

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL CASE NO. HAA114 OF 2017**

**(Magistrates' Court Case No. 602 of 2017)**

**BETWEEN:**            **JOJI CIRIDAI**

**APPELLANT**

**AND:**                 **THE STATE**

**RESPONDENT**

**Counsel:**        **Ms P Chand for the Appellant**  
                      **Ms S Naibe for the Respondent**

**Date of Hearing:**    **20 December 2017**

**Date of Judgment:** **22 December 2017**

**JUDGMENT**

[1]     This is an appeal against conviction and sentence arising from a plea of guilty to a charge of robbery in the Magistrates' Court at Lautoka. The appellant was sentenced to 6 years, 10 months and 14 days imprisonment with a non-parole period of 4 years.

[2]     The grounds of appeal are as follows:

- (i)     **THE** Learned Trial Magistrate erred in law and fact when he convicted the petitioner when the summary of facts did not fulfill all the elements of the charge.
- (ii)    **THE** Learned Trial Magistrate erred in fact and law when he convicted the petitioner for Robbery when he had admitted to the

offence of Assault Causing Actual Bodily Harm as per the summary of facts.

- [3] It is trite law that an appeal against conviction arising from a plea of guilty can be entertained only in limited circumstances. One of the circumstances where an appeal may lie is if the plea of guilty is shown to be ambiguous. As was said by Lord Reading CJ in *Rex v Golathan* (1915) 84 LJKB 758 at 759:

It is a well known principle that a man is not to be taken to have admitted that he has committed an offence unless he pleads guilty in plain, unambiguous and unmistakable terms.

- [4] On 21 August 2017, the appellant was charged with robbery contrary to section 310 (1) (a) (i) of the Crimes Act 2009. The charge alleged that the appellant on 27 July 2017, robbed Samuela Verevakawalu of a LG Mobile phone valued at \$350.00 and immediately before such robbery used force on the said Samuela Verevakawalu .
- [5] On 13 October 2017, the appellant appeared in person in the Magistrates Court and was further remanded in custody. The learned Magistrate did not advise the appellant of his right to counsel. The case was adjourned to 4 September 2017 for mention.
- [6] On 4 September 2017, the appellant appeared in person and elected the Magistrates' Court. The Court Record reads:

Charge read, explained and understood.

Facts Admitted.

**Mitigation**

33, separated, 2 children, delivery boy with Venus Enterprise, \$125 weekly, forgiveness, promised not to re-offend, sole breadwinner. The Complainant hit me first. I used his mobile first to call his wife.  
Adjourn – 18/9/17 – Sentence.

- [7] The facts tendered in support of the charge were as follows:

On the 27<sup>th</sup> day of July, 2017 at about 0715hrs at Bulileka Street, Waiyavi Stage 1, Lautoka in the Western Division **JOJI CIRIDAI** (Accused) 33years, Delivery boy of Bulileka Street, Waiyavi Stage 1, Lautoka assaulted one **SAMUELA VEREVAKAWALU** (Complainant) 23 years, Labourer of Tomuka, Lautoka causing him injuries.

### **Facts**

On the above mentioned date, time and place victim was walking along Ganges Road and had to cross a playing ground towards Vomo Street.

### **First Count**

Whilst walking, accused came from behind and punched victim's back. Accused came in front and punched victim again on his right and left eye. Victim fell on the ground and then accused kicked and hit him with a stick causing him injuries as per medical report.

### **Second Count**

Deleted.

### **Injuries**

- ❖ Right premarital swelling and ecchymosis.
- ❖ Right nasal above deviation.
- ❖ Right nasal bridge laceration.
- ❖ Left upper lip swelling.

Matter was report to Police, victim was sent for medical examination. Accused was arrested, interviewed under caution and then subsequently charged for one count of Assault Causing Actual Bodily harm contrary to Section 275 of Crimes Act 2009 and a count of Theft contrary to Section 291 (1) of Crimes Act 2009.

Accused produced in custody.

signed  
[Investigating Officer]

[8] The sentence was pronounced on 2 October 2017 and not on 18 September 2017.

### **Duty to advise the appellant of his right to counsel**

[9] The Constitution gives every accused the right to be represented by counsel. That right is set out in section 14 (2) (d) of the Constitution as follows:

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

[10] The purpose of according the right to counsel to an accused was explained by this Court in *Chand v State* [2008] FJHC 9; HAC138.05 (18 January 2008) at [28]:

The constitutional right to legal representation, albeit not absolute, embodies a realistic recognition of the obvious truth that the average accused does not have the professional legal skill to protect himself or herself when brought before a tribunal with power to take his or her liberty. The accused's right to legal representation is particularly important in an adversary system of criminal justice. The State hires qualified or trained lawyers to prosecute. The accused persons who have money hire best lawyers to defend. The poor accused persons are left to defend themselves. That which is simple, orderly, and necessary to the lawyer – to the untrained laymen – may appear intricate, complex, and mysterious.

