] The appeal record in this case clearly shows that the defense of provocation was not available to the appellant and therefore, there is no reasonable prospect of success on merits in this ground of appeal.

Bandara, JA

[36] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Orders

1. Appeal is dismissed.

.....
Hon. Justice Almeida Guneratne
ACTING PRESIDENT COURT OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice Chandana Prematilaka
JUSTICE OF APPEAL

.....
Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL