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

CRIMINAL APPEAL NO. AAU 056 of 2019 and AAU 086 of 2019
[In the High Court at Suva Case No. HAC 300 of 2017S]

BETWEEN	:	**JOSAIA DOBUI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. E. Samsoni for the Respondent**
Date of Hearing	:	**19 July 2022**
Date of Ruling	:	**20 July 2022**

RULING

[1] The appellant (02nd accused) had been charged with two others in the High Court at Suva (HAC 300 of 2017S) with a single count of aggravated robbery contrary to Section 311(1)(a) of the Crimes Act 2009 and another count of theft contrary to Section 291 of the Crimes Act 2009 of the Crimes Act, 2009 committed on 15 September at Navua in the Central Division and Sigatoka in the Western Division .

[2] He had also been indicted along with the same co-accused in Lautoka High Court (HAC 021 of 2018) with two counts of aggravated robbery contrary to Section 311(1)(a) of the Crimes Act 2009 committed on 09 September 2017 at Sigatoka in the Western Division.

[3] The appellant had pleaded guilty on 11 May 2018 in Suva High Court while his co-accused pleaded not guilty. The appellant was sentenced on 14 September 2018 to 08

years of imprisonment on aggravated robbery with a non-parole period of 07 years and 18 months of imprisonment on theft; both sentences to run concurrently.

[4] The summary of facts reveal *inter alia* the following

> *"On 15 September, 2017 at around 2 am, the accused in the company of others, drove to Navua from Nadi in a motor vehicle and broke into the complainant's home armed with an iron rod whilst they were asleep and then tied them up using cello tape and pieces of clothing. The complainant's children aged 2 and 4 years old witnessed the ordeal. The accused and his accomplices had their faces covered with clothing and after restraining the complainants, armed themselves with a kitchen knife from the complainant's kitchen.*
>
> *The accused and his accomplices then stole the following items from Rahul Prakash: 1x mangal sutra valued at $3,000.00; 1 x Apple iPad valued at $2,500.00; 1 x Samsun Galaxy J2 mobile phone valued at $400.00, microphones valued at $300.00; a BSP bank card valued at $10.00; a motor vehicle registration number REYNSH valued at $50,000.00; and Australian currency of AUD $4,000.00 (approximately FJD$6,323.00) all to the total value of $62, 533.00.*
>
> *Two of the accomplices drove off in the stolen motor vehicle to the nearest BSP ATM (automated teller machine) to check if the PIN number that PW2 had provided them for the BSP bank card was correct whilst the accused stayed watch over Rahul and Praneeta Prakash. Once the PIN number was confirmed, the accused then also fled the scene.*
>
> *The complainants managed to free themselves soon after and they alerted the police for assistance.*
>
> *The accused and his accomplices reached Sigatoka, one of the accomplices used the stolen BSP bank card belonging to Praneeta Prakash at a BSP ATM there and withdrew $1,000.00 from her bank account.*
>
> *The accused and his accomplices were arrested on 19 September, 2017 traveling towards Raviravi Community Police Post in the Western Division. The accused and his accomplices were charged with these offences thereafter.*
>
> *The accused made full admissions in his Record of Interview at Question and Answers 60, 64, 65, 66, 68, 69, 71, 74, 75, 76, 79, 80, 82, 83, 98, 100, 115, 121, 122, 127, 128, 132 and 138. The accused admitted to being picked up in a vehicle together with his accomplices and that they travelled from Nadi to Navua to commit the robbery armed with a pinch bar. He further admitted that after committing the robbery, the accused and his accomplices then travelled back to Nadi through Sigatoka and withdrew money from an ATM using Praneeta Prakash's BSP bank card. The accused also admitted to stealing the assorted*

items as stated in the Amended information, [Annexed is a copy of the Record of Interview] [not included].

There were nil recoveries made of the stolen items apart from the motor vehicle "REYNSH".

On 11 May, 2018, the accused in the presence of his counsel, pleaded guilty to both counts as charged, of his own free will..."

