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

CRIMINAL APPEALS NO.AAU 103 of 2015
[In the High Court at Suva Case No. HAC 059 (B) of 2010S)

BETWEEN	**:**	**JOSAIA KOROINAVOSA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA** **Bandara, JA** **Rajasinghe, JA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Tivao for the Respondent**
Date of Hearing	**:**	**19 April 2021**
Date of Judgment	**:**	**29 April 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been charged with others in the High Court at Suva on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009, one count of theft of a motor vehicle contrary to section 291(1) of the Crimes Act, 2009, one count of wrongful confinement contrary to section 286 of the Crimes Act, 2009 and another count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009 committed on 15 February 2010 at Suva in the Central Division.

[2] The appellant had pleaded guilty and the High Court judge had convicted the appellant on all counts accordingly. The trial judge had then proceeded to sentence the appellant on 17 May 2013 as follows:

'(i) Count No. 1 : Aggravated Robbery : 7 years imprisonment

(ii) Count No. 2 : Theft of Motor Vehicle : 2 years imprisonment

(iii) Count No. 3 : Wrongful Confinement : 2 years imprisonment

(iv) Count No. 4 : Aggravated Robbery : 12 years imprisonment.'

All the above sentences are concurrent to each other, that is, a total sentence of 12 years imprisonment.'

[3] The appellant in person had filed an application for enlargement of time on 08 July 2015. Thus his appeal was out of time by 02 years and 01 month. He through the Legal Aid Commission had tendered an amended notice of appeal and written submissions on 18 March 2019. However, thereafter the appellant had in person submitted 04 amended grounds of appeal on 24 April 2019 and at the leave to appeal hearing had disengaged his counsel to pursue his grounds of appeal in person. The single Judge had in its ruling delivered on 17 July 2019 refused an extension of time to appeal against conviction out of time. The grounds of appeal considered by the single Judge are as follows:

1. *That the Guilty plea entered was not voluntary made at the time I pleaded as I was subjected to such pressure from the court, Defence Counsel and other factors in that I did not genuinely have a free choice between "Guilty" and "Not Guilty" thus constituting the original proceedings a material.*

2. *That the Guilty Plea entered was not voluntary made as Defence Counsel did not advise me on the strength of the evidence and advances of a Not Guilty plea as regards to a prospect of an acquittal.*

3. *That the guilty plea entered was involuntary made, as the court and defence counsel failed to afford me a fair trial by not having Criminal Case No: HAC 059/2010 and Criminal Case No: HAC 077/2010, consolidated pursuant to section 59(1)(a)(b) of the Criminal Procedure Act as both matters were similar in nature and arose out one investigation whilst detained and arrested at Nabua Police station for both offences. Failure to do so prejudiced my right to a fair hearing.*

4. *That the guilty plea entered was involuntary made my mind did not go with my plea, as I was a schizophrenia patient capable of drifting in and out of a delusional world making irrational decision. Thus constituting the original proceedings a mistrial.*

[4] The appellant on 09 August 2019 had renewed all four grounds of appeal before the full court and sought the assistance of the Legal Aid Commission. However, the Legal Aid Commission had rejected his request to prosecute his renewal application before the full court. The appellant had in person submitted written submission for the hearing before the full court on 01 May 2020 and the state had filed its written submission on 19 November 2020.

[5] In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal stated:

> *'[15] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.'*

[6] Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[7] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[8] It is clear that the delay is very substantial and appellant has not explained the delay. As far as the prejudice is concerned, there will be undue hardship on the victims to relive their story again in court if there is to be fresh proceedings though the respondent had not averred any prejudice that would be caused by an enlargement of time. Nevertheless, if there is a **real prospect of success** (vide ***Nasila)*** in the belated

grounds of appeal in terms of merits this court would be inclined to grant an extension of time (vide ***Nasila)***.

[9] When the matter was taken up for hearing on 13 April 2021, the appellant informed court that he had been provided only the written submissions of the state but not a copy of the appeal brief. He moved to withdraw the appeal due to the non-availability of the appeal brief. The court decided that it was not a ground on which a withdrawal of the appeal should be permitted and as directed by court the appellant was given a copy of the appeal brief forthwith. When the court wanted to re-fix the hearing of the appeal allowing sufficient time for the appellant to get ready, he indicated that he was ready to make submissions. Nevertheless, the court of the view that the appellant should be afforded adequate time and adjourned the hearing to 19 April 2021. When the matter was taken before the full court on 19 April 2020 the appellant once again moved to withdraw the appeal and the basis that 'Fiji Times Horoscope' mentioned in the psychiatric report dated 16 April 2013 had not been given to him. The court found that ''Fiji Times Horoscope' was not a real document but only a reference in the appellant's thoughts recorded under 'Health Records' in the said psychiatric report. In the circumstances, the court was not satisfied that there were genuine and acceptable reasons to allow the abandonment of the appeal in terms of principles laid down in **Masirewa v The State** [2010] FJSC; CAV 14 of 2008 (17 August 2010). Accordingly, the appellant's application to withdraw the appeal was refused and the parties were asked to proceed with the hearing of the appeal.

[10] The appellant relied on his written submission and the state made some oral submissions. The appellant briefly replied highlighting matters relating to the 04th ground of appeal.

[11] The summary of facts admitted by the appellant read as follows:

> ***'Josaia Koroinavosa*** *["Accused"] at the time of offence was a Caddy Boy at the Fiji Golf Club in Vatuwaqa. Prior to 15 February 2010, the Accused, with others planned to rob the Headquarters of Dee Cees Bus Company ("Company") situated at Lot 4, Taramati Street in Vatuwaqa. The plan included obtaining a motor vehicle for transportation to and from the premises. The Accused during this time met Kavitesh Krishant Lal ("Victim")*

who drove a van registered FD722 for hire. The Accused obtained the victim's number and told him that he would call him later for a job.

On 15 February 2010, at 7.30am the Accused called the victim to see if he was driving that day. At 8.30am the Accused was at his place of employment at the time and was visited by another and received instructions to collect empty beer bottles which they would use as weapons. At 9.30am the Accused called the victim again and informed him that a Fijian boy will come to hire his van. This Fijian man then hires the victim's van at the Total Service Station near Hansons Supermarket in Makoi and he followed this man's directions. While following instructions, the victim picked up another at the junction of Vesivesi Road. At this point, the victim was assaulted and robbed of his Nokia mobile phone worth $40 by these men. The victim was choked at the neck, dragged and dumped into the boot of the vehicle. His hands and legs were then tied with masking tape and his mouth was also taped. The victim was confined in the boot of the vehicle.

Sometime after 12pm, the Accused was picked up with another by these men in the van from the Accused's place of employment. The Accused with others then proceeded to the Company Headquarters. The Company at the time was about to do its banking. A sum of $26,820.20 belonging to the Company was kept inside a black briefcase and was loaded into a vehicle registered CY705, which the Company was to use to do the bank run. The vehicle was to be driven by Mohammed Rafiq, the Company's Accounts Clerk, who sat in the driver's seat. The Accused along with others, armed with cane knives then ran towards the vehicle registered CY705 and surrounded it. Themen then smashed the windows of the car and took the said briefcase and ran back into the hired van and drove off. In the process, a struck of the cane knife hit the head of Mohammed Rafiq, who immediately blacked out, with blood pouring from his head.

The Accused and others then abandoned the van at Marcelin Primary School. The victim was still confined inside the vehicle. At around 2.30pm the Accused and others all arrived at one Tevita Seru's House in Nabua were the Accused and others shared the loot. After this they all went their separate ways.

The Accused was interviewed under caution between 17 and 19 February 2010 at the Nabua Crime Office. He was subsequently charged on 19 February 2010.'

01st ground of appeal

[12] The appellant submits that the guilty plea was not voluntary and he was subjected to pressure from the court, defence counsel and he did not have a free choice between "guilty" and "not guilty". He also alleges that the trial judge had pressurised him by saying that he would be given a lengthy sentence if he was found guilty after trail but

if he pleaded guilty a more lenient course might be possible. The appellant seems to have couched this ground of appeal based on the decision in **Bulivou v State** [2014] FJCA 215; AAU78 of 2010 (05 December 2014) where reference was made *inter alia* to **Turner** [1970] 2 QB 321 and 20th Edition of Blackstone at paragraphs D.12.94 to D.12.98. **Bulivou** also stated that in such circumstances, the only way to assess and determine whether the plea of guilty can stand as a voluntary plea is by examining the record of the proceedings in the High Court.

[13] **Tuisavusavu v State** [2009] FJCA 50; AAU 0064.2004S (3 April 2009) the Court of Appeal held:

> *"[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see **Boqiwaluv State** [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (**Liberti**(1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*
>
> *[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered."*

[14] Having perused the appeal record and given that the trial judge had taken all possible precautions to make sure that there was a free and voluntary admission of guilty, I do not find that there is any merit in this complaint. There is absolutely nothing to even remotely suggest that the trial judge had threatened the appellant with a lengthy sentence if he was to contest the case or *vice versa*.

