

STATE v SAMU SERU

HIGH COURT — CRIMINAL JURISDICTION

5 SHAMEEM J

26 March 2003

[2003] FJHC 189

10 **Criminal law — plea — application to set aside plea of Accused — whether plea of Accused is ambiguous — whether change of plea is allowed before sentence was passed — whether plea was unequivocal and made with full understanding — whether Accused was prejudiced by lack of representation — Penal Code (Cap 17) ss 149, 150.**

15 The Accused had unlawful carnal knowledge with her daughter without the latter's consent. Six counts of the offence were charged against him. He pleaded not guilty without any counsel representing him. During cross-examination, the Accused was asked if he wishes to change his plea and answered yes. The Accused was convicted and charged on
20 s 222 of the Criminal Procedure Code. Counsel for the Accused applied to have the plea of guilty set aside on the ground of lack of representation and to have the matter remitted to the Magistrates' Court for trial on the basis of a not guilty plea. The State objected.

25 **Held** — (1) In the Magistrates' Court, the learned magistrate may well have been confused about what the Accused meant and he rightly sought to clarify matters by asking him if he wished to change his plea. The answer he received was unambiguous as were the pleas themselves when the charges were read and explained to the Accused. Despite the rather unusual circumstances which led to the change of plea, the Accused's pleas were clear and unequivocal.

30 (2) The Accused was not prejudiced. He was given time to make other arrangements and he continued to plead not guilty until after the complainant's examination-in-chief. His plea was clear and unequivocal. His several appearances before the court have shown that although he is partially deaf, he is able to follow the proceedings well and has been able to express himself clearly in court. His pleas of guilty were clear, unambiguous and unequivocal.

35 Application to change pleas dismissed.

Cases referred to

R v Bournemouth Justice; Ex parte McGuire [1997] COD 21 DC; *R v Isleworth Crown Court and Uxbridge Magistrates' Court; Ex parte Buda* (2000) 1 Crim App R (S) 538; *R v Rochdale Justices; Ex parte Allwork* 73 Crim App R 313, cited.

40 *R v Muford & Lothingland Justice; Ex parte Harber* [1971] 2 QB 291, considered.

J. Waqaivolavola for the State.

J. Nair for the Accused.

45 **Shameem J.** This case has been referred to the High Court for sentencing pursuant to s 222 of the Criminal Procedure Code. Counsel for the Accused now applies to have the plea of guilty set aside, and to have the matter remitted to the Magistrates' Court for trial on the basis of a not guilty plea. The State objects.

50 **The history of the case**

The Accused was originally charged with the following offences:

*FIRST COUNT**Statement of Offence*

WRONGFUL CONFINEMENT: Contrary to Section 253 and 256 of the Penal Code, Cap 17.

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Particulars of Offence
SAMU SERU, between the 1st day of May 2001 and the 14th day of June 2001 at Tailevu in the Eastern Division, knowingly and wilfully confined MEREANI MARAMA.

*SECOND COUNT**Statement of Offence*

10 *RAPE*: Contrary to Sections 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

SAMU SERU, between the 1st day of May 2001 and the 14th day of June 2001, at Tailevu in the Eastern Division, had unlawful carnal knowledge of MEREANI MARAMA without her consent.

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*THIRD COUNT**Statement of Offence*

COMMON ASSAULT: Contrary to Section 244 of the Penal Code, Cap 17.

Particulars of Offence

SAMU SERU, between the 1st day of May 2001 and the 14th day of June 2001, at Tailevu in the Eastern Division, assaulted MEREANI MARAMA.

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*FOURTH COUNT**Statement of Offence*

INCEST BY MALES: Contrary to Section 178 of the Penal Code, Cap 17.

Particulars of Offence

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SAMU SERU between the 1st day of May 2001 and the 14th day of June 2001 at Tailevu in the Eastern Division, had carnal knowledge of [THE COMPLAINANT], knowing the same to be his daughter.

They were substituted, on 25th July 2002 with the following set of charges:

*FIRST COUNT**Statement of Offence*

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ABDUCTING IN ORDER TO SUBJECT A PERSON TO THE UNNATURAL LUST OF ANY PERSON: Contrary to Section 252 of the Penal Code, Cap 17.

Particulars of Offence

SAMU SERU on a day between the 1st of May 2001 and the 15th June 2001, at Tailevu in the Eastern Division, abducted [THE COMPLAINANT] in order that she may be subjected to the unnatural lust of SAMU SERU.

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*SECOND COUNT**Statement of Offence*

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

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SAMU SERU on a day between the 1st day of May 2001 and the 15th June 2001, at Tailevu in the Eastern Division, had unlawful carnal knowledge of [THE COMPLAINANT] without her consent.

*THIRD COUNT**Statement of Offence*

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

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SAMU SERU on a day between the 1st of May 2001 and the 15th June 2001, at Tailevu in the Eastern Division, had unlawful carnal knowledge of [THE COMPLAINANT] without her consent.

*FOURTH COUNT**Statement of Offence*

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap 17.

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Particulars of Offence

SAMU SERU on a day between the 1st of May 2001 and the 15th June 2001, at Tailevu in the Eastern Division, had unlawful carnal knowledge of [THE COMPLAINANT] without her consent.

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*FIFTH COUNT**Statement of Offence*

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

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SAMU SERU on a day between the 1st of May 2001 and the 15th June 2001, at Tailevu in the Eastern Division, had unlawful carnal knowledge of MEREANI MARAMA without her consent.

*SIXTH COUNT**Statement of Offence*

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

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SAMU SERU on a day between the 1st of May 2001 and the 15th June 2001, at Tailevu in the Eastern Division, had unlawful carnal knowledge of [THE COMPLAINANT] without her consent.

When the Accused first appeared in the Nausori Magistrates' Court on 28 February 2002, he was unrepresented. He pleaded not guilty. He was advised to engage counsel and told that legal aid was available. On 26 March 2002, counsel from the Legal Aid Commission (Ms Nair) appeared for the Accused. He was granted bail on the same day. On 13 May 2002, counsel asked that the Accused be examined by a psychiatrist. The court agreed but remanded the Accused in custody for his non-appearance on an earlier date.

On 24 May no report was available, but there was apparently a new set of charges to be filed in respect of which plea was deferred. The case was called again on 6 June 2002. Counsel appeared for the Accused. It was called again on the 14 June. The court record reads: "Legal Aid is representing the Accused through telephone call". Thereafter, counsel made no further appearance. On the 25 July 2002, the court declared that the report had been received and that the Accused was fit to plead. In fact the report shows that the Accused had problems with socialising with others in his community because his hearing is partially impaired. There was no evidence of mental illness and the report concluded: "he understands well the charges laid against him, and is fit to plead".

On 25 July 2002, the prosecutor is recorded to have said that she had filed fresh charges, and that the accused was no longer represented by the Legal Aid Commission. The court then asked the Accused if he wished to be represented by counsel. He said he did.

The new charges were then put to him. He pleaded not guilty on all six counts. He was then bailed to appear for his hearing on 19 August 2002, and was advised to engage a solicitor. On the 19 August the Accused did not appear and the matter was adjourned to 24 October 2002. He continued to be unrepresented. On the 24 October, the Accused again failed to appear. A bench warrant was issued and the Accused arrested and kept in custody until the hearing commenced on 10 December 2002. Prior to that on the 29 November 2002, State counsel had made an application that the magistrate proceed instead with a preliminary inquiry but that application appears to have been refused by the learned magistrate.

On the 10 December the Accused was unrepresented. The Complainant gave evidence. She said she was 18 years old and that the Accused was her father. She said that in May 2001, the Accused raped her, and that he had raped her on five

occasions thereafter during the year. She said that he had hit her with a stick and had told her that if she did not agree to sexual intercourse, he would cut her into pieces and burn her. She gave evidence of being held against her will in the bush on one occasion before being raped and of being tied up with a rope around her wrists and legs and beaten with a stick, on another occasion. On the fifth occasion she said he used a spear to force her to lie on the floor before raping her. She told a woman named Tokasa about what had happened.

After her examination-in-chief the learned magistrate asked the Accused if he wished to cross-examine. The record reads:

10 ACCUSED: I do not have any question to ask her, but I have a letter with me which I wish to tender into court.

COURT: I have read your letter. The Holy Bible translation of the three verses in the Holy Bible as quoted by you: — (In Fijian)

(1 Kings 1:11)

15 “God has forgiven both David and Bathsheba”

(Hebrews 8:12)

“For I shall be merciful to the unrighteous deeds, and I shall by no means call their sins to mind anymore.”