[5] Thereafter, HAC 300 of 2017S had been amalgamated with HAC 021 of 2018 and dealt with under HAC 300 of 2017S.

[6] The appellant had pleaded guilty for Lautoka High Court case also under amalgamated Suva High Court case HAC 300 of 2017S. The appellant was sentenced on 29 March 2019 to 08 years of imprisonment on each count of aggravated robbery with a non-parole period of 07 years; both sentences to run concurrently and also concurrently to the sentences imposed earlier on 14 September 2018.

[7] The summary of facts reveal *inter alia* the following.

'*In the early hours of 9th September, 2017 at about 4.40 am, PW1 Ritesh Prasad and his wife PW2 Devina Devika Darshani with their two children were sleeping in the comfort of their home when they were awoken by a sound inside their kitchen.*

PW1 got out of his bed to investigate what the sound was. When he reached the door of his bedroom he met a man wearing a mask and armed with a pinch bar. The man shone a torch on his face. The man put the pinch bar on PW1's neck and told him to co-operate or else he would kill him and his family and steal their items.

PW1 was afraid after hearing that threat and switched the bedroom light on. PW1 then asked the masked men if he could wake up PW2 Devina Devika Darshani who was sleeping with their baby because if she awoke on her own she would scream. While he was walking to the room where PW2 was sleeping he saw another man in another room checking all the drawers. This second man was not wearing a mask but was wearing a white hat and long sleeve t-shirt with long pants (jeans).

After waking his wife, PW1, PW2 and their baby all went to their son's room which was guarded by the masked men. They entered their son's room and were directed to sit on the bed. The masked men started asking for jewellery and started checking all their drawers again. PW1 and PW2 were then told to go to

the sitting room when they saw one of the robbers coming out of their prayer room with their items.

The accused was one of the men who had entered the home and helped pack some of the stolen items. The accused and his friends then stole the items intemized in count no. 1 and 2.

After taking all the above items from PW1 and PW2's home, the accused and his accomplices drove off in a Toyota Fielder vehicle registration number FP 846 belonging to PW1.

The accused was arrested by the police and interviewed in relation to these offences.

The accused made full admissions in his Record of Interview at Question and Answers 50, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 80, 81, 82, 83, 84 and 85. The accused admitted to travelling with three accomplices to Kulukulu, Sigatoka from Nadi. The accused and his accomplices entered the home of PW1 and PW2 by using a pinch bar to open a side door. They then committed robbery and stole the items as listed above. The accused and his accomplices then drove off in a Toyota Fielder owned by PW1. The accused also admitted to the offences in his Charge Statement.

$25,457.00 worth of items were recovered.'

[8] The appellant appealed against conviction and sentence in person in both cases; in HAC 300 of 2017S on 08 April 2019 and in HAC 021 of 2018 on 07 May 2019) and his first appeal is late by over 04 months and the second by a week. However, the appellant later filed Form 3 (17 March 2021 and 19 July 2022) to abandon his sentence appeal. Both he and the state had tendered written submissions for the hearing before a single judge on his conviction appeal.

[9] 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? (vide **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).

[10] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[11] The delay of this appeal is not very substantial for an appellant in person. The appellant has tried to explain the delay in his an affidavit along with his appeal that reached the CA Registry on 08 April 2019. According to him, his appeal handed over to the Correction officers on 05 October 2018 had not been lodged in the Court of Appeal Registry. There may be some truth in that. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[12] The multiple grounds of appeal urged by the appellant could be dealt with under the following grounds identified by the State with which the appellant expressed his agreement.

01st ground of appeal

'**Equivocal plea'**

[13] His main plank of submission is that he was forced by his co-accused to plead guilty.