[15] The appellant represented by counsel from the Legal Aid Commission had indicated to court on 16 April 2013 that the appellant was prepared to take the plea after receiving legal advice. The charges had been read over and explained to the appellant and he had understood the same. Accordingly, the appellant had pleaded guilty to all counts in the information. The case had been adjourned to 30 April 2013 *inter alia* for summary of facts, sentence submissions and sentence. On that day the prosecutor had

tendered the summary of facts and trial judge had questioned the counsel for the appellant on each of the charges whether the appellant admitted the particulars of the offences and the answers had been in the affirmative in respect of all four charges. The appellant had admitted previous convictions, the antecedent report and the victim impact report as well. Thereafter, the High Court judge had found the appellant guilty as charged on all counts and convicted him accordingly. Both parties had filed elaborate sentence submissions too. The sentencing had been postponed to 10 May 2013 and then to 17 May 2013. Therefore, the appellant had ample time to change his mind since 16 April 2013 to 17 May 2013 if he so wished but he had not done so.

[16] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal dealing with a similar situation remarked:

> *'[28] In addition, after tendering the plea of guilty on 06 August 2013 and prior to conviction on 08 August or sentencing on 09 August, the appellant had ample opportunity to state to the trial judge that his plea was equivocal, involuntary and made under pressure and moved to withdraw the plea of guilty. If that was the case he could still, at the discretion of court, have withdrawn the guilty plea before the sentence was imposed (vide **Plummer** [1902] 2 K.B 339, 347, 349, **R. v. McNally** [1954] 1 W.L.R 933; 38 Cr. App. R.90, **R v. Popovic** [1964] Qd. R. 561,565, **S. (An Infant) v. Recorder of Manchester** [1970] 2 WLR 21; [1969] 3 All E. R. 1230, [1971] AC 481)……'*

[17] In **Nalave v State**, Criminal Appeal AAU0004 of 2006; AAU005 of 2006: 24 October 2008 [2008] FJCA 56 the Court of Appeal held:

> *"It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (**Rex v Golathan** (1915) 84 L.J.K.B. 758, **R v Griffiths** (1932) 23 Cr. App. R 153, **R v Vent** (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (**R v Murphy** [1975] VR 187. A valid plea of guilty is one that is entered in the exercise of a free choice (**Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132."*

[18] 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."*

[19] Therefore, the appeal record clearly shows that there is no real prospect of success or merits in this ground of appeal.

02nd ground of appeal

[20] The appellant's complaint is that the defense counsel had not advised him on the strength of the evidence and the prospect of an acquittal. In **Chand v State** (supra), the Court of Appeal laid down a clear and specific procedure to be adopted by an appellant when a ground is pursued in appeal based on criticism of his trial counsel (see in particular paragraphs [39] and [40]. Obviously, the appellant had not taken those steps in pursuit of this ground. Therefore, this ground of appeal does not deserve to be entertained at this stage.

[21] Be that as it may, it appears that in the High Court the appellant had sought assistance from the Legal Aid Commission (LAC) but his request had been declined on 23 January 2012. Thereafter, he had appealed to the LAC and as a result from 30 August 2012, Mr. J. Savou and Mr. S. Waqainabete of LAC had represented the appellant till 14 February 2013. From 16 April 2013 to 17 May 2013 Mr. N. Sharma of the LAC had appeared for the appellant in the High Court. At no stage had the appellant raised any reservation about the counsel for the Legal Aid Commission. Even after the

proceedings in the High Court were terminated he had filed an amended notice of appeal on 18 March 2019 through Mr. T. Lee of Legal Aid Commission.

[22] In **Chand v State** (supra) the Court of Appeal stated:

> *'[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).'*

[23] 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.'*

[24] 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.'

[25] Yet, 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 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'*.

[26] It is clear from the summary of facts that there was no reasonable prospect at all in the appellant obtaining an acquittal if the case had proceeded to trial. If the appellant had pleaded guilty on the advice of his counsel he had got the full benefit of the guilty plea by way of a substantial discount of 05 years for mitigating factors including the guilty plea though offered nearly after 03 years of the first call in February 2011.

[27] Therefore, there is no real prospect of success or merits in this ground of appeal.

03rd ground of appeal

[28] The appellant argues that his counsel failed to secure him a fair trial by not requesting the consolidation of his case (HAC59/10) with another case bearing No. HAC 77/10 pursuant to section 59(1)(a)(b) of the Criminal Procedure Act as he was detained in Nabua police station relating to one investigation into both offences.

[29] There had been an appeal against conviction and sentence in HAC 77 of 2012 reported as **Sugu v State** [2016] FJCA 69; AAU44.2012 (27 May 2016) where the appellant had been the 03rd accused/appellant. On a perusal of the judgment of the Court of Appeal on 27 May 2016 it is clear that the appellant had been charged with co-accused for an entirely different matter though the offences had been aggravated

robbery and theft of a van on 01 February 2010. In HAC59/10 the appellant had been charged with unknown others of two instances of aggravated robbery, theft of a motor vehicle and wrongful confinement committed on 15 February 2010. The victims in the cases too had been completely different. The charges in two cases were not founded on the same facts or were part of a series of offences of same or similar nature.

[30] Thus, those two cases could not have been consolidated in terms of section 59(1)(a)(b) of the Criminal Procedure Act and the counsel was right in not making an application to do so. Therefore, there is no real prospect of success or merits in this ground of appeal.

04th ground of appeal

[31] The appellant's contention is that he was a schizophrenia patient capable of drifting in and out of a delusional world making irrational decisions and his plea of guilty was therefore involuntary.

[32] The High Court record indicates that on 25 July 2012 the court had ordered a psychiatric report on the appellant and for him to be taken to St. Giles Hospital. The report dated 12 October 2012 signed by Dr. Epi Tamanitoakula had recorded *inter alia* the following:

> *'He can recall the events leading up to the incident in 2010. He maintains that the robbery was premeditated and executed with precision. At that time, he was well aware of the consequences of his actions if he was arrested by the police.'*
>
> *'At present, he is aware of basic court procedure and the nature of his charges. He is aware of the possible sentences the judge will give him if he is found guilty. He is also aware that Legal Aid Commission is willing to represent him in court.'*
>
> *'Evidence from these interviews, indicate Mr. Koroinavosa was mentally well at the time of the alleged crime. There is no indication that his actions at the time of the robbery was directly influenced by his delusions and though disorder.'*

'In addition he was aware of the events leading up to, during and after the incident.'

[33] Dr. Epi Tamanitoakula had concluded that in his opinion that the appellant was fit to plead and recommended that he should continue with his medications and be managed as an outpatient at the Prison Clinic.

[34] The High Court had ordered an updated psychiatric report on 14 February 2013 and Dr. Peni Moi Biukoto of St. Giles Hospital had examined the appellant on 15 April 2013 and stated in his report dated 16 April 2013 *inter alia* as follows:

'Defendant stated that his next court hearing was on 16/04/2013 'tomorrow'. He stressed that a plea of guilty would lead to imprisonment and he identified a possible sentence of ten years. He stated that a plea of not guilty would lead to further investigations.'

'Defendant showed evidence of a mental disorder identified as schizophrenia.'

'In my opinion, at the time of the alleged offence:-

1. *Defendant had the capacity to understand the nature of his actions.*
2. *Defendant had the capacity to control his actions.*
3. *Defendant had the capacity to understand the consequences of his actions.'*

[35] Dr. Peni Moi Biukoto had expressed his opinion as follows and recommended that the appellant did not need hospital care and treatment but could receive care in a prison clinic or community clinic:

'1. *Defendant has the capacity to participate in a coherent and relevant manner in a court of law.*
2. *Defendant has the capacity to understand and follow court proceedings.*
3. *Defendant had the capacity to understand the consequences of guilty plea and not guilty plea.'*

[36] Therefore, there was no doubt that the appellant was in a rational frame or state of mind both at the time of the commission of the offences as well as when he had offered the plea of guilty. He obviously was in a position to give instructions and receive advice from his counsel. The mitigation submission made by his counsel had relevant input from the appellant. He was quite capable of understanding the meaning of guilty plea and consequences thereof. The appellant had obviously weighed the pros and cons of his decision to plead guilty and chosen that path as the best option for him. Considering the summary of facts and the two psychiatric reports I have no doubt that he and his counsel had taken the best possible course of action.

[37] Therefore, I see no real prospect of success or merits in this ground of appeal as well.

Bandara, JA

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

Rajasinghe, JA

[39] I agree with the reasons and conclusions in the draft judgment of Prematilaka, JA.

Orders

1. Enlargement of time to appeal against conviction out of time is refused.
2. Appeal is dismissed.

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Hon. Mr. Justice Chandana Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL

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