(Hebrews 10:17)

20 “And I shall by no means call their sins and their lawless deeds to mind anymore.”

These verses in the Holy Bible as quoted by you, are they quoted because of your admission to the charges, so that, you are now seeking forgiveness?

Accused: Yes.

Court: Do you now wish to change your plea?

Accused: Yes.

25 Court: Charges read and explained to the Accused.

Count 1: Guilty

Count 2: Guilty

Count 3: Guilty

Count 4: Guilty

30 Count 5: Guilty

Count 6: Guilty.

The prosecutor then said that the facts were as already given in evidence, and the Accused was convicted and charged on all six counts. This was followed by a committal to this court for sentencing.

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The submissions

The Accused was not represented when he first appeared in the High Court, but, legal aid was finally granted on 19 March 2003 when Ms Nair appeared and applied for change of plea. Her submissions are that the Accused was prejudiced by lack of representation, that the Legal Aid Commission had only appeared in the Magistrates’ Court for a bail application, that the learned magistrate erred in assuming that the biblical verses quoted by the Accused indicated a change of plea, and that the subsequent plea of guilty was equivocal.

40 She referred to the Accused’s confession to the police (which she tendered and which contain a confession to five acts of sexual intercourse by consent but with the use of a stick) but said that the Accused had not been told of his right to counsel in custody and that therefore the confession was not voluntary. She asked that the case be remitted to the Magistrates’ Court for continuation of the trial.

45 Counsel for the State filed written submissions. The State also filed the affidavit of Aloesi Vasuturaga dated 24 March 2003 in relation to disclosure. However no application had been made to file this affidavit, and I disregard it

because no opportunity has been given to the Accused to file affidavits explaining the change of plea. Further, as I explain later in this judgment, this application must be considered, not after a fresh inquiry conducted by the High Court, but on the basis of the circumstances as they were before the learned magistrate.

5 State counsel submits that the history of the case shows that the Accused understood the nature of the allegations made against him, that the bible verses quoted showed an indication of a change of plea and that the charges were put to the Accused and explained to him before he pleaded guilty. Further, in mitigation the Accused said that this was his first offence and that the devil had
10 led him to commit the offence. Finally, counsel submitted that counsel for the Accused had herself withdrawn from representing the Accused in the Magistrates' Court, and was now (surprisingly) arguing that the Accused was prejudiced by such lack of representation. He submitted that this position was contradictory.

15 **Were the pleas ambiguous?**

A plea is ambiguous if the Accused makes an answer which is neither guilty nor not guilty. Where an Accused person is unrepresented, his plea may be considered ambiguous if he did not understand and agree to the commission of
20 all the elements of the offence.

A change of plea from guilty to not guilty may be entertained at any time before sentence is passed. Where an Accused has been committed to the High Court for sentence and it appears to the court that the Accused pleaded guilty on the basis of a material mistake of fact, the court may remit the matter to the
25 Magistrates Court with a direction to proceed on a not guilty plea: (*R v Isleworth Crown Court and Uxbridge Magistrates Court; Ex parte Buda* (2000) 1 Crim App R(s) 538.)

In *R v Mutford and Lothingland JJ; Ex parte Harber* [1971] 2 QB 291, it was said that while the Crown Court had a discretion to remit a case for trial to the
30 Magistrates' Court on a committal for sentence "the cases must be comparatively rare in which it would be proper at that stage to allow a change of plea": at 299.

The court may allow a change of plea where it is arguable that the prosecution could not establish the essential ingredients of the offence: *R v Bournemouth JJ; Ex parte McGuire* (1997) COD 21 DC (cited in Archbold 2003 4:187). The
35 paramount question on any change of plea application, is whether the plea was unequivocal, and made with a full understanding of the offence alleged and its ingredients. In considering this question, the history of the case itself is highly relevant.

The Accused was unrepresented when the case was first brought to court and
40 he pleaded not guilty. When the second set of charges was filed, he continued to plead not guilty. The absence of counsel appeared to have made no difference to this position. What did appear to influence a change of heart was the evidence of the complainant. Her evidence was clear and unambiguous. She gave evidence of five separate incidents of forced sexual intercourse with the Accused, and of one
45 incident of being taken away by him without her consent in order that she be raped by him. There could have been no misunderstanding of the nature of her evidence.

When the Accused was invited to cross-examine her, he did not do so. Instead he quoted some verses from the bible. One interpretation of these verses might
50 have been that the Accused was seeking forgiveness. Another might be that he was asking forgiveness for his daughter. State counsel helpfully said in his

submissions that the reference to David and Bathsheba, was a reference to God's forgiveness of King David for his act of killing Bathsheba's husband and committing adultery with her. The difficulty with using references from religious books to support legal submissions, is that this often leads to confusion and ambiguity. In the Magistrates' Court, the learned magistrate may well have been confused about what the Accused meant, and he rightly sought to clarify matters by asking him if he wished to change his plea. The answer he received was unambiguous, as were the pleas themselves when the charges were read and explained to the Accused. Further to clear any further doubts, the Accused said in mitigation: "I ask for forgiveness. This is my first offence. I have been led by the devil. I want to spend Xmas with my sisters. God has forgiven those who did wrong. The court should do likewise. Married man but separated. 52 years old. I have two children. I am from Naivicula village. I want to be freed today".

These were not the words of a person who did not understand the nature of his plea. The evidence of the complainant clearly established not only the acts of sexual intercourse but also the lack of consent including the use of a stick and a spear. It also established one act of criminal abduction. Finally, the consultant psychiatrist at the St Giles Hospital found that the Accused was able to understand the proceedings and was fit to plead.

In all the circumstances, despite the rather unusual circumstances which led to the change of plea, I consider that the Accused's pleas were clear and unequivocal.

Representation

Counsel submitted that the Accused was prejudiced by lack of representation. I do not think that he was because he maintained his not guilty plea until the complainant gave evidence. His change of plea does not appear to be linked to the non-appearance of counsel.

However, I do observe that counsel withdrew from the proceedings in a way that must be deprecated by this court. Counsel did not appear merely to apply for bail. She appeared when the Accused was first granted bail (on 26 March 2002) and continued to appear on 13 May 2002, to ask for a psychiatric examination until the 14 June 2002 when the court was told: "Legal Aid is representing the Accused". However on 25 July 2002, counsel for the State told the court that the Legal Aid Commission was no longer representing the Accused. At the hearing of this application counsel told me that the commission expected a new application for legal aid to be made when fresh charges were substituted. I was not told if this is a policy of the commission's. However, if this is so, then it is quite illogical. It suggests that a new application must be made when a charge is reduced from Murder to Manslaughter, or where a charge of Murder is substituted for one of Infanticide. In this case the Accused was charged with more serious offences than those originally filed although clearly the factual basis of the charges remained the same. Why should the Accused, who is already hampered by lack of representation, be required to file a fresh application for legal aid? Is the court expected to wait, while the new application is processed? Clearly such an approach does not lead to the efficient administration of criminal justice.

Finally, a word must be said about the manner in which counsel withdrew in this case. Sending a message through the telephone, or through counsel for the State is not the accepted way for counsel to withdraw from court proceedings. Counsel must appear, and seek leave to withdraw. It is for the court to decide whether leave should be granted.

In this case, despite the unorthodox withdrawal of counsel from the proceedings however, I do not think that the Accused was prejudiced. He was given time to make other arrangements, and he continued to plead not guilty, until after the complainant's examination-in-chief. His plea was clear and unequivocal. In coming to this conclusion, I have taken into account his disability as to hearing. His several appearances before me have shown that although he is partially deaf, he is able to follow the proceedings well, and has been able to express himself clearly in court.

Finally, I note that the Accused's caution interview, to which I have already referred, is not on the court record and does not appear to have been given to the learned magistrate. In considering a change of plea application, this court must confine itself to the proceedings and the evidence led in the Magistrates' Court. As was held in *R v Rochdale JJ; Ex parte Allwork* 73 Crim App R 313, the issue of whether the plea was equivocal, must be decided by reference to what occurred in the lower court. In any event, the statement contains a confession to "consensual" sexual intercourse (although with the use of a stick). It would therefore have been unhelpful in ascertaining the Accused's willingness to plead guilty to non-consensual sexual intercourse. What was important was the clarity of the complainant's evidence, especially as to lack of consent, and the plea of guilty thereafter.

Conclusion

I find that the Accused's pleas of guilty in the Magistrates' Court were clear, unambiguous and unequivocal. The application to change his pleas is dismissed.

Application to change pleas dismissed.