[11] The duty is on the courts to promptly advise an accused of his right to legal representation and any waiver of that right must be an intelligent waiver (*Suren Singh & Ors v State* unreported Cr App No 79 of 2000).

[12] In the present case, the appellant was never advised of his constitutional right to legal representation and there was no intelligent waiver of that right.

### **Was the plea properly taken?**

[13] Section 174 of the Criminal Procedure Act 2009 sets out the procedure for a plea to be taken from an accused. Section 174 states:

- (1) The substance of the charge or complaint shall be stated to the accused person by the Court, and the accused shall be asked whether he or she admits or denies the truth of the charge.
- (2) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Decree 2009.

[14] There is nothing in the Records to show that the appellant admitted to the truth of the robbery charge before the facts were admitted. If the appellant had admitted to the robbery charge, then his admission should have been recorded as nearly as possible in the words used by him. The procedure used to take the appellant's plea was irregular.

**Was the plea ambiguous?**

[15] Robbery requires proof that the accused stole someone's property using force. Theft (taking property without consent and with the intention to permanently deprive the owner) is an essential element of robbery. The admitted facts disclosed the offence of assault causing actual bodily harm but not the offence of robbery. The facts did not indicate that the appellant stole anything from the complainant. In mitigation, the appellant informed the learned Magistrate he was hit first by the complainant. He used the complainant's mobile to call the complainant's wife.

[16] Counsel for the State fairly concedes that the admitted facts do not disclose the offence of robbery. If the learned Magistrate had directed his mind to the essential elements of robbery, he would have come to the conclusion that the admitted facts did not prove robbery. Clearly, the plea of guilty was ambiguous.

**Court's obligation to exercise care when taking a plea of guilty from an unrepresented accused**

[17] The obligation on the part of the court to exercise care when taking a plea of guilty from an unrepresented accused is explained in 10 *Halsbury* 3<sup>rd</sup> Ed p 408, paragraph 742:

Plea of guilty. A prisoner is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence....

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.

- [18] In *Michael Iro v Reginam* FLR 12, 104, the Court of Appeal endorsed the above obligation and held that:

There is a duty upon a trial judge, where an accused person is unrepresented, to exercise the greatest vigilance to ensure that the accused person fully comprehends exactly what the plea of guilty involves.

- [19] In *Anaia Nawaqa & Ors v State* HBM 14 of 2000L, Gates J (as he then was) endorsed the practice of examining the caution interview of an unrepresented accused to ensure that nothing has been said in the statement that may cast doubt as to the guilt before convicting on a plea of guilty.

- [20] Recently, in *Tubuna v State* [2017] FJHC 155; HAA024.2016 (28 February 2017), this Court said that it is part of the duty of the courts always to be vigilant that a plea of guilty by an unrepresented accused is only accepted if it is a clear, complete and unequivocal admission of the offence charged (*Kumar v The State* [2006] FJCA 57: AAU0048.2006 (10 November 2006), [15]).

- [21] In this case, the learned Magistrate was not vigilant to ensure that the appellant's plea of guilty was a true admission of guilt to the offence charged. As a result, the proceedings in the Magistrates' Court miscarried.

### **Whether there should be a retrial?**

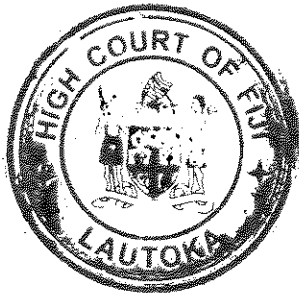
- [22] Counsel for the State seeks a retrial. A retrial is ordered only if it is in the interests of justice to do so. Initially, the appellant was charged with assault causing actual bodily harm. Subsequently, that charge was upgraded to robbery. When the appellant pleaded

guilty to robbery, the prosecution failed to support the charge with facts. A retrial will give the prosecution an unfair advantage to fill the gaps in the evidence to sustain the robbery charge.

- [23] The appellant had been in custody since he was arrested in this case and before he was sentenced. He has served almost 6 months imprisonment. If the appellant was charged with assault causing actual bodily harm and convicted of that offence, his sentence would have been in the range of 6 months imprisonment. Taking all these matters into account, it is not in the interests of justice to remit the case for a retrial.

**Orders of the Court:**

- [24] Appeal allowed.  
Conviction and sentence for robbery set aside.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecutions for the Respondent