[14] He had pleaded guilty in HAC 300 of 2017S (Suva case) on 11 May 2018 when he was represented by counsel for the Legal Aid Commission having understood the information. On 16 May 2018 the prosecution presented the summary of facts. The trial judge had noted in the sentencing orders:

> *'4. The court then checked with defence counsel on whether or not Accused No. 2 was admitting the above summary of facts. Defence Counsel, on behalf of Accused No. 2, said, Accused No. 2 admitted the above summary of facts, including the particulars of the offences in the information. As a result of the above, the court found Accused No. 2 guilty as charged on both counts and convicted him accordingly on those counts.*

[15] The appellant was sentenced several months later only on 14 September 2018. There is absolutely nothing to suggest that he had pleaded guilty under any pressure or duress. If that were the case he could have withdrawn the plea of guilty before the sentence was passed. There is no equivocality or ambiguity on record at all. I see no tell-tale signs of his admission of guilt being not voluntary.

[16] He pleaded guilty in person in HAC 021 of 2018 (Lautoka case) under amalgamated case no. HAC 300 of 2017S on 16 November 2018 having understood the information and the prosecution presented the summary of facts. The trial judge had noted in the sentencing order:

> *6. The court then checked with the accused to find out whether or not he was admitting to all the elements of the offence of "aggravated robbery", contrary to section 311 (1) (a) of the Crimes Act 2009. The accused admitted the prosecution's summary of facts. As a result of the above admission, the court found him guilty as charged on both counts and convicted him accordingly on those counts. The court noted that he was a first offender and had also considered his plea in mitigation.*

[17] The appellant was sentenced months later on 29 March 2019. There is material to suggest that he had pleaded guilty under any pressure or duress. If did so in the first instance there was no reason for him to do it for the second time. Even if he did plead guilty under pressure or duress, he could have withdrawn the plea of guilty before the sentence was passed. There is no equivocality or ambiguity on record at all. I see no signs of his admission of guilt being not voluntary.

[18] **Samy v State** [2012] FJCA 3; AAU0019.2007 (30 January 2012), **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019, **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) and **Masicola v State** [2021] FJCA 176; AAU073 of 2015 (29 April 2021) demonstrate the approach taken by the appellate court in dealing with a complaint based on 'equivocal plea'.

02nd ground of appeal

'Cautioned interview was wrongly admitted'

[19] There was no question of admitting the appellant's cautioned interview since there was no trial and he simply pleaded guilty. His complaint is that that it was obtained under oppression. Summaries of facts did contain a gist of his admissions made in the cautioned interview in both cases. If the appellant had any reservations on the summaries of facts, he could have raised them through his counsel and not admitted the same in the first instance. Even in the second instance there was no compulsion for him to admit the summary of facts.

[20] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) and **Masicola v State** [2021] FJCA 176; AAU073 of 2015 (29 April 2021) it was held and accepted that the primary source of a guilty plea is the summary of facts and once the summary of facts is accepted the trial judge should not go on a voyage of discovery looking into the case record and drawing inferences from extraneous sources.

03rd ground of appeal

Incompetence of trial counsel

[21] Similar ground of appeal was discussed at length in **Masicola v State** [2021] FJCA 176; AAU073 of 2015 (29 April 2021). The appellant blames the trial counsel in not challenging the truthfulness of his cautioned interview.

[22] This ground of appeal fails for two reasons. Without following the procedure set out in **Chand v State** [2019] FJCA 254; AAU0078 of 2013 (28 November 2019) no ground of appeal based on criticism of trial counsel could be agitated in appeal. The appellant has not complied with ***Chand.***

[23] Secondly, he had pleaded guilty earlier in HAC 300 of 2017S (Suva High Court) on 11 May 2018 represented by his counsel. The appellant pleaded guilty in HCA 021 of 2018 (Lautoka High Court) on 16 November 2018 without any counsel. Thus, if he had pleaded guilty due to alleged incompetence of his counsel on 11 May 2018 there was no reason for him to once again plead guilty when he was appearing in person on 16 November 2018.

[24] There is not a trace of any flagrantly incompetent advocacy on record. 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."*

Order:

1. Enlargement of time to appeal against conviction is refused.

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL