## RAJENDRA SAMY v STATE (AAU0019 of 2007)

COURT OF APPEAL — APPELLATE JURISDICTION

MARSHALL SRISKANDARAJAH and WIKRAMANAYAKE JJA

3 November 2011, 30 January 2012

**Criminal law — appeals — appeal against conviction recorded on guilty plea — ambiguous pleas — involuntary pleas — whether ambiguous pleas — whether involuntary pleas — Court of Appeal Act s 23.**

**Criminal law — procedure — pleas — general pleas — plea of guilty — whether plea valid — where original plea of not guilty**

An accused pleaded guilty to three counts of attempted murder and was convicted and sentenced to a term of imprisonment. Initially, the accused had pleaded not guilty, however subsequently changed his pleas to guilty. He appealed against his conviction and sentence on the basis that his pleas were ambiguous or involuntary.

**Held** –

(per William Marshall JA, Wikramanayake JA agreeing; Sriskandarajah JA dissenting)

(1) The accused's pleas were ambiguous pleas because they were based on an incorrect understanding of the law relating to the elements of the offence of attempted murder.

(2) The accused's pleas were involuntary pleas because the accused was pressured by the prosecutor and defence counsel to change his pleas from not guilty to guilty.

(3) The accused's pleas were involuntary pleas because the accused was unrepresented. His defence counsel did not advise and act in the accused's interests but in the interests of the accused's family.

(4) Where an unrepresented accused pleads guilty, the Court has a duty to enquire that the accused understands the elements of the offences to which he is pleading guilty.

(5) The prosecutor must always act to uphold due process and the safeguards essential to maintaining the rule of law.

(6) There was a clear mistrial and the writ of *venire de novo* ran.

Leave to appeal against conviction and sentence granted, appeal allowed and conviction and sentence on all counts set aside and annulled

**Cases referred to**

*He Kaw Teh v R* [1985]) 157 CLR 523; *Ingleson* [1916] 11 Crim App R 21, applied.

*Cutter v R* [1997] 143 ALR 498; *McGhee v R* [1995] 183 CLR 82; *R v Gadaloff* (CA(Qld)) No 24 of 1999; *R v Laga* [1969] NZLR 417; *Sorhaindo* [2006] EWCA Crim 1429; *Turner v R* (1970) 2 QB 321, considered.

*Baker* (1912) 7 Crim App R 217; *Li Kuen v R* [1916] 11 Crim App R 293; *Whybrow v R* (1951 – 52) 35 Crim App R 141, explained.

*Hall v R* [1968] 2 QB 788, distinguished.

*R v Blandford JJs Ex parte G* [1967] 1 QB 82; *R v Griffiths* [1932] 23 Crim App R 153, followed.

Leave to appeal against conviction and sentence granted, appeal allowed and conviction and sentence on all counts set aside and annulled

*Appellant in Person*

*S. Puamau* for the Respondent

**[1]** **Marshall JA.** This case is about pleas of guilty to an indictment at a higher Court. In Fiji at trial before Judge and Assessors in the High Court it is called an information rather than an indictment, but the same principles apply. No doubt in most cases a competent counsel dedicated only to his clients interests is fully and properly instructed and the accused pleads *"guilty"* to the counts in the indictment. No doubt the accused understands the applicable law in respect of the elements of each offence charged and intends on the facts to plead guilty because he has accepted the facts and is persuaded that on these facts he has no choice but to plead guilty. Nevertheless there are a small number of cases thrown up by the criminal law where because of ambiguity as to his plea or involuntariness the accused cannot be held to his plea. Criminal appeal courts by way of safeguards in the system have regarded this as a mistrial or miscarriage and have granted the writ or remedy of *venire de novo* to commence the process afresh. The proviso that *"no substantial miscarriage of justice"* has taken place is inapplicable to this process.

**[2]** These principles are an important element of the rule of law as applied to criminal cases. In *Li Kuen v R* (1916) 11 Crim App R 293 the Court of Criminal Appeal was concerned in a murder trial that the accused who did not understand English, had not had the evidence of the prosecution witnesses translated to him during his trial at the Central Criminal Court. Lord Reading LCJ at page 30 said:

> *"It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity, or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safeguards so carefully provided by the law".*

**[3]** This problem can be triggered if it coincides with one of the little legal pockets of complexity which even very distinguished judges sometimes get wrong.

**The Relevant Facts**

**[4]** Rajendra Samy appeals his conviction and sentence to this Court in respect of three counts of attempted murder. He pleaded guilty and was sentenced to 9 years imprisonment on each count with each sentence to be served concurrently with the others. The incident took place on 7th June 2006. Rajendra Samy pleaded guilty to three counts of attempted murder on 26th November 2007.

**[5]** At the time of the offence Rajendra Samy was 43 years old. His extended family lived in a family compound at Lots 54 and 55 Tiloko Lane, Nadawa near Suva. Rajendra Samy since 1991 has been a taxi driver thereby supporting his wife and two school age children. At the time of the offence he was of good character and lived a temperate God fearing life. Leaving aside his relationship with his mother he was respectful and helpful to the other members of his extended family and well regarded by members of his community.

**[6]** The family relationships are important and must be explained. Mrs Ram Kuar on 7th June 2006 was the widow of Krishna Samy. They had five children in all, two daughters and three sons. Both husband and wife worked at full time jobs. In 1993 they migrated to the United States. Their eldest child is a daughter Parvati (Mrs Parvati Phillips) who migrated to the United States in 1986 with

husband and children. The second child is Rajendra Samy the Appellant who was born on 24th January 1964. Since childhood he has been known as Master in the family. He was 43 at the time of the incident and is now 48 years old. He lives in a flat at the family compound with his wife Roshni Lata, his daughter Shilpa aged 11 years in June 2006 and his son Akash also known as Aman aged 9 years in June 2006. The third child of Mrs Ram Kuar and Krishna Sami is a daughter Angela Devi Chand. Aged about 40 or 41 years in June 2006 she lives in a house in Lot 54 immediately adjacent to the house at Lot 55 where the Appellant and family lived in one flat (Flat 2) and his brother and his family live in another (Flat 1). Second daughter Angela has a husband Suresh Chand and a son and a daughter. They all live at Lot 54. The son Ashneel Aman Chand was 19 years old in June 2006 and was involved in the incident on 7th June 2006. The fourth child of Mrs Ram Kuar and her husband is a son, who rather confusingly, was also named Rajendra Sami. When he gave evidence in mitigation on 29th November 29006 he said he was then 39 years old. He lives in the second flat at Lot 55 adjacent to that of the Appellant. He has a wife, a son Amit Raj Sami aged 19 years in June 2006. Amit is involved in the incident on 7th June 2006. Rajendra Sami also has two daughters one aged 20 years in June 2006 and the other aged 9 years in June 2006. To avoid confusion I will call the appellant's brother Rajendra Sami by a name by which he is known by the family members. That name is Pillay. The youngest child is a son Manoj Sami who went to the United States two years after Mrs Ram Kuar and her husband to live with them. After a few months his mother threw him out and ever since he has lived with his oldest sister Parvati and her family but although in the United States he and his oldest sister Parvati are closely involved in family affairs in Fiji.

**[7]** The evidence is that the family is divided. On the one hand Mrs Ram Kuar of all her children has only affection and good relations with her second daughter Angela. Her disposition is to have family property in her name and to dispose of it as she wishes in her will.

**[8]** The family property in Fiji since about 1995 has been at Lots 54 and 55 Tiloko Lane at Nadawa. The appellant and his brother Rajendra Sami (Pillay) bought Lot 55 while sister Angela bought Lot 54. Using materials from a previous residence, the brothers Rajendra and Pillay built a house with two self contained flats which each had two bedrooms. Then the Appellant Rajendra Samy in the year 2000 found out that his brother Pillay had not paid his share of the payments in respect of the land at Lot 55. After discussions Mrs Ram Kuar and her husband agreed to buy out the land. Mrs Ram Kuar then arrived from the United States, paid off the money to the Housing Authority, and had Lot 55 transferred into her name. She then returned to the United States.

**The Underlying Causes of the Events of 7th June 2006**

**[9]** It seems clear that in this family Mrs Ram Kuar always created divisions. When she went to the United States and shortly thereafter her youngest child Manoj came to reside with her and her husband and she expelled him within a short space of time.

**[10]** In the United States Mrs Ram Kuar eventually left the home of her older daughter Parvati cursing her. As Parvati writes:

> *"As we grew up we saw that she only liked my younger sister Angela Devi and not the rest of us.*
>
> *We started to hate our own mother Ram Kuar because of the daily abuses we took from her. She made me and my brothers feel worthless.*

*My mother had an affair that we all grew to know and (she) made me marry the man she had an affair with. After I got married my mother would tell my husband lies and my husband would hit me while my brother Rajend watched.*

*After we came to America she would tell us life was bad, would always call my husband and tell him to call her to America. After she came to America and lived with us she started to feed my husband with lies and he started hitting me again.*

*One day after a big fight I asked my mother to leave and she did cursing us. My brother Rajend told our mother to leave me alone or he will see to it. My mother told him you try me. With that said she got mad at Rajend because he was taking my side and said that she would go to Fiji and take away Rajend's home and destroy his family. Then she went to Fiji and raised hell from my father's funeral until Rajend took some actions. Sometimes it seems like my brother Rajend had no other choice to do what he did so we can all live in peace".*

**[11]** Mrs Ram Kuar's husband died in April 2005 in the United States. The funeral was in Fiji. Mrs Ram Kuar went back to the United States after the cremation. Then Mrs Ram Kuar decided to come back and live with her family in Fiji for the rest of her life. She arrived in Fiji on 13th May 2006. She stayed with her son Pillay and his family at Lot 55. Almost immediately she started constructing a self contained small flat with bedroom, toilet, bathroom and kitchen adjacent to Pillay's flat. It was being built by one Rakesh Krishna who was involved in its construction at the time of the incident on 7th June 2006.

**[12]** As stated at paragraph 8 above it was only because of Pillay's default in 2000 that Rajendra Samy, the Appellant, had the land title removed from the two brothers to the mother and father in the United States. The Appellant was concerned about this but thought in 2000 that his mother and father would never return to live in Fiji. But his worries increased when he and Pillay were asked to pay rent to Angela at $50 each per month. After two years, this money supposedly earmarked for repairs to Lot 55 was found to be being used by Angela for constructing her own house at Lot 54. Both brothers stopped paying.

**[13]** There is no doubt that the decision of Mrs Ram Kuar to re settle in Fiji, set the scene for a family feud over on what terms Rajendra Samy, the Appellant his wife and two children were going to be allowed to stay in Lot 55, Flat 2 which he had built, and title to which had been taken out of his hands by his brother Pillay's default at a time when he, the Appellant, was paying the Housing Authority in full on his payment book.

**[14]** Matters came to a head on Sunday 4th June 2006. According to the Appellant he had offered $50 for one month's rent for Flat 2. His mother refused the $50 and demanded $100 instead. On the day before she had received and demanded $25 a week *"for the housing"*. When the Appellant said that he was *"just a taxi driver and I cannot pay"* Mrs Ram Kuar his mother said *"Pay the $100 a month or find your own (property). This is my property. I am the boss"*.

**[15]** The fact that Angela and Pillay were present at this Sunday incident and did not support him caused him to believe that they for their own ultimate advantage at his expense had conspired with his mother against him. Angela, her favourite would get rent payments until her mother's death. Pillay or Pillay and Angela would inherit Flats 1 and 2 on her death. Mrs Ram Kuar only liked Angela. Angela wanted everything she could obtain from her mother. She manipulated whatever family arguments were current. In his *"plan"* Rajendra Samy describes Angela referred to as *"Babbi", "My sister Babbi the instigator. This lady Babbi is the cause of everything. Putting benzine on the fire so she could take out money from her"*.

**[16]** There is no doubt that the row on the Sunday was long lasting and at the high end of the decibel scale. Even the neighbours could hear, as I set below. As to its content there was a non family member in the person of the builder of the new flat Rakesh Krishna. He heard it all and said about it, in his statement of 7th June 2006:

> *"I can recall on Sunday (4/6/06) I went to Rakesh's house at about 9am to build the double wall in Rakesh's mother's house which I am building myself and Rakesh were doing the job (building the double wall). Between 11am to 11.30 am Rajen came in the taxi which he is driving that time we were still building the double wall. After 10 minutes time Rajen came to the place where we were building the house. At that time Rajen's mother was also present there. Rajend came and took out $50.00 note from the front pocket and was giving [it] to [his] mother. He said 'Ama' [which means mother] I am giving you $50.00. His mother then said that I want $100.00 not $50.00 Rajen then said that he can only give $50.00 his mother then said she wants $100.00 then the heated argument arose. Then his mother said if you can't pay $100.00 then look for another house. She said to look for a house where you can pay $50.00 Rajen said to her mother that when his father was still alive that this land will be under both son's. Then Rajen's mother said that the land is under her name and whom ever she wishes to give it to I will give. Then Rajen said that you have made the Will under Rakesh's name. Their mother said it is her property and whom she want to give she will give it. The heated argument kept on going then I went to the toilet I then heard no noise".*
>
> Given this objective account two things were clear to Rajendra Samy. Firstly that the home he had built and which was needed for himself, his wife and his two children was being immediately and permanently wrested from his possession. Secondly that he was moved to such anger and depression that he considered a violent solution.

**[17]** On the Wednesday 7th June 2006 the incident occurred. But it must be enquired as to the state of the evidence in the disclosures as to what actually happened on that day.

**The Evidence of the Incident on 7th June 2006 as Disclosed**

**[18]** The facts according to the Appellant are contained in his statement under caution. This commenced at 21:25 hours on 7th June 2006 but it was suspended after twenty minutes. At this point only preliminaries had been addressed. It was resumed on 8th June 2006 at 0929 hours and was completed at 22:04 hours. The answer to Question 15 was a denial of criminal liability except insofar as self defence may have been disproportionate.

> *"I did in the above in self defence after trying to reconcile with my mother on her conditions. Her demands were exorbitant. An argument developed there after I was sitting on the kitchen table. She was cutting garlic. She striked me with the kitchen knife on my right pointer finger. I jumped back. The chopper was on the kitchen table. Seeing her proceed towards me I picked the chopper and striked at her. My brothers' son Amit Raj Sami striked me with a piece of timber on the right hand side of the chest. I turned around and having the chopper in my hand I striked him. A scuffle broke out and my sisters' son Ashneel joined in. In the meantime Amit ran away. Ashneel managed to grab the chopper on the driveway in front of my steps and ran away. I had no intention of killing anyone. Eventhough my effort to reconcile went in vain. I was so furious that I went inside my house, closed the front door and tried to hang myself inside the sitting room. After tying the rope on the rafter I came back into my senses that I haven't taken life, I cut the rope again, went to the back door where Police Officers were calling me".*

**[19]** Later in the interview he said:

> *"I struck (my mother) three or four times".*
>
> The Appellant Rajendra Samy also further denied any intention to kill his mother.

"If I had the intention to kill her I could have taken the axe from the car and gone and killed her".

**[20]** Towards the end of the interview he said:

'Q. 157: Do you want to say anything else?

A. It was not my intention to kill anyone on Wednesday. My intention was to create real reconciliation.'

At the end of the interrogation on the 8th of June 2006 the police decided to charge him with attempted murder of his mother and two charges of grievous bodily harm with intent, one in respect of his nephew Amit and one in respect of his nephew Ashneel Chand. In response to the charges he said:

*"I would like to say that on 07/06/06, my intention was not to kill but reconciliation. Such circumstances developed that a heated argument erupted and my mother strike me first with the kitchen knife and in self-defence and spur of the moment I picked up the chopper on the table and strike her. During the incident Amit strike me with a piece of timber from behind, so I turned and strike him. A scuffle erupted with Ashneel joining and in the process, they got hurt*."

**[21]** In her statement of 19th June 2008 Mrs Ram Kuar said she was inside Flat 1 where she was staying with Pillay and his family. She states:

*"Son on 4th June, on a Sunday "Master" came to me with one $50 and said he cannot pay $100. I did not take that $50 and he asked me what I will do when he does not give me $100-00 a month. I told him to go and find somewhere to stay. He then went away.*

*On 07/06/06 at about 10 am, I was at home and grandson was also at home. My son Master came home with his taxi at about 10 am and came to me on my porch and said to me that he will come back and want to talk to me. He said he will go and drop the wife to doctor in the taxi. He took his wife away in the taxi. I then told my grandson [to go] and have his shower and also told him that his uncle, my son Master will come back and wants to talk to me.*

*Amit then woke up and had his food and few minutes later, that was about 10.30 am to 11.00 am Master came back in his taxi. He came and went to his flat and then changed his clothes and came to our side. When he came to my flat, he told my grandson Amit to go to the shop to buy Fiji Times. My grandson went away and Master told me to make some RASAM a soup with spices and tamerin and water. He said to me that he is sick and he has body pain and wants to drink his soup. I started making the soup in the kitchen and he again came inside my flat and went out to his flat.*

*Just after a few minutes to my surprise I saw Master back into my flat with a chopper knife in his hand. He held the knife in his right hand. I then asked him as to what he will do with the knife. He just said I will chop you. Then he striked the knife at me with his right hand. I was standing in the kitchen. I quickly held his hand with my left hand. He kept on striking on my face and neck and head area. He then held me by my hair and again striked the knife on my face and head. I kept on yelling for help calling Amit and Ashneel names. He then pushed me down and I fell face down. He again striked at me on my head. I was bleeding and shocked.*

*Then I suddenly put my face up and noticed that he was striking Amit with the same knife outside on the porch, just at the front door. I then manage to stand up and opened the back door grill locked and ran out of the house yelling for help. I also received cut on my right hand little and ring finger."*

**[22]** Amit Sami then aged 19 years is the son of Pillay and lives at Lot 55 Flat 1. His statement of 8th June 2006 supports that of his grandmother. He said:

*" … He told me to go to the shop to buy the Fiji Times. My uncle (Rajen) gave me the money and told grandmother to make the Rasam (it is a kind of food prepared [with] termarin). After that I wore my singlet and started to go to the shop. Then I went to my*

*neighbour's place namely Rita. I went inside the sitting room and was standing there for a while. I heard a sound from my house that somebody is making an unusual sound. Then I ran outside to my house. As soon as I went inside the house I saw Rajen hitting my grandmother with something. That time I was not clear whether Rajen was using his fist or a chopper. That time my grandmother was in the kitchen laying downwards and making unusual sound saying Aa Aa. When I went inside the kitchen at the same time I turn around to pick something to save my grandmother. As soon as I turn around my uncle (Rajen) hit me with a chopper on my neck. Then the blood started coming. That time I was black out. Then I open my eyes and saw him again trying to hit me with the same chopper then I got hold of the chopper and threw it straight outside and the chopper landed on the porch. He then got hold of my leg and started to pull and again he got hold of the chopper and hit on my forehead. Again he hit on my neck, then I put my left hand on my neck to save myself but my three (3) fingers were chopped and started bleeding. I would like to say about the time I got hold of the chopper and threw it outside. That time I yelled out saying Ashneel, Ashneel who is my cousin. I only heard Ashneel saying "Mama" (means uncle) What are you doing? "That time I was laying down and at the same time I stood up ran toward the main road. Then I went at the junction of my lane and main Nadawa road to look for transport to take me to hospital."*

**[23]** The account of Ashneel Chand then a 19 year old student of Information Technology who was at his home on the adjacent Lot 54 is in a statement made on the 8th June 2006. Ashneel is the son of the second daughter of Mrs Ram Kuar, Angela, whose husband is Suresh Chand. In his statement Ashneel said:

*"As I sat down to study I heard someone calling my name. I could make out that my cousin Amit was calling me so I lowered the volume of my radio. Then again I heard the sound someone was calling Ashneel, Ashneel, Ashneel. Then I lowered the volume and left out and rushed to the house of Amit as what was happening. Then I entered the compound and whilst reaching the steps of the porch of the house I saw Rajend was hitting Amit with the chopper. Since Rajend was facing Amit's house and his back was facing me, I then got hold of him from the back. When I held Rajend from the back, then he tried to free himself and as a result we both fell down in my grandmother's room which is under construction. We then faced each other whilst I was still holding his hand in which he was holding the chopper. He then plead to me to join hands and promise him and not to tell what he did to anyone. Whilst I was trying to hold his other hand, he turned around and strike the chopper on my head at once. I kept on holding him. Then on the same time he again strike me on the head for the several time. I was blacked out but I was still holding him. In about 14 seconds later I regain conscious and he tried to push me on the barb wire i.e. the fence of my compound. I kept on holding him and dragged him to the driveway. Then he tripped and I fell down on the ground. Then when he realised that he has struck me and said that he didn't mean to hit me, but he believed that I was Amit as his intention was to hit Amit. Then I asked him why you hit Amit. Then he picked up a stone and hit me on my head. Whilst I was on the ground that he lifted me up and told me that he is willing to take me to the hospital. I told him that I will not go to the hospital but you give me the chopper. Then I snatched the chopper from him and Rajend ran into his house. Then I went to the Sunrise Taxi Base with the chopper."*

**[24]** Concerning the incident on 7th June 2006 there are two witnesses who may be described as *"independent"*. They also overheard the argument on Sunday 4th June 2006 which they describe loud and long lasting.

**[25]** The first of these witnesses is Mrs Reshmi Lata whose house on Drivi Road is adjacent to Lot 55. She says in statement dated 7th June 2006:

*"I can very well recall and remember that on the 7th day of June 2006 I did not go to work since I was not feeling well, so I decided to take a day off. I know that one lady whose name is not familiar to me stays about 20 meters from my house. I know since one month ago she has returned from overseas but until today I have not spoken to her.*

*I can recall on the 4th day of June, 2006 i.e. last Sunday about 2.00pm whilst I was at home I heard the old lady and her son were talking in loud voice and quarrelling regarding some money. I could not get the whole story but I believe the house belong to the old lady and she was asking for some money from the son. I also don't know the son's name. In about ½ hours time they stop fighting. On the 7th day of June, 2006 at about 11.30 am I was sitting in my lounge wanting to see a movie suddenly I heard the noise from the old lady saying 'bachaoo', 'bachaoo', Ashneel bachaoo' bachaoo. Then when I look through the window I saw the old lady going very fast towards the main road. I also saw she was bleeding. There was some blood also seen on her clothes. As she arrived on Drivi Road then a maroon car came and she sat down and left. Then again, I heard the banging on the floor as someone is fighting. Then in five minutes time everything was quiet."*

**[26]** The second witness is Mrs Artika Devi who resides in the same house as her mother in law Mrs Reshmi Devi Lata. In a statement also dated 7th June 2006 she said:

*"I do not go to anyone's house so I do not know my neighbours properly. I can recall on Sunday 4/6/06 at about 2pm I was in my room looking after my baby whilst I was in my room I could hear our neighbour who lives in a house which is in front of our house since entrance is from Nadawa Rd were having an argument and (they) were talking on (the) top of their voice in regarding cash. I could not hear what. They argued for half an hour and stopped as this was the first time I heard them arguing. I never heard them arguing before. Today at about 11.30 am I was at home with my mother in law Reshmi Lata was watching video film in the sitting room when I heard the old lady calling (in Hindi) Ashneel 'Bacho, Bacho mardaris' meaning Ashneel save me I am killed with the struggling sound. Little later I saw an Indian lady our neighbour came running from her house with her whole body covered with blood."*

**[27]** The significance of this neighbour evidence is that while both witnesses were able to hear the argument on 4th June 2006, they both did not hear any argument along the same lines involving the same two participants on 7th June 2006. If a Court were considering which version of the events of 7th June 2006 to believe, the testimony of these two neighbours might be influential in that the Appellant Rajendra Samy's version of another huge argument taking place on that day was not supported by these *"independent"* witnesses.

**[28]** There is a final piece of evidence which also tends in the same direction. Rajendra Samy, the Appellant denied going from Flat 1 to Flat 2 and picking up the meat cleaver and then returning to Flat 1. His version was that when his mother stabbed him he picked up and immediately used a meat cleaver from Flat 1. But when the Appellent's wife Mrs Roshni Lata was shown the same meat cleaver or chopper on 7th June 2006 she said in her statement:

*"I wish to further add in this statement that the chopper that was shown to me belongs to me. This was used to chop meat at home. This chopper was left at the washing dish in the kitchen".*

**Evidence on Rajendra Samy's Intent to Kill Amit and Ashneel**

**[29]** In addition to what is said in the excerpts of statements of the accused and witnesses above, it is the case that Rajendra Samy, the Appellant was asked and answered in regard to this in the statement under caution. He said on this issue:

*"Why did you strike her several times with the chopper?*

*When she was coming towards me I kept on striking her and in the mean time Amit came and hit me with piece of wood.*

*Where was your mother when Amit hit you?*

*I was striking her and was just inside the sitting room at the door. When Amit hit me I turned around and striked Amit.*

*How many times did you strike Amit?*

*Two or three times. We were having a scuffle and we already came out of the front door onto the porch.*

*Did you see that you striked Amit and also cut off his fingers?*

*I did not see that.*

*Why did you strike Amit also on the forehead and neck?*

*I was just striking and I did not see where it landed.*

*What happened after that?*

*Ashneel came in and joined. I also striked Ashneel.*

*What happened then?*

*Amit ran away and later myself and Ashneel had a struggle and we fell down on the porch, then on the floor of that newly constructed mothers room and then on to the driveway. Ashneel managed to grab the chopper from my hand and he also ran away …*

*… I want to ask you that why did you ask Ashneel to promise to you not to tell anyone of what you have done before you left out to hang yourself?*

*I did not say those words to him …*

*… Why did you hit Ashneel with the stone?*

*I did not hit with the stone … "*

**[30]** Following the Sunday incident the Appellant became pre disposed to a violent resolution and wrote a plan to murder his mother, his sister Angela and her husband as well as his brother Pillay. In the *"plan"* he recorded in a note book, it is noteworthy that Amit and Ashneel are not targetted in any way. Indeed the plan is to benefit the next generation including Amit and Ashneel. His *"plan"* includes a message for Amit:

*" Amit*

*You are a fair person. … look after your and my family especially Aman."*

**[31]** Rajendra Samy abandoned the plan to kill four family members which plan had been set for 8th June 2006. In my view the existence of the plan strengthens the evidence of a specific intention on the part of Rajendra Samy the Appellant to kill his mother on 7th June 2006. But in respect of Amit and Ashneel it is clear that they were never targets. If anything the intention was to persuade them towards leading the extended family to happier times after the violent events had taken place.

**The Charges were Changed by the DPP**

**[32]** On 8th June 2006 the police assessment on the charges was that Rajendra Samy should be charged with attempted murder of his mother and grievous bodily harm with intent in respect of Amit and Ashneel. If you apply the correct law and consider the DPP's criteria in respect of whether or not there is a better than 50% chance of success, it seems to me that these charges were wholly appropriate on the evidence. However when the DPP filed his information on or about 27th July 2006, he changed the charges in respect of grievous bodily harm with intent, in respect of Amit and Ashneel, to charges of attempted murder. This was obviously not done on the basis of looking up the law in respect of attempted murder and calculating whether there was a better than 50% chance of success on the new charges. This decision is relevant to practically everything that has happened in the case since.

**What is the Relevant Law in Respect of charges of Attempted Murder?**

**[33]** This is one of the areas of law where even experienced judges and counsel get it wrong.

**[34]** In October 1951 the case of Whybrow v R in the Court of Criminal Appeal in England was presided over by Lord Goddard CJ. It is reported at (1951 – 52) 35 Crim App R 141. Unusually it was heard by a panel of five judges. Whybrow wanted his wife to die because he was involved with another woman. An amateur electrician he set up a situation where electric current was delivered to a metal soap dish used by those having a bath. However he did not realise if his killer circuit was passed through a lamp *en route* to the soap dish, the 230 volts circuit would deliver a much reduced and non lethal shock. So Mrs Whybrow survived and he was arrested and tried on one charge of attempted murder at Essex Assiges before Mr Justice Parker (who later succeeded Lord Goddard as Chief Justice) and a jury. There should have been no problem. The fact that Whybrow had fantastic and incredible explanations for his handiwork, and that he was not aware of the reason for his wife's escape, made it a very strong case against him on the specific intent required which is an intention to kill. The charge was correct and his plea was intentional because, despite the weight of the evidence against him on intent to murder, he wished to contest the case on the basis that he did not have an intent to kill. He was convicted and sentenced to 10 years imprisonment. But although Mr Justice Parker was an eminent criminal judge, he made a mistake in his summing up. In the appeal judgment at page 146 and 147 Lord Goddard CJ said this:

> *"The case lasted two days and the learned Judge's summing-up, so far as the facts were concerned, was meticulously careful and meticulously accurate, but unfortunately he did, in charging the jury, confuse in his mind for a moment the direction given to a jury in a case of murder with the direction given to a jury in a case of attempted murder. In murder the jury is told – and it has always been the law – that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm".*
>
> Although it was a miscarriage of justice, it was not a substantial miscarriage of justice because the evidence against Whybrow on intent to murder was overwhelming. So the appeal was dismissed.

**[35]** Had Whybrow pleaded guilty on arraignment and said though his lawyer or in person that he was pleading guilty because he had caused grievous bodily harm with intent to cause grievous bodily harm, Mr Justice Parker would have accepted the plea to attempted murder and have sentenced him on the charge of attempted murder. This would have resulted in serious error.

**[36]** The case of *Ingleson* [1916] 11 Crim App R 21 is short and instructive. The head note read *"where there has been a mistrial the Court will award a venire de novo; Baker (1912) 7 Crim App R 217 followed"*.

**[37]** The case was decided by Lord Coleridge J sitting alone; the learned Recorder in the Court below was not named and it was perhaps generously said that his mistake was in failing to read a relevant document to the end. I set out the whole report:

> *"This was an appeal against conviction by leave of Lush, J. Appellant was convicted of horse-stealing, on the 2nd October, 1914 at the Bradford Borough Sessions, and was sentenced to four months' imprisonment with hard labour.*
>
> *Appellant, in person.*
>
> *F. Wood, for the Crown. The appellant pleaded guilty to the indictment and there is no precedent for quashing the conviction in such a case. It is the fact that he handed up a statement to the recorder to the effect that he did not know the horses had been stolen; if it is held that his plea of guilty ought not to have been accepted he must be sent back to be tried on the indictment. Baker, 28 TLR 363; 7 Cr AppR 217 (1912).*
>
> *Lord Coleridge, J.: In this case there has been a mistake. The appellant was charged with stealing and receiving horses; he pleaded guilty and handed up a statement to the recorder which, if believed, was a complete exculpation; it ended with the words, 'I am guilty of taking the horses not knowing that they were stolen'. If the recorder read that it was clearly his duty to explain to the prisoner that his proper course was to plead not guilty, and to have such a plea entered. We presume the recorder did not read to the end of the statement. It is most important that a prisoner should not be caught by a phrase like 'guilty'; clearly he meant that he had had no felonious intent. In those circumstances it is quite clear that the plea of guilty was wrong entered and all the proceedings based on that plea are bad. The case must go back for re-hearing, and as the assizes precede the next sessions he must go for trial to the assizes".*

**[38]** In these situations it matters not whether the learned judge has made a mistake about the law or has not fully comprehended the basis on which the accused has pleaded guilty. The effect is the same and the result is a mistrial. At this point error on the part of the Court concerning the law applicable to offences merges into the topic of ambiguity and involuntariness with regard to the plea of the accused.

**Ambiguous Pleas and Involuntary Pleas**

**[39]** As is clear from what I have said above and below, that it is an ambiguous plea, if the accused is saying *"guilty but …"* and the words used by the accused, as in *Ingleson* (supra) means that his guilty plea results from the accused's misunderstanding of the law.

**[40]** Archbold 44th Edition (1992) says at 4.90 the following regarding ambiguity in plea:

> *"It is important that there should not be ambiguity in the plea, and that where the defendant makes some other answer than Not Guilty or Guilty, as the case may be, care should be taken to make sure that he understands the charge and to ascertain to what the plea amounts. Where the plea is imperfect or unfinished, and the court of trial has wrongly held it to amount to a plea of Guilty, on appeal the Court of Appeal may order that a plea of Not Guilty be entered and that the appellant be tried on the indictment: R v Ingleson* [1915] 1 KB 512, 11 Cr App Rep 21; or that the appellant be sent back to plead again to the indictment: *R v Baker* (1912) 7 Cr App Rep 217;; *R v Hussey* (1924) 18 Cr App Rep 160; *R v Brennan* (1941) 28 Cr App Rep 41; or may merely quash the conviction without sending the appellant back for trial: *R v Alexander* (1912) 7 Cr App Rep 110; *Golathan v R* (1915) 11 Cr App Rep 79; *R v Field* (1943) 29 Cr App Rep 151.

In the case of an undefended defendant who pleads guilty care should always be taken to see that he understands the elements of the crime to which he is pleading Guilty, especially if the depositions disclose that he has a good defence: *Griffiths v R* (1932) 23 Cr App Rep 153 and see observations in *R v Blandford Justices, Ex parte G (an infant)* [1967] 1 QB 82, DC. See also R v Iqbal Begum, ante, S4-7."

**[41]** Blackstone 2011 at para D12.93 is to similar effect.

*"If an accused purports to enter a plea of guilty but, either at the time he pleads or subsequently in mitigation, qualifies it with words that suggest he may have a defence (eg 'Guilty, but it was an accident or Guilty, but I was going to give it back'), then the court must not proceed to sentence on the basis of the plea but should explain the relevant law and seek to ascertain whether he genuinely intends to plead guilty.*

*If the plea cannot be clarified, the court should order a not guilty plea to be entered on the accused's behalf (Criminal Law Act 1967, s 6(1)(c): 'if [the accused] stands mute of malice or will not answer directly to the indictment, the court may order a plea of not guilty to be entered').*

*Should the court proceed to sentence on a plea which is imperfect, unfinished or otherwise ambiguous, the accused will have a good ground of appeal. Since the defect in the plea will have rendered the original proceedings a mistrial, the Court of Appeal will have the options either of setting the conviction and sentence aside and ordering a retrial (see, eg. Ingleson [1915] 1 KB 512) or of simply quashing the conviction (see, eg. Field (1943) 29 Cr App Rep 151). If the former course is chosen (i.e. there is to be a retrial), the court may either then and there direct that a not guilty plea be entered or order that the accused be re-arraigned in the court below (eg., Baker (1912) 7 Cr App Rep 217).*

**[42]** The situation on Rajendra Samy's case is that the pleas were based on a misunderstanding of the law. A counsel Mr D Prasad purportedly on behalf of Rajendra Samy explained the basis of his plea to Count 1.

*"However, his intention in that particular day was to threaten his mother so that she understands what her own children are going through in Fiji. Unfortunately an argument developed and his mother said to "get out of my house" which angered Rajendra and thus the incident for which he is totally regretful".*

In Court on 29th November 2007 in his verbal mitigation referring to this, according to the Record of the learned Justice of the High Court, said *"There was an argument and he did strike his mother".*

This was a reference to the argument on 7th December 2006 as described in Rajendra's statement and is set out above. It involves Mrs Ram Kuar, his mother starting the violence by cutting him on a finger with her kitchen knife. In the prosecution evidence on 7th June 2006 in contrast to what happened on 4th June 2006, there was no argument and violence commenced with a serious attack by Rajendra Samy on his mother.

**[43]** It follows that in Count 1 Rajendra Samy's state of mind was that if you commit grievous bodily harm with intent to do so that is within the *mens rea* of attempted murder. Rajendra Samy on advice was making the same mistake as to the applicable law as Justice Parker did in *Whybrow*.

**[44]** Mr Justice Widgery (as he then was) in *R v Blandford Justices; Ex parte G (an infant)* [1967] 1 QB 82 made it clear that when the judge hears something actually or potentially inconsistent with a plea of guilty, the Court, whether a magistrate in the summary proceedings or a High Court Judge in proceedings on Information or Indictment should consider and question whether the *"guilty plea"* can stand. It is a *"guilty but"* situation. As Widgery J put it at pages 90 and 91.

*"But in cases where the defendant is not represented or where the defendant is of tender age or for any other reasons there must necessarily be doubts as to his ability finally to decide whether he is guilty or not, the magistrate ought, in my judgment, to accept the plea, as it were, provisionally, and not at that stage enter a conviction. He ought, in my judgment, in these cases to defer a final acceptance of the plea until he has had a chance to learn a little bit more about the case, and to see whether there is some undisclosed factor which may render the unequivocal plea of guilty a misleading one. I have no doubt that experienced magistrates in fact do in these cases wait until they have heard the facts outlined by the prosecution and wait until they have heard something of what the accused has to say.*

*If at that stage the magistrate feels that nothing has been disclosed to throw doubts on the correctness of the plea of guilty, he properly accepts it, enters a conviction and that is the end of the matter so far as this point is concerned.*

*If, however, before he reaches that stage he finds that there are elements in the case which indicate that the accused is really trying to plead not guilty or, as Lord Goddard CJ put it, 'Guilty, but,' then the magistrate has, in my judgment, no discretion, but must treat the plea for what it is, namely, a plea of not guilty".*

**[45]** The problem is that judges and counsel do sometime, become confused at least temporarily about rules of law. Particularly if it is a rule of some complexity which often causes error. In *Ingleson* (supra) the Court of Appeal probably covered up the situation when it opined *"we presume the Recorder did not read to the end of the statement"*. Because it was in the summing up, the five man Court of Appeal had to say what Justice Parker had done in *Whybrow*. If Parker J could make this mistake then the legion of Counsel and Judges who made it in this case should not be criticised.

**[46]** So the High Court Justice should have done something in this case when that Justice read what Counsel D Prasad had written as Rajendra Samy's state of mind relevant to three pleas of guilty to attempted murder. Or when D Prasad in his verbal mitigation said *"There was an argument and he did strike his mother"*.

**[47]** The Justice should have said:

*"Mr Prasad this is not an admission by your client of intention to murder his mother. Even less it is an admission that he intended to murder Amit or Ashneel. Pleas of not guilty must be entered and your client must be tried on these three counts".*

**[48]** But the learned Justice of the High Court together with the prosecutor, the defence counsel, the counsel who refused Legal aid at an earlier time and the prosecutor on behalf of the DPP who changed the charges in respect of Amit and Ashneel on 27th July 2006 from grievous bodily harm with intent to charges of attempted murder all were unaware of the necessary *mens rea* required for a charge of attempted murder. When it came to Rajendra Samy applying for leave to appeal things got worse. Not only did the Learned Justice of Appeal fall into the *mens rea* of attempted murder error, but he thought that the second and third counts against Amit and Ashneel in the High Court were *"acting with intent to cause grievous bodily harm"*.

The *mens rea* error was shared by prosecuting and defence counsel who wrote their respective legal submissions and by the Counsel on either side who actually appeared on 17th November 2008. The learned Justice of Appeal dismissed Rajendra Samy's application on 12th December 2008. Unfortunately on the issue of *"involuntary"* plea, the Learned Justice of Appeal did not have the record in the High Court which is absolutely essential in deciding such applications.

**[49]** Before leaving this part of the case I should refer to the rule which prevailed at common law and which, I am of the opinion, in the absence of authority to the contrary, still applies. This is in respect of what alternative offence the jury may find when attempted murder is charged and they are not satisfied on the essential element of intention to murder. Archbold 36th Edition at paragraph 2560 says:

> *"2560. Power to convict of unlawful wounding. If the intent is not proved, the prisoner may, by virtue of the Prevention of Offences Act, 1851, s 5 (ante, s 2555), be convicted of unlawfully wounding, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of unlawfully wounding: that is, by imprisonment for any period not exceeding five years: section 20 of the Offences against the Person Act, 1861 (post, 2664). Section 5 of the Prevention of Offences Act, 1851, is to be read as if the word 'maliciously', as well as 'unlawfully', had been inserted therein, with reference to the wounding of which the jury may convict the prisoner, and it is therefore essential to a conviction under that section that the act which caused the would should be done maliciously. The unlawful wounding of which the jury are at liberty to find the prisoner guilty under that section is the unlawful and malicious wounding referred to in section 20 of the Offences against the Person Act, 1861 (post, 2664): R v Ward,* LR 1 CCR 356. As to what constitutes a malicious wounding under the last-mentioned enactment, see R v Ward *(ante); R v Martin,* 8 QBD 54 (post, 2666). On an indictment for the felony the prisoner may plead guilty to the misdemeanor: Criminal Justice Administration Act, 1914, s 39(1) (ante, 426).

**[50]** The DPP can charge what he thinks appropriate and the High Court judge must hear the case. In the present case it was objectively appropriate to charge Rajendra Samy with attempted murder in respect of Mrs Ram Kuar. The evidence from the disclosures examined above demonstrates that. At the same time, as the evidence examined above also demonstrates there was either a scintilla or no evidence to prove the required *mens rea* when it came to proving a charge of attempted murder in respect of Amit and Ashneel. Amit the evidence goes was diverted by Rajendra Samy to go and buy a copy of the Fiji Times. He did not go immediately and came back and attacked his uncle with a piece of wood. From then on it becomes a struggle for physical supremacy with each trying to stop the other from interfering with their obvious intention. From the evidence it would not be unreasonable to conclude that Rajendra Samy's intention was to remove Amit from preventing his intended continuing violence towards his mother; likewise Amit's intention was to prevent or disable his uncle from continuing the attack on his mother; Ashneel at the time his grandmother was escaping came to Amit's assistance and Amit although sustaining serious injuries was able to withdraw from the scene. Then Ashneel although also sustaining serious injuries succeeded in removing the chopper or meat cleaver from his uncle, who then departed from the scene. There is little doubt that in these kinds of struggle, Rajendra Samy is credible when he said: *"I was just striking and I did not see where it landed"*.

**[51]** Consequently it is much more likely than not that the tribunal of fact in the High Court properly directed or self directed could not have been sure beyond reasonable doubt of the necessary element of a specific intention to murder Amit and Ashneel. If so consideration would have to be given to unlawful wounding which is comparatively a much less serious offence with a maximum term of five years imprisonment.

**[52]** The duty of Counsel for prosecution and defence is to be in a position to assist the Court so far as the law is concerned. While the State is free to charge anything that is broadly in line with the factual matrix, if mistake of law leads to inappropriate charges in terms of the State's interests in obtaining a just conviction, the State is also in the position that it cannot help the learned judge in ascertaining the correct law.

**[53]** The law of ambiguity is only concerned with an accused's right on plea to an information to tender a plea on the facts in accordance with a correct understanding of the law relating each element of the offence charged. His incorrect understanding was not enquired into and his plea was allowed to stand. I propose in accordance with law, to find ambiguity in the pleas and issue a *venire de novo* requiring a new trial and a new arraignment.

**[54]** If there had been *"not guilty"* pleas and the mistake as to the law in respect of *mens rea* was not appreciated during the trial, there would have been a miscarriage of justice in the summing up as happened with Justice Parker in *Whybrow*.

**[55]** In this case Rajendra Samy on the disclosures had advanced a case that he acted in self defence after his finger was cut by his mother's knife when he as attempting conciliation of issues. It is an accused's right to plead *"not guilty"* and whatever defence counsel or the Court may think of chances of success in pleading *"not guilty"*, the accused has *"complete freedom of choice"* and the *"responsibility for the plea is the accused's"*. I now turn to the law on *"involuntary pleas"*.

**Involuntary Pleas**

**[56]** The common law was developed in *R v Turner* [1970] 2 QB 321 and there have been later cases of relevance. It is well summarised by the 20th Edition of Blackstone at paragraphs D12.94 through D12.98 which state:

*Involuntary Pleas*

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| *D12.94* | *A plea of guilty must be entered voluntarily. If, at the time he pleaded, the accused was subject to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty', his plea is a nullity (R v Turner* [1970] 2 QB 321). On appeal, the Court of Appeal will have the same options as it has when a plea is adjudged ambiguous, namely that it must quash the conviction and sentence but will be able, in its discretion, to issue a writ of venire de novo for a retrial as the original proceedings constitute a mistrial. |
| | *Pressure to plead may come from a number of sources: the court, defence counsel or other factors. Whatever the source, the effect is the same.* |

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| *D12.95* | *The Court An example of this principle is provided by Barnes (1970) 55 Cr App R 100, where the judge, during a submission of no case to answer made in the absence of the jury but in the presence of the accused, said that, having regard to the prosecution evidence, B was plainly guilty and was wasting the court's time by pleading not guilty. Despite this pressure, B did not change his plea. Allowing his appeal against conviction on other grounds, the court indicated that the judge's remarks were 'wholly improper', and, if B had pleaded guilty in consequence of them, the plea would have been null.* |
| *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 Rep 233 and R v Cain; R v Schollick* [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 Rep 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.* |
| | *However, in the absence of a suggestion that counsel was acting as a conduit to pass on a threat or promise from the judge, it will be extremely difficult for an appellant to satisfy the court that he was deprived by counsel's advice of a voluntary choice when pleading. Thus, in R v Hall* [1968] 2 QB 788, H was charged with burglary and, alternatively, with handling some of the items stolen during that burglary. The prosecution were willing to accept plea to the latter. Counsel advised H that, if he pleaded not guilty to both counts, he ran the risk of being convicted of the burglary itself since his defence would involve attacks on the character of prosecution witnesses and thus the revelation of his own bad character. If so convicted, he could expect to receive up to 12 years' imprisonment, whereas if he pleaded guilty to handling the maximum sentence would be five years. |
| | *Dismissing H's appeal, Lord Parker CJ said (at pp.534-7):* |

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| | *What the court is looking to see is whether a prisoner in these circumstances has a free choice; the election must be his, the responsibility his, to plead guilty or not guilty. At the same time, it is the clear duty of any counsel representing a client to assist the client to make up his mind by putting forward the pros and cons, if need be in strong language, to impress upon the client what the likely results are of certain courses of conduct.* |
| | *His Lordship then paraphrased the advice given by counsel:* |
| | *[Defence Counsel], in the opinion of this court, was only doing his duty in setting forth the dangers, even, as [he] said, in strong language.* |
| | *… anybody who has heard the evidence in this case and has understood the workings of the law and our procedure, could not fail to realise that the appellant has no grievance at all … and that his counsel performed his duty to the best of his ability. This Court has no hesitation in those circumstances in dismissing the appeal.* |
| | *The position will be different if the advice given by counsel is demonstrably wrong. For example, in Sorhaindo [2006] EWCA Crim 1429, the Court of Appeal held that, where an accused had erroneously been advised that his factual case afforded him no defence, he should have been permitted to vacate the guilty plea that he entered in reliance on this advice.* |
| *D12.97* | *Guidance to Defence Counsel The Code of Conduct of the Bar, Written Standards for the Conduct of Professional Work, para, 12.3, confirms that defence counsel should explain to the accused the advantages and disadvantages of a guilty plea. It goes on to say that he must make it clear that the client has complete freedom of choice and that the responsibility for the plea is the accused's. It is common practice, endorsed by para. 12.5.1, to tell an accused that he should plead guilty only if he is guilty (see Lord Parker CJ's observation in R v Turner* [1970] 2 QB 321 at 326F that: 'Counsel of course will emphasise that the accused must not plead guilty unless he has committed the acts constituting the offence charged'). However, it may be felt that, on occasions, realistic advice about the strength of the prosecution case and the sentencing discount for a guilty plea will effectively force an accused into a guilty plea however punctilious defence counsel may be in saying that he should plead guilty only if he is guilty. |

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| | *Where an accused persists in pleading guilty notwithstanding telling counsel that he is in fact innocent, counsel may continue to act for him but must say nothing in mitigation that is inconsistent with the guilty plea (paras. 12.5.2 and 12.5.3.) Counsel may thus be forced to confine his mitigation to the circumstances and background of the offender and any matters minimising the gravity of the offence which are apparent on the face of the prosecution statements; since his only instructions about the offence itself are that the accused is not guilty of it, counsel cannot explain (as he might otherwise do) the immediate temptations etc. that led to its commission.* |
| *D12.98* | *Other Pressures Apart from cases where pressure has been brought to bear on the accused to plead guilty, there may be other situations where his mind did not go with his plea and he is therefore entitled to have his own conviction set aside. An example is R v Swain* [1986] Crim LR 480, in which S changed his plea to guilty half way through the prosecution case. He gave no coherent explanation to counsel at the time, but it was afterwards discovered that he had been under the influence of the drug LSD. Psychiatric evidence called before the Court of Appeal established that LSD can put the user into a state akin to schizophrenia where he drifts in and out of a delusional world and makes irrational decisions. The court held the change of plea to have been a nullity". |

The only way to assess whether the pleas of guilty can stand as voluntary pleas is through the record of the proceedings as relevant in the High Court.

**What Happened According to the Court Record**

**[57]** On 11th August 2006 Rajendra Samy was represented by Mr M Raza retained and paid by him and the pleas were taken.

*" Before the Hon. Justice of the High Court*
*Friday 11th day of August 2006 at 9.30 am*

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| *… Court:* | *Take plea first. Information read.* |
| *Count 1:* | *Not Guilty.* |
| *Count 2:* | *Not Guilty.* |
| *Count 3:* | *Not Guilty.* |

*… Trial for one week 27th November 2006 in open court …"*

**[58]** On 29th September 2006, the record discloses Mr M Raza saying in respect of the charge to three counts of attempted murder *"DPP says they will proceed with charges as they are"*.

**[59]** The first trial dates were vacated. The record on 16th March 2007, shows Mr M Raza asking for a *"2 to 3 weeks trial"*.

**[60]** On 17th October 2007 the record shows that Mr T Fa was now representing the accused. The accused had not paid him and he wished to withdraw.

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| *"T Fa:* | *My client has not paid my fees. He has not got any money and now wants to apply for legal aid.* |
| *Prosecutor:* | *Still no trial date.* |
| *T Fa:* | *I want to withdraw at this stage.* |
| *Court:* | *Mr Fa given leave to withdraw."* |

**[61]** On the 6th November 2007, the learned Justice of the High Court confirmed the trial would take place on 12th November 2007. This date was because the prosecution was putting pressure for an early trial because Mrs Ram Kuar, the accused's mother, was intent on departing Fiji for the United States on 18th November 2007.

**[62]** On 8th November 2007 Ms J Nair legal aid counsel, appeared before Madam Justice Shameem. She told the Court that she was assessing the application and that the Director had instructed her to take the standard time to do this. Two possible trial dates were fixed by the Honourable Justice of the High Court. They were 26th November 2007 and 6th December 2007.

**[63]** Then on 16th November 2007 there was an influential event prejudicial to Rajendra Samy. Ms J Nair did not appear. The only inference is that legal aid for Rajendra Samy's defence had been refused. On the same day his bail was revoked for breach of condition. Rajendra Samy said he had no other place to live than with his wife and children. It seems his brother and mother had worked with police to achieve this. On this matter the record shows:

**[64]**

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| *"Accused:* | *The case is dragging on. I can't stay in someone else's house for so long. I have attended all the court hearings. I did obey all the conditions. I have children in Nadawa. I have no other place to stay.* |
| *Court:* | *Why didn't you come back to vary bail.* |
| *Accused:* | *I have been told that my brother is sending money to my mother as a bribe. That's why he is so concerned. I said I would raise issues with the court.* |
| *Court:* | *… Bail is revoked."* |

**[64]** On Friday 23rd November 2007 a new defence lawyer Mr D Prasad appeared. He was immediately pressured by the prosecution and the Court to be ready two days later. I set out the entry from the record. What is most worrying is that for the first time there is a strong hint of the prosecutor and the new defence lawyer agreeing to pressure Rajendra Samy into pleas of *"guilty"* to the three counts in the information. The Court seemed to be going along with this but said *"If no change of position trial will proceed on Monday"*.

> *" Before the Hon. Justice of the High Court*
> *Friday 23rd day of November 2007 at 9am*
> *Prosecutor*
> *Mr D Prasad & Ms J Nair for Accused.*

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| *D/P:* | *I am now appearing for the Accused. However I have just received instructions. I know the complainant has to go back to the US. Prefer a progressive approach and need to advise my client.* |
| *Court:* | *Ms Nair is given leave to withdraw. Can Mr Prasad tell us on plea by Monday? Adjourn to trial on Monday, but if there is change of position then we will retake the plea.* |
| *Prosecutor:* | *Only 3 key witnesses and police officers. Will not take long. We will have agreed facts. But worried about another change of plea later. The family members have own agenda.* |
| *Court:* | *If no change of position, trial will proceed on Monday. Adjourn to 9.30 am on 26th of November in Court."* |

**[65]** On Monday 26th November 2007 Rajendra Sharma was pressured by the prosecutor the Court and his Counsel to plead guilty to the three attempted murder counts on the information and did so. I set out the record:

*" Before the Hon. Justice of the High Court*
*Monday 26th day of November 2007 at 9.30 am*
*Mr D Prasad for Accused*

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| *D/P:* | *My client will plead guilty today. I then wrote the letter. Now he has changed his mind and has sacked me. He wants to represent himself – he is ready for trial. I have given him full advice.* |
| *Accused:* | *I didn't understand what he told me last week. I want to proceed but want to engage another lawyer.* |
| *Court:* | *The main witness due to leave the country this weekend.* |
| *Accused:* | *I didn't know that.* |
| *Court:* | *That occurred in your presence.* |
| *Accused: Yes, I agree.* | *Prosecutor: We are ready for trial. We are concerned – this is a deliberate tactic – if any further adjournment we will lost our witnesses. The main witness Kuar leaves on the 30th.* |
| *Court:* | *Will give Accused and counsel time to have a discussion.* |
| *D/P:* | *My difficulty is that I can't do a trial – my views are that he has no option – and I wrote the letter on that basis. How can I represent him now? I was prepared to mitigate.* |
| *Accused:* | *I did understand what he said. I did agree but I need some clarification – I need concrete answers.* |
| *Court:* | *Stand down for counsel and Accused to discuss the matter.* |
| *10.30 am* | *Appearances as before.* |
| *D/P:* | *Have explained everything to my client. He now understands the position. I have not pressured him at all.* |

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| *Accused:* | *I confirm that I want to plead guilty.* |
| *D/P:* | *I will need time to prepare mitigation.* |
| *Prosecutor:* | *Could we have 2 hours to make a new summary of facts.* |
| *D/P:* | *Can I mitigate on Thursday?* |
| *Court:* | *Yes, all right.* |
| *Assessors in.* | |
| | *Information read to the Accused.* |
| *Count 1:* | *Guilty.* |
| *Count 2:* | *Guilty.* |
| *Count 3:* | *Guilty.* |
| *Court:* | *Assessors discharged.* |
| *12 noon for facts. Adjourn to then."* | |

**[66]** When the court resumed on 26th November 2007 at 12.00 pm facts prepared by the Prosecutor were said by D. Prasad to be agreed by Rajendra Samy. In these there was no mention of the necessary element of intention to kill in respect of his mother, Amit or Ashneel. The learned High Court Justice asked if the statement under caution was agreed. D. Prasad replied in the affirmative. The learned High Court Justice did not at any time raise the issue that his agreed statements under caution were in fact denials of the most essential element of the offence of attempted murder. This laid the foundation for D. Prasad to state on 29th November 2011 that Rajendra Samy had pleaded on the facts in his caution statement.

**[67]** The matter of law decisive in respect of ambiguity must also render the pleas of *"guilty"* on 26th November 2007 a nullity on account of being involuntary. Mr D Prasad advised him, as is clear from the record, that defending himself when conciliation went wrong and his mother attacked and stabbed him in the finger with a kitchen knife amounted to facts which if proved amounted as a matter of law to both the *actus reus* and *mens rea* of attempted murder. In *Sorhaindo* [2006] EWCA Crim 1429 the Court of Appeal in England held that, where an accused had erroneously been advised that his factual case afforded him no defence, he should have been permitted to vacate the guilty plea that he entered in reliance on this advice. Not only has an accused a right to free choice of plea, but where legal advice is involved it must be correct advice. His intelligence must be engaged correctly to the matters of law which are relevant to the factual case he believes will be proved if a trial proceeds. If his intelligence is not so engaged it is an involuntary plea and a nullity. If the advice is intentionally wrong the accused is the victim of wilful pressure by the adviser. If the adviser has made a *bona fide* mistake about the law, the pressure on the accused is the same. It amounts to wrongful pressure which has denied him of his right to choose. The plea is an involuntary one and a nullity.

**[68]** The situation is made worse in this case by what D Prasad is recorded as saying on 26th December 2007. He said:

> *"My difficulty is that I can't do a trial – my views are that he has no option [but to plead guilty] – and I wrote the letter on that basis. How can I represent him now? I was prepared to mitigate".*

This is an admission that the advisor is not going to support free choice of plea – but is going to pressure the appellant from pleading *"not guilty"* into pleading *"guilty"*. The Court had accepted *"not guilty"* as a plea some fifteen months earlier and since that event had been trying to fix dates for a trial. Even without a mistake of law the facts bends towards a conclusion that it was an involuntary plea and a nullity.

**[69]** Both the prosecution and the learned judge acted to expedite a trial on the basis that a witness Mrs Ram Kuar was intent on departing to the United States. First of all it was said to be on 18th November 2007. Secondly 23rd November 2007 was found to be acceptable for this witness. Then it was said to be 30th November 2007. The prosecutor said he was concerned with a family that had its own agenda. Yet he and police had acted with two hostile members of the family to get Rajendra Samy into custody. It is clear that Ms Ram Kuar's return to the United States was an event that could be easily changed and manipulated. On 8th November 2007 the learned judge had said the trial could commence on 6th December 2007. This was presumably on the basis that Mrs Ram Kuar would be available and would give evidence. Earlier on 2nd August 2007 the record shows that the prosecutor was anxious to delay the trial because Mrs Ram Kuar was in the United States.

| | |
|---|---|
| *"Prosecutor:* | *Our main witness is not available. She has moved house in California and we have no contact address. But we have her son's contact. We are trying to contact him as well as the US Embassy".* |

On 23rd November 2007 the learned Justice had said that the trial would take place on 26th November 2007. On 26th November 2007 Mrs Ram Kuar was in Suva and could have given her evidence. She could have also been available for 27th November 2007, 28th November 2007 and 29th November 2007. Why not proceed with the trial which was the right and expectation of Rajendra Samy since 11th August 2006? The prosecutor and the family factions hostile to Rajendra Samy were manipulating events to pressure Rajendra Samy into pleading guilty. But whatever their concern was, it had nothing to do with the availability of Mrs Ram Kuar.

**[70]** The evidence is that in August 2006 Rajendra Samy was represented by Mr M. Raza who would appear at trial. But by all the delays not requested by him, for which he was not responsible his representation money was used up. By 17th October 2007 Mr T. Fa had not been paid. He then said *"(The Appellant) has not got any money and now wants to apply for legal aid"*. Mr D. Prasad turned up on 23rd November 2007 for the first time. Since 16th November 2007 Rajendra Samy had been in custody. There is no evidence that he was visited in prison by D. Prasad.

**[71]** Who was lawyer D. Prasad representing? Since Rajendra Samy was in custody from 16th November 2007, and had no money it could not have been arranged by him. Was it arranged by his estranged brother (Pillay), with the support of Mrs Ram Kuar (who was the only one with money)? Then it turns out that D. Prasad will only act if Rajendra Samy agrees to plead guilty to all three charges in the information of attempted murder. Any counsel who advised Rajendra Samy to plead guilty to attempted murder of Amit and Ashneel was not acting in the accused's interest.

**[72]** I find it more likely than not that D. Prasad was retained and paid by the hostile faction of the family and was representing their interest and their agenda. He cannot be found to be acting as Rajendra Prasad's lawyer. At no time did he act in his interest; at no time did he give correct legal advice. I conclude that on the facts Rajendra Samy was unrepresented. This finding also affects ambiguity. It will be borne in mind that even before R v Blandford JJ's extended the doctrine of when the Court must intervene, it was already the common law that where an unrepresented defendant pleaded guilty, the Court has a duty to enquire that he understands the elements of the offences to which he is pleading guilty. It is especially so if the depositions disclose that he has a good defence. *R v Griffiths* (1932) 23 Crim App Rep 153 (see paragraph 40 above). So there are two bases for concluding that ambiguity applied.

**[73]** But this pressure from the family was improper. It should have been recognised. It should have been prevented from having effect. This pressure from the family through D. Prasad resulted in an involuntary plea.

**[74]** As early as 11th August 2006 the accused had pleaded *"not guilty"* to all the charges. Ever since it was about when the trial would take place. I do not understand then why the learned judge said on Friday 23rd November 2007 *"Can Mr Prasad tell us on plea by Monday? Adjourn to trial on Monday but if there is change of position then we will retake the plea"*. Then on Monday 26th November 2007 D. Prasad is sacked by the accused – who wants *"concrete answers"* and is prepared to represent himself. What then happens? The learned judge says *"Stand down for [D. Prasad] and accused to discuss the matter"*. Yet just three days earlier the learned judge was clear that a trial would commence at this time if the accused was not persuaded to change his plea to *"guilty"*. As noted above the witness Mrs Ram Kuar was in Fiji and available to give evidence.

**[75]** Let us assume there was no mistake of law concerning the *mens rea* of attempted murder. Was this an involuntary plea? In my view it was quite contrary to the law as stated in *R v Locker* [1971] 2 QB 321. The prosecutor wanted a plea rather a trial. So he put pressure on Rajendra Samy. He was able to do this because the family instructed and paid for a lawyer D. Prasad to obtain pleas of guilty in their interests. It is clear that the prosecutor, for reasons that are unclear, agreed with the family agenda. But the prosecutor must always act to uphold due process and the safeguards essential to maintaining the rule of law. With the objective of pleas of guilty rather than a trial, he did not assist the Court in ensuring as required by the common law in R v Turner that a voluntary plea to serious allegations of crime, the right of accused persons, was tendered. Instead he seems to have encouraged the Court to assist in ensuring an involuntary plea of *"guilty"* to the Information. Perhaps the prosecutor had momentarily forgotten about R v Turner and involuntary pleas.

**[76]** As to Defence Counsel he was in breach of the primary and only duty of defence Counsel which is to advise and represent the interests of his client. He was in breach of both the spirit and the letter of the guidance to defence Counsel at paragraph D12.96 and D12.97 of Blackstone (2011) cited at paragraph 51 above. In cases such as *R v Hall* [1968] 2 QB 788, also cited in paragraph 56 above, defence counsel acts properly if strong advice to plead is necessary in the facts. In *Hall* the accused's previous convictions and his line of defence was such that if found guilty, he was likely to be sentenced to 12 years imprisonment. On a plea to handling the maximum was 5 years imprisonment. In the present case

Rajendra Samy had no criminal record. It was not a case where defence counsel could urge a plea on the grounds of a substantial disparity arising from Rajendra Samy having a criminal record. The usual discount for a plea of guilty can never be a reason for justifying the use of pressure and the obtaining of an involuntary plea.

*Conclusions re Ambiguous and Involuntary Pleas*

**[77]** 77. In my view there is clear mistrial and *venire de novo* must run. I propose that leave to appeal against conviction and sentence be granted and, that the leave hearing be treated as the hearing of the appeal. In the appeal I propose that the appeal be allowed, the conviction and sentence of Rajendra Samy on all counts be set aside and annulled, and that the matter be remitted to the High Court so that Rajendra Samy plead to and answer the information on this case. I propose also that Rajendra Samy be remanded in custody until a bail hearing can be immediately arranged before Justice Daniel Goundar or such other High Court Justice as may be available.

**[78]** 78. As to bail, in my view since Rajendra Samy was in pre trial custody for about three months and has now served four years in prison, he should be granted bail on his recognisance and should be permitted to live with his wife and children at the compound.

*Leave to Appeal Against Sentence*

**[80]** In view of my proposed disposal of the appeal against conviction then, should that view prevail with my brother judges, there is no need to discuss or deal with the sentence appeal. But I wish to explain some views.

**[81]** Firstly I have no quarrels at all with 9 years imprisonment for a bad case of attempted murder. The only attempted murder disclosed by the papers here is upon Mrs Ram Kuar. With regard to Amit and Ashneel they attacked Rajendra Samy to stop him murdering his mother. He defends himself but attacks them in excess of self defence intent on preventing them from preventing him in carrying out his purpose. Therefore he is guilty of batteries and the severity of injuries probably puts them at causing grievous bodily harm with intent. These are serious charges but well short of attempted murder.

**[82]** If this had been pleaded to in terms, the correct sentence would be a total sentence of 8 years.

**[83]** However I have read the evidence of Ram Kuar's eldest child and daughter Mrs Parvati Phillip in a statement dated 23rd November 2007. This is set out in part at paragraph 10 above. It is headed *"Ram Kuar – Character Letter"*. Mrs Phillip writes:

> *"I have raised Rajend since childhood because my parents both worked. Since my childhood I have watched my mother Ram Kuar abuse all of us verbally and physically.*
>
> *First of all she would not provide food for us, she would make us clean the entire house, and would hit Rajend a lot. She would say to Rajend that he was a bastard (kid without father). As we grew up we saw that she only liked my younger sister Angela Devi and not the rest of us.*
>
> *We started to hate our own mother Ram Kuar because of the daily abuses we took from her. She made me and my brothers feel worthless. …*
>
> *… One day after a big fight I asked my mother to leave and she did cursing us. My brother Rajend told our mother to leave me alone or he will see to it. My mother told him you try me. With that said she got mad at Rajend because he was taking my side and said that she would go to Fiji and take away Rajend's home and destroy his family.*

*Then she went to Fiji and raised hell from my father's funeral until Rajend took some actions. Sometimes it seems like my brother Rajend had no other choice to do what he did so we can all live in peace. …*

*… I am the oldest daughter (and) have no remorse for my mother at all. Watching this from childhood I regret to say to this woman deserves all that she got."*

**[84]** Where murder has been caused by conduct of the victim which immediately provokes action in the person inflicting death arising from uncontrollable emotions, the tribunal of fact convicts of manslaughter. While provocation never applies to cold blooded premeditated killing, there is a grey area as to how long a period there may be between uncontrollable emotional disposition arising and the fatal acts for the provocation rule to be applicable. There is no similar rule in respect of liability for attempted murder. However I have no doubt that where the conduct of the victim causes or contributes to loss of control in the actor, it is important and valid mitigation going to the appropriate length of sentence. In circumstances like this, the judge, where the prosecution are denying the truth of what the defence witness is endeavouring to establish, should have the issues raised made the subject of live oral evidence with cross-examination. If witnesses such as Mrs Phillip live in the United States of America they can give evidence and be cross-examined by video-link or by skype. This was recently done in a Fiji High Court criminal trial.

**[85]** In sentencing I note the use of the following words *"You were having on-going financial disputes with your mother and sister"*. That understates that Rajendra Samy was being evicted for the present and future from the only home he and his wife and two children possessed. Also that he had built the flats on Lot 55 with his brother. It also leaves out that when he and his brother owned the land, he was up to date with his share of capital and interest payments to the Housing Authority. It was his brother Pillay that caused the need to involve their parents; not only had Pillay not been paying his obligations to the Housing Authority, he had not let Rajendra Samy know for two years that he was in default.

**[86]** I note also that in sentencing there is no reference to Rajendra Samy's role in the disputes between Parvati and her mother in the United States and Parvati's evidence

*"My mother told [Rajend] you try me. With that said she got mad at Rajend because he was taking my side and said that she would go to Fiji and take away Rajend's home and destroy his family".*

It seems that Rajendra Samy, more likely than not, was doing his duty in protecting his sister. If so the need for revenge has no basis. To take away a man's home and destroy a family for unjustified revenge is a provocative and evil sentiment. To put it into practise is simply evil. Rational victims of such behaviour can become reactively depressed and be driven to violence or suicide.

**[87]** There were a number of other witnesses in addition to Mrs Phillip with similar evidence. It is clear that this family had its share of issues and was not the paradigm of the happy extended family presided over by a loving mother and grandmother.

**[88]** In my view if provocation or similar circumstances was established by evidence it would reduce the appropriate sentence to 6 years. But these comments are only intended to be considered if and when Rajendra Samy faces sentence for his conduct on 7th June 2006.

**[89]** **Nimal Wikramanayake JA.** Rajendra Samy appeals to this Court against his conviction and sentence with regard to three counts of attempted murder. He pleaded guilty and was sentenced to 9 years in prison on each count with each sentence to be served concurrently. At the time of his offence, Rajendra Samy was 42 years old, and had been driving a taxi for 15 years in order to support his wife and two school aged children. He was a man of good character and no previous convictions and was respectful and helpful to his extended family members as well as to members of his community.

**[90]** At this trial on 29th November, 2007 the learned Justice of the High Court described facts relating to the injuries that were sustained by the three victims in the following terms:

> *"On the 6th of June 2006 you recorded in your diary a plan to execute your mother, your brother, your sister and your brother in law and then you to commit suicide. You were having - ongoing financial disputes with your mother." On 7th June 2006, you went to your mothers flat, and asked her to make rasam for you. You sent your nephew Amit, who was present to the shop to buy Fiji Times. You went to your own flat and got a chopper. You approached your mother and struck her with a chopper on the face and neck. She called for help and your nephews arrived at the scene. When Amit Raj picked up the timber to hit you, you struck him with the same chopper. He received injuries to his neck, head, and two of his fingers were chopped off. You then struck Ashneel on the head with the chopper. Ashneel pulled the chopper from you and fled the scene. You went to your taxi, took a rope, an axe and a file that you had put there earlier and tried to commit suicide. …*
>
> *… Your mother was taken to the hospital and found to have incised wounds over her face and neck. The wounds needed stitching. Ashneel had lacerations on his forehead, the back of his neck, and two amputated fingers. Your mother in particular received the most serious long term injuries. She was hospitalized some twenty (20) days had an open fracture to her right 4th and 5th metacarpal bones. In September 2006 she was still receiving physiotherapy to try to regain function of her hands. She is 67 years old. …*
>
> *… The victim impact statement submitted by the State shows that Ashneel continues to suffer from headaches and dizziness, and has been unable to work as a result of the assault. He is 20 years old. Ram Kuar's victim impact statement, shows that apart from the four incised wounds on her face and neck she is emotionally depressed and lives in fear. Her relationship with other members of her family has broken down."*

*Appeal Against Conviction*

**[91]** William Marshall JA points out:

> *"The law is that for attempted murder, the most important element that must be proved beyond reasonable doubt is an intention to kill. The evidence is all one way in that Rajendra Samy loved his nephews Amit Samy and Ashneel Chand. Their names do not appear on the original plan. There was overwhelming evidence that he intended to kill his mother. He struck and injured his nephews because they tried to stop him killing his mother, who was their grandmother. In these circumstances I found it inexplicable that Rajendra Samy pleaded guilty to attempted murder of Amit and Asneel. As Archibold 'Criminal Pleadings and Practice' 36 Edition at Paragraph 2559 states:*
>
> *'… where the indictment alleges attempted murder, the intent to murder is the principal ingredient in the crime. It is therefore a misdirection, where a prisoner is charged with attempted murder to tell the jury that they must find the prisoner guilty if they are of the opinion that his intention was either to cause death of the victim or to inflict grevious bodily harm upon him. R v Whybrow* 35 Cr App Rep 141.'
>
> *… On the other hand he would have had to plead guilty to committing grievous bodily harm with intent in respect of Amit and Ashneel. So in the end while the*

*appropriate sentence in respect of the attacks upon them could be less than 9 years, the sentence in respect of his mother Ram Kuar, at least on the reasoning adopted by the Learned Justice of the High Court on 29 November 2007, would still be 9 years. Then on the totality basis he would still be likely to receive 9 years."*

**[92]** Sriskandarajah JA disagreed with the judgment, the reasons and the Orders proposed by Marshall JA. Under the heading *"Appellants intention to kill Amit and Ashneel"* he said:

*"The fact of the names of Amit and Ashneel did not appear in the written plan of the Appellant where he has mentioned the plan to kill his mother only show that he had not planned to kill Amit and Ashneel. The intention of a person who commits a crime can be inferred from the words spoken or the manner in which he is committing the crime. In this instance case the appellant was having a chopper [deadly weapon] in his hand and he struck Amit on the forehead, neck and two of his fingers were chopped. When a person with a chopper strikes another person in a vital part of the body on his forehead and neck the only inference that could be drawn is that he is attempting to kill that person. If suppose the chopper had severed one of the blood vessels in the neck the death could be inevitable. If the Appellants intention was to keep Amit away, he could have threatened him with a chopper that he would cut him or would have beaten him with a piece of timber that was used by Amit to hit the Appellant. The Appellant had no plan to kill Amit Raj or he had no motive to kill Amit Raj is immaterial in inferring intention.*

*"For the same reason I hold that the Appellant had intention to kill Ashneel when he struck him with the chopper on his head."*

**[93]** I have had great difficulty in determining which of my brother judges is correct in his analysis of this crime. As the learned author of criminal law *"Smith and Hogan"* on Criminal Law points out in the 3rd edition of their work at page 29.

*"The principle that a man is not criminally liable of his conduct unless the prescribed state of mind is also present is frequently stated in the form of latin maxim; actus non facit reum nisi mens sit rea."*

**[94]** The important words in this maxim are: *"nisi mens sit rea"* or colloquially translated into English means *"without the necessary mental state"*. As the learned author of criminal law points out page 42:

*" in order to properly appreciate the meaning of the term [mens rea] it is necessary to distinguish between a number of different possible mental attitude a man may have with the respect of the actus reus of the crime in question. These are:*

*[a] intention*
*[b] recklessness,*
*[c] negligence,*
*[d] blameless inadvertence."*

**[95]** It is clear that a man intends the consequences of his act if he foresees that it may result and desires that it should do so. For that Sriskandarajah JA is correct when he says at paragraph (6):

*"The intention of a person who commits a crime can be inferred from the word spoken or the manner in which he is committing the crime. In the instance case the Appellant was having a chopper [deadly weapon] in his hand and he struck Amit on his forehead, neck and two fingers were chopped. When a person with a chopper strike another person in a vital part of the body on his forehead and neck the only influence that could be drawn is that he is attempting to kill that person."*

Sriskandarajah JA chooses the same words to describe the accused hitting Ashneel.

**[96]** With all due deference I have to disagree with Sriskandarajah JA. It is important to remember that when the accused was using the chopper on his mother Amit Raj picked up a piece of timber to hit the accused. His instinctive reaction was to turn around and hit Amit Raj with the chopper. If he wanted to kill Amit Raj he did not need to send him away to buy a copy of the Fiji Times. But he went back home and picked up the chopper he could have returned and killed his mother and his two nephews. I find that when the accused hit Amit Raj he did not have the necessary intention to kill for he may have been using the chopper to defend himself. The fact that he had the chopper in his hand and used it on Amit Raj does not lead to the sole inference that he intended to kill him. Further when his other nephew Ashneel came towards him, Ashneel tries to pull the chopper from the accused's hand. Again the use of the chopper is not just consistent with his wanting to kill Ashneel, for he may have been trying to protect himself. I agree with William Marshall JA that there was no intention on the part of the accused when he used the chopper on his two nephews that he intended to kill them.

**[97]** The other matter raised by Marshall JA was the hearing was conducted in a manner unfair to the accused and resulted in a denial of justice. In this regard it would be convenient to look at the grounds of appeal against conviction which were:

> *"[a] The Honourable Judge erred in law in not advising the Appellant the nature of the allegations against him.*
>
> *[b] The learned Honourable Judge erred to explain to the Appellant the ingredients of the offence.*
>
> *[c] That the Appellant pleaded guilty to all the charges after being told by his Counsel that if he pleaded guilty he would not go to prison that he was a first offender and that he would get a suspended sentence.*
>
> *[d] That the Appellant pleaded guilty to the charge after being advised for prejudice by his counsel and only the Appellant now says that the said Counsel was incompetent and as a result the Appellant suffered a miscarriage of Justice."*

**[98]** This is what happened before the Lord Justice in the High Court. On 6th November 2007 the Hon. Justice of the High Court confirmed that the trial would take place on 12 November 2007. William Marshall JA states:

> *"This date was because the prosecution was putting on pressure for an early trial date because Mrs Ram Kuar the accused mother was intending to depart Fiji for the United States on 18th November, 2007."*
>
> Why she could not put it off for a short period of time to enable the trial to take place?

**[99]** On 17th October 2007 his private lawyer Mr Tevita Fa said that he had not been paid and that Rajendra Samy had no money. Mr Tevita Fa applied for permission of the court to withdraw from the case. On 26th October 2007 the accused told the court that he had applied for legal aid. Therefore one could safely assume that the accused Rajendra Samy was not in funds to retain a lawyer to conduct his defence. The Learned Justice of the High Court had on the 6th of November confirmed that the trial would take place on the 12th. On the 8th of November, Ms J Nair a Legal Aid Counsel, appeared before the Learned Justice of the High Court and informed the Learned Justice that she, Ms J Nair was assessing the situation and the director had instructed her to take the standard time to do so. In view of these developments two possible trials dates were fixed by the Learned Justice of the High Court on 26th November, 2007 and 6th

December, 2007. In the meantime what was Mrs Ram Kuar doing about her trip to United States of America when the case had been postponed to either the 26th of November or 6th December, 2007?

**[100]** On 16th November, 2007, Ms J Nair did not appear for the accused. It was apparent that that legal aid for his defence had been refused. On the same day his bail was revoked, breaching a condition.

William Marshall JA states at Paragraph 12:

*"On Friday 23rd November, 2007 a new lawyer Mr D Prasad who it is likely was been instructed by the family appeared. He was immediately pressured by the prosecution and the court to be ready two days later".*

The interesting question arises as to whether William Marshall JA was justified in arriving at these conclusions. On 17th October, 2007 the accused's private lawyer had withdrawn from the case with the permission of the court. A fair inference could be drawn that the accused did not have the money to pay Mr Tevita Fa for his defence. On 26th October, 2007 the accused told the Court that he had applied for Legal Aid. On 8th November, 2007 Ms Nair appealed and said that she was assessing the accused application. On 16th November, Ms Nair did not appear and only inference that could be drawn was that Legal Aid had been refused for the accused's defence.

The interesting question arises as to where did the money come for this new lawyer Mr D. Prasad. I am of the opinion that it could be safely assumed that the members of the family provided the funds.

Parts of the record set out by Mr Marshall JA indicate that Mr Prasad was pressured to appear in this case on the following Monday two days later by the prosecution and the court. The record shows:

"*Before the Hon. Justice of the High Court*
*Friday 23rd day of November, 2007 at 9.00am.*

| | |
|---|---|
| *Prosecutor* | *for State* |
| *Mr D Prasad and Ms J N Nair* | *for Accused* |
| *Mr D Prasad:* | *I am now appearing for the accused however I have received instruction. I know the complainant has to go back to the United States. Prefer a progressive approach and need to advise my client.* |
| *Court:* | *Ms Nair has given leave to withdraw. Can Mr Prasad tell us on plea by Monday? Adjourned to trial on Monday, but if there is a change of position then we will retake the plea.* |
| *Prosecutor:* | *Only three key witnesses and police officers. Will not take long. We will have agreed facts. But worried about another change of plea later. The family members have their own agenda.* |
| *Court:* | *If not change of position trial will proceed on Monday. Adjourned to 09.30 am on 26th November in Court."* |

**[101]** Two matters arise from this little interlude on Friday 23rd November 2007. What is it did Mr Prasad mean when he said *"prefer a progressive approach and need to advise my client"*. The prosecutor for the State says *"The family members have their own agenda"*.

**[102]** When the case came on for hearing on Monday 26th November 2007 William Marshall JA goes on to state at paragraph 13:

*"On Monday 26th November 2007 Rajendra Samy was pressured by the prosecutor, the court and his counsel to plead guilty to 3 attempted murder counts on the information and did so. I set out the record:*

*Before Hon Justice of the High Court*

*Friday 26th day of November, 2007 at 9.30 am*

| | |
|---|---|
| *Prosecutor* | *for State* |
| *Mr D Prasad* | *for Accused* |
| *DP:* | *My client will plead guilty today. I then wrote a letter. Now he has changed his mind and has sacked me. He wants to represent himself – he is ready for trials. I have given him full advice.* |
| *Accused:* | *I did not understand what he told me last week. I want to proceed but want to engage another lawyer.* |
| *Court:* | *The main witness due to leave the country this weekend.* |
| *Accused:* | *I did not know that.* |
| *Court:* | *That occurred in your presence.* |
| *Accused:* | *Yes, I agreed.* |
| *Prosecutor:* | *We are ready for trial, we are concerned – this is a deliberate tactic –If any further adjournment, we will lose our witnesses. The main witness Kaur leaves on the 30th.* |
| *Court:* | *I will give accused and the counsel to have a discussion.* |
| *D.P:* | *My difficulty is that, I cannot do a trial – My views are that he has no option and I wrote the letter on that basis. How can I represent him now? I was prepared to mitigate.* |
| *Accused:* | *I did understand what he said, I did agree but I need some clarification – I need concrete answers.* |
| *Court:* | *Stand down for counsel and accused to discuss the matter.* |
| *10.30am:* | *Appearance as before* |
| *D.P.:* | *Have explained everything to my client – now he has understood my position - I have not pressured him at all.* |
| *Accused:* | *I confirm that I want to plead guilty.* |
| *D.P:* | *I will need time to prepare mitigation.* |
| *Prosecutor:* | *Could we have two hour to make a new summary of facts?* |
| *D.P:* | *Can I mitigate on Thursday?* |
| *Court:* | *Yes, all right. Assessors in.* |
| *Information read to the Accused.* | |
| *Count I:* | *Guilty* |
| *Count II:* | *Guilty* |
| *Count III:* | *Guilty* |
| *Court:* | *Assessors are discharged, 12.00 noon to the bench. Adjourned to then."* |

**[103]** Sriskandarajah JA in deciding whether the accused received the fair hearing cited Marshall JA's reference to Archbold on Criminal Pleading Evidence and Practice [36 Edition] Paragraph 425 As to the circumstances in which the guilty plea should be set aside:

> *"It is important that there should be no ambiguity in the plea, and that where the prisoner makes some others answers then "not guilty" or "guilty" as the case should be taken to make sure that he understands, the charge and to ascertain to what the plea amounts."*

Sriskandarajah JA then said:

> *"Both propositions that there should not be any ambiguity in the plea, and that the Appellant must understand the charge and should plead to the charge is not violated in this proceedings. In this case from the record I could see the case was fix on trial for several days. The court was reluctant to postpone the trial the reason that counsel for the Appellant was not ready or not available. But the refusal of the postponement of the trial does not mean that a pressure was brought on the Appellant to plead guilty. The burden of proof of the charges, and its ingredients is on the prosecution. The Appellant could have pleaded not guilty and placed the burden on the prosecution to prove the charges and its ingredients.*
>
> *"On the other hand the court record shows that the Appellant was represented by counsel on that day he pleaded guilty and the Court has given sufficient opportunity for the Appellant to discuss with counsel and also to form its own opinion in the question of pleading guilty."* [my emphasis]

**[104]** Sriskandarajah JA then refers to part of the proceedings that took place on 26th November 2007.

| | |
|---|---|
| *" 10.30am:* | *Appearance* |
| *D.P:* | *Have explained everything to my client. And now I understand the position. I have not pressured him at all.* |
| *Accused:* | *I confirm that I want to plead guilty."* |

**[105]** Sriskandarajah JA then states at paragraphs 13 and 14:

> *"13. The above proceeding showed that under the request of the Appellant about one hour was given to the Appellant to discuss with his counsel in the middle of the court proceedings. The way the accused conducted shows that he has confidence in what he is doing.*
>
> *In Halsbury's Laws of England [4th Edition] Volume III]*
>
> *14. The learned Author says this of the duty of counsel in the Criminal trial: The client must decide on his plea, and his line of defense, and whether or not he is to give evidence himself. Counsel may of course properly advise on these matters, in strong term, if need be, but it is the client who must make the decision: it is not for counsel to manufacture the line of defense. If the accused person instructs counsel that he is not guilty but decides not give evidence, it is nevertheless counsel's duty to put the defence before the court to the extent, if necessary, or making positive suggestion to other witnesses."*
>
> *For the above reasons I do not agree that the Appellant was given an unfair hearing in the given circumstances."*

**[106]** Regrettably, I am unable to agree with His Lordships conclusion that the accused was given a fair hearing.

**[107]** For my part, I was puzzled as to why the 42 year old man, with a wife and two school aged children decide to commit such a brutal and hideous crime on his mother. He recorded in his diary that after killing his mother and some members of his family, he was going to commit suicide. He must have been extremely agitated.

**[108]** William Marshall JA refers to these circumstances of extreme provocation of the accused at paragraph 31 of his judgment. Provocation in the present case did not lead to a sudden impetuous act but lead to a cold calculated crime. The accused's sister added that she had no remorse for her mother and that her mother deserved all that she got. The facts referred to in this proceeding by Marshall JA can lead to only one and one conclusion alone that the accused did not get a fair hearing.

**[111]** On 16th November 2007 the accused's bail was revoked and on 23rd November 2007 Mr D. Prasad appeared for the accused. An interesting question then arises has to who was funding Mr D. Prasad's fees. On 23rd November 2007 when the case was called Mr D. Prasad told the court:

> *"I am now appearing for the accused. However I have just received instructions. I know the complainant has to go back to the United States. Prefer a progressive approach and need to advise my client."*

**[112]** Mr D. Prasad obviously knew nothing about the background of the case and nothing about the actual events that took place on 7th June 2006. An interesting question arises as to what Mr D. Prasad meant when he said that a progressive approach had to be taken and he needed to advise his client? Anyway the trial of the matter was adjourned to 9.30am on 26th November in court, and the learned Justice of the High Court made an interesting comment *"if no change of position, trial will proceed on Monday"*.

**[113]** The case then came on for hearing before the learned Justice of the High Court on Monday 28th November 2007. Mr D. Prasad then stated to the court:

> *"My client will plead guilty today I then wrote the letter. Now, he has changed his mind and sacked me, he wants to represent himself- he is ready for trial I have given him full advice"*.

Mr D. Prasad makes two contradictory statements. The first is that the client will plead guilty. In the same breath the second is *"the client has changed his mind and sacked him"*. If the accused had sacked him then Mr D. Prasad should have sought the leave of court to withdraw and taken no further part in the trial.

**[114]** The accused then said:

> *"I don't understand what he told me last week. I want to proceed but want to engage another lawyer."*

It is obvious that the accused was dissatisfied with Prasad and he wanted to engage another lawyer and wanted to proceed to trial.

**[115]** The learned High Court Justice then said:

> *"The main witness due to leave the country this weekend."*

And prosecution counsel for the State said:

> *"We are ready for trial we are concerned - this is a deliberate tactic – if any further adjourned we will lose our witnesses. The main witness Kaur leaves on the 30th.*

There was nothing to prevent the accused's mother leaving at a later date.

**[116]** The learned High Court Justice then said that the accused's counsel would be given time to have a discussion. Why did the accused need to have a discussion with a counsel whose services he had already terminated? Why did he need to have a discussion? The trial had to proceed.

**[117]** Mr D. Prasad then made his intentions clear when he stated:

> *"My difficulty is that I cannot do a trial. My views are that he has no option and I wrote the letter on that basis. How can I represent him now? I was prepared to mitigate*".

**[118]** It is obvious from this last statement of counsel and he was not in a position to conduct a trial on behalf of the accused. What did he mean when he stated: *"How can I represent him now? I was prepared to mitigate"*. It was obvious that Mr D. Prasad had only one intention in his mind and that was to get the accused to plead guilty. This is obvious from his statement: *"in my view is he has no option"*.

**[119]** Although I run the risk of repetition it is abundantly clear from the transcript of the proceedings that Mr D. Prasad had come there to court with no intention of defending the accused in a trial. He had come there with the hope of trying to persuade the accused to plead guilty. The accused refused to do so. The accused rejected his advice and advised Mr D. Prasad that he wanted to represent himself and he was free and ready to go to trial.

**[120]** The Case was then stood down for Mr Prasad and his client to discuss the matter. The accused and Mr D. Prasad returned to court probably 45 minutes later and Mr D. Prasad told the court:

> *"Have explained everything to my client and he now understand the position, I have not pressured him at all. The accused then said: "I confirm that I want to plead guilty."*

**[121]** What happened in that half an hour is anybody's guess and is certainly open to conjecture that Mr Prasad prevailed upon him to plead guilty.

An inference can be drawn from grounds of (c) (d) of the accused appeal against conviction where he states:

> *"(c) The Appellant pleaded guilty to all the charges after being told by his counsel that if he pleaded guilty he would not go to prison as he is a first offender and he would get a suspended sentence.*
>
> *(d) The Appellant pleaded guilty to the charge after being advised/prejudiced by his counsel and whom the appellant knows the said counsel was incompetent and as the result the Appellant suffered miscarriage of Justice."*

**[122]** In the present case the accused intended rightly or wrongly that he wanted to go to trial. A Mr D. Prasad handily turns up as defence counsel. Someone other than the accused, and in my opinion it was the family, had obviously paid for his services. Another matter of considerable interest is the fact that the learned Justice of the High Court adjourned the case for half an hour for Counsel and accused to discuss the matter. There was nothing to discuss at that stage as the accused wanted to go to trial. The clear inference that can be drawn is at the half an hour adjournment was given to enable Mr D. Prasad to persuade the accused to plead guilty. In the circumstances I conclude that the accused was in a position of a unrepresented accused as defence counsel had no intention of doing what the accused wanted him to do.

**[123]** In this regard I could only refer to William Marshall JA's reference to Archbold Criminal Pleading Evidence and Practice 36 Edition at Paragraph 425 with regard to circumstances in which a plea of guilty should be set aside:

*"In the case of an undefended prisoner who pleads guilty, care should be taken to see that he understands the elements of the crime to which he is pleading guilty especially if the deposition disclosed that he has a good defence: R v Griffiths* 28 Crim App Rep153".

A good defence in this context is one that is raised on the committal papers which includes the statements made by the accused. All the statements of Rajendra Samy consistently denied any intention to kill his mother as well as denying any intention to kill his nephews. He said that the incident occurred after an argument and it commenced with his mother cutting one of his fingers with a kitchen knife. At this point he grabbed a chopper and defended himself. It follows that he had a good defence on the depositions with regard to attempted murder of his mother because in his case if it is accepted by the tribunal of fact, the element of *"intention to kill"* was absent. It is nothing to the point that his mother, Amit, and Ashneel deposed to a conflicting version of the facts and that their version in respect of an attack on his mother was – at least on paper -, more likely to be believed. On either version of the facts regarding his nephews he was likely to be acquitted of attempted murder in the absence of any significant evidence that he intended to kill Amit and Ashneel. Since he had a good defence on the depositions and cannot have been said to have a defence lawyer in the person of Mr D. Prasad, the case of *Griffiths*, in my view, required the learned Justice of the High Court to ensure that in pleading *"guilty"* Rajendra Samy understood the elements of the offence of attempted murder. This was not done; it was therefore an ambiguous plea and a nullity.

**[124]** I wish to make one observation on sentence although it does not arise. Although the accused had suffered for years at the hands of his mother as deposed to by his sister, he could not claim that he acted under provocation which only applies to murder charges. It was her unfair and credible threat made on Rajendra Samy to evict him, his wife and children from the house that he had built that moved him to consider violence. It is a factor, in my view, that a court should have considered in reducing his sentence for attempted murder of his mother.

**[125]** I agree with William Marshall JA that there is a clear mistrial and *venire de novo* must run. I also agree that leave to appeal against conviction and sentence should be granted, and that the leave hearing be treated as the hearing of the appeal.

I also agree that the Appeal be allowed and the convictions and sentences of Rajendra Samy on all counts be set aside and annulled and that the matter should be remitted to the High Court so that Rajendra Samy have this information put to him. The matter will then proceed on unambiguous pleas one way or another.

**[126]** I also propose that Rajendra Samy be remanded in custody until the bail hearing can be immediately arranged before Justice Daniel Goundar or one of the other High Court Justices as may be available.

**[127]** With regard to bail Rajendra Samy was in pre-trial custody for about three (3) months and has now served four years in prison should be granted bail on his own recognisance and should be permitted to be with his wife and children at the compound. As I understand it Mrs Ram Kuar is residing once more in the United States.

**[128]** In view of the fact that I agreed with William Marshall JA in the proposed Appeal against the conviction is no need to discuss or deal with the appeal against sentence.

**William Marshall JA.**

**ORDERS OF THE COURT**

**[129]** By a majority, the orders of the Court are:

(1) That Rajendra Samy be granted leave to appeal against conviction and sentence.

(2) The leave hearing is merged with the hearing of the appeal. The appeal of Rajendra Samy against conviction and sentence is allowed.

(3) On the basis of mistrial the conviction and sentence of Rajendra Samy on all counts are set aside and annulled.

(4) That the writ *venire de novo* be issued and the information against Rajendra Samy be remitted to the High Court so that Rajendra Samy may plead to and answer the information in this cause.

(5) That Rajendra Samy be remanded in custody until an expedited bail hearing is heard by Mr Justice Goundar or such other High Court Justice as may be available.

**[1]** **Sriskandarajah JA.** I do not agree with the judgment, the reasons and the proposed orders of William Marshall JA. I give my reasons for my dissent and my judgment.

**[2]** The Appellant was indicted in the High Court of Fiji on three (3) counts of attempted murder of Mrs Ram Kuar, Amit Sami and Ashneel Chand. He was convicted and sentenced on a plea of guilt in relation to all the counts. An application for leave to appeal against the conviction and sentence of the Appellant was refused by Devendra Pathik JA sitting as a single Judge on 31st December 2008. The Appellant Rajendra Samy now renews his application to the Court of Appeal against the conviction and sentence imposed on him.

**[3]** This case had not proceeded for trial and the case was concluded with the plea of guilt hence there is no evidence led in this case. The facts available in relation to this case are from statements made by witnesses and the Appellant to persons in authority and these statements were neither given on oath nor the veracity of these statements were tested by cross-examination, therefore one has to caution himself before drawing conclusions relying on these statements.

**[4]** I will now deal with each count in the indictment/information separately. The first count is a charge of attempted murder of Ram Kuar.

**[5]** This charge was framed on the basis of facts available to the DPP. The facts revealed that the Appellant on Sunday 4th June 2006 had gone to his mother's flat and offered $50 as a month rent for flat 2. His mother refused the $50 and demanded $100 instead. When the Appellant said that he was just a taxi driver and he cannot pay, Mrs Ram Kuar said:

*" pay the $100 a month or find your own. This is my property and I am the boss."*

**[6]** Following the Sunday incident the Appellant wrote a plan in a note book to murder his mother, his sister Angela and her husband as well as his brother Pillay. This plan had been set for 8th June 2006.

**[7]** The Appellant had gone to his mother's flat on 7th June 2006. To execute his plan he sent his nephew Amit who was in his mother's flat to buy Fiji Times. Thereafter he went to his own flat and got a chopper, came back to his mother's flat and dealt blows to the mother with the chopper on the face and neck. She called for help and Amit arrived at the scene. He picked up a piece of timber to hit the Appellant. The Appellant struck him with the same chopper. He received injuries to his forehead, neck and three of his fingers were chopped off. The Appellant also struck Ashneel on the head with the chopper who came there to prevent the assault. All injured were treated and they had subsequently recovered from their injuries.

**[8]** It is settled law that there must be an intent to kill in a case of attempted murder; *R v Whybrow* (1951) 35 Cr App Rep 141. On the facts the Appellant had a plan to kill his mother, to execute his plan he had gone to his mother's house

and sent away Amit who was there to by Fiji Times. Thereafter he went to his flat brought a chopper and dealt several blows to his mother with the chopper. These blows were of such a nature that is likely to endanger the life of his mother. Appellant caused these injuries to fulfil his desire to kill his mother. In these circumstances there is no doubt that the Appellant had an intention to kill his mother at the time of causing the said injuries. William Marshall JA in his judgment at paragraph 31 has observed:

> *"In my view the existence of the plan strengthens the evidence of a specific intention on the part of Rajendra Samy the Appellant to kill his mother on 7th June 2006."*

**[9]** On the above facts it is justifiable for the DPP to arrive at a decision to indict the Appellant on a charge of attempted murder of Ram Kuar.

**[10]** According to the Court Record the case came up on several occasions and finally when the case came up on 26th November 2007 the following proceedings had taken place:

| | |
|---|---|
| *" Before the Hon. Learned Justice of the High Court* | *Friday 26th day of November 2007 at 9.30 am* |
| *Prosecutor* | |
| *Mr D Prasad for Accused* | |
| *D/P:* | *My client will plead guilty today. I then wrote the letter. Now he has changed his mind and has sacked me. He wants to represent himself – he is ready for trial. I have given him full advice.* |
| *Accused:* | *I didn't understand what he told me last week. I want to proceed but want to engage another lawyer.* |
| *Court:* | *The main witness due to leave the country this weekend.* |
| *Accused:* | *I didn't know that.* |
| *Court:* | *That occurred in your presence.* |
| *Accused:* | *Yes I agree.* |
| *Prosecutor:* | *We are ready for trial. We are concerned – this is a deliberate tactic – if any further adjournment we will lose our witnesses. The main witness Kumar leaves on the 30th.* |
| *Court:* | *Will give Accused and counsel time to have a discussion.* |
| *D/P* | *My difficulty is that I can't do a trial – my views are that he has no option – and I wrote the letter on that basis. How can I represent him now? I was prepared to mitigate.* |
| *Accused:* | *I did understand what he said. I did agree but I need some clarification – I need concrete answers.* |
| *Court:* | *Stand down for counsel and Accused to discuss the matter.* |
| *10.30 am* | *Appearance as before* |

| | |
|---|---|
| *D/P* | *Have explained everything to my client. He now understands the position. I have not pressured him at all.* |
| *Accused:* | *I confirm that I want to plead guilty.* |
| *D/P* | *I will need time to prepare mitigation.* |
| *Prosecutor:* | *Could we have 2 hours to make a new summary of facts.* |
| *D/P:* | *Can I mitigate on Thursday?* |
| *Court:* | *Yes, all right.* |
| *Assessors in.* | |
| *Information read to the Accused* | |
| *Count 1:* | *Guilty* |
| *Count 2:* | *Guilty* |
| *Count 3:* | *Guilty* |
| *Court:* | *Assessors discharged.* |
| *12 noon for facts. Adjourn to then".* | |

**[11]** The above proceedings show that on the request of the Appellant about one hour was given to the Appellant to discuss with his counsel in the middle of the court proceedings. The way the accused conducted himself in these proceedings shows that he has confidence in what he is doing. It appears that the Appellant after careful consideration and discussion with his counsel had pleaded guilty to the charges.

**[12]** When considering the first count there is no doubt that the accused had the intention to kill his mother, he planned to kill his mother and this plan was recorded in his note book. He executed his plan by using a deadly weapon a chopper and caused injuries to his mother that are fatal in the ordinary cause of nature. The evidence supports the charge. He pleaded guilty to the first charge and it is an unequivocal plea of guilt.

**[13]** For the above reasons I disagree with the observation of William Marshall JA at paragraph 46 and 47 of his judgment:

> *"[46] So the High Court Justice should have done something in this case when that Justice read what counsel D Prasad had written as Rajendra Samy's state of mind relevant to three pleas of guilty to attempted murder or when D Prasad in his verbal mitigation said 'There was an argument and he did strike his mother'.*
>
> *[47] The learned High Court Justice should have said:*
>
> *Mr Prasad this is not an admission by your client of intention to murder his mother. Even less it is an admission that he intended to murder Amit or Ashneel. Pleas of not guilty must be entered and your client must be tried on these three counts."*

**[14]** William Marshall JA in paragraph 48 observed that the learned Justice of the High Court together with the prosecutor, the defence counsel all were unaware of the necessary *mens rea* required for a charge of attempted murder. When it came to Rajandra Samy applying for leave to appeal things got worse. Not only did the Learned Justice of Appeal fall into the *mens rea* of attempted murder error.

**[15]** In so far as the first count is concerned (as I am dealing with the first count) there is no doubt that the accused had the intention to kill his mother. This is the finding even William Marshall JA arrived at in his judgment in paragraph 31 of his judgment. This is the *mens rea* required for an offence of attempted murder. The submission of D Prasad in mitigation that *"There was an argument and he did strike his mother"* is to consider the reduction of sentence but it will not have any impact on the *mens rea*. Although provocation is available to reduce murder to manslaughter, it is not available to defeat a charge of attempted murder: *McGhee v R* (1995) 183 CLR 82. Provocation is not a defence to a charge of attempted murder but is taken into account by the court after conviction in considering the sentence: (Woodhouse J) *R v Laga* [1969] NZLR 417.

**[16]** I do not agree with William Marshall JA that there is ambiguity or involuntariness as to the plea of the Appellant to consider as mistrial. In *Li Kuen v R* (1916) 11 Crim App Rep 293 the trial was considered a mistrial as the evidence was led in a language that the accused cannot understand. In *Baker* (1912) 7 Crim App Rep 217 the mistake was in failing to read a relevant document to the end to the accused, pleading guilty in such a situation based on partly read document could fall under a mistrial.

**[17]** William Marshall JA cited Archibald 44th Edition (1992) at 4.90 which says the following about pleas of guilty that should be set aside.

> *"It is important that there should not be ambiguity in the plea, and that where the defendant makes some other answer than "not guilty" or, "guilty", as the case may be, care should be taken to make sure that he understands the charge and to ascertain to what the plea amounts".*

William Marshall JA in paragraph 67 observed:

> *"The matter of law decisive in respect of ambiguity must also render the pleas of "guilty" on 26th November 2007 a nullity on account of being involuntary. Mr D Prasad advised him, as is clear from the record, that defending himself when conciliation went wrong and his mother attacked and stabbed him in the finger with a kitchen knife amounted to facts which if proved amounted as a matter of law to both the actus reus and mens rea of attempted murder. In Sorhaindo [2006] EWCA Crim 1429 the Court of Appeal in England held that, where an accused had erroneously been advised that his factual case afforded him no defence, he should have been permitted to vacate the guilty plea that he entered in reliance on this advice. Not only has an accused a right to free choice of plea, but where legal advice is involved it must be correct advice. His intelligence must be engaged correctly to the matters of law which are relevant to the factual case he believes will be proved if a trial proceeds. If his intelligence is not so engaged it is an involuntary plea and a nullity. If the advice is intentionally wrong the accused is the victim of wilful pressure by the adviser. If the adviser has made a bona fide mistake about the law, the pressure on the accused is the same. It amounts to wrongful pressure which has denied him of his right to choose. The plea is an involuntary one and a nullity."*

**[19]** Both proposition that there should not be any ambiguity in the plea and that the Appellant must understand the charge and should plea to the charge voluntarily is not violated in these proceedings. In this case from the records I could see the case was fixed for trial for several days. The Court was reluctant to give postponements for reasons such as the Counsel for the Appellant was not ready or not available. But the refusal to postpone the trial does not amount to bring a pressure on the Appellant to plead guilty. The burden of proof in relation to a charge and its ingredients are on the prosecution. The Appellant could have plead not guilty and place the burden on the prosecution to prove the charges and

its ingredients. His exercise of free choice to plead guilty or not guilty is not affected in the given circumstances. On the other hand the Court record shows that the Appellant was represented by a Counsel on the day he pleaded guilty and the Court has given sufficient opportunity for the Appellant to discuss with Counsel and also to form his own opinion.

**[20]** In Halsbury's Laws of England (4th edition volume 3) at paragraph 1140, the learned Author says this of the duty of counsel in a criminal trial:

> *"What a barrister defending a client on criminal charge may legitimately do in the course of the defence is nowhere laid down but he is not entitled wantonly or recklessly to attribute to another person the crime with which his client is charged, and he should not make such an imputation unless there are facts or circumstances, or rational inferences to be drawn from them, which at the least raise a not unreasonable suspicion that the suggested person committed the crime.*
>
> *The client must decide on his plea, his line of defence, and whether or not he is to give evidence himself. Counsel may of course properly advise on these matters, in strong terms if need be, but it is the client who must make the decisions: it is not for counsel to manufacture a line of defence. If the accused person instructs counsel that he is not guilty but decides not to give evidence, it is nevertheless counsel's duty to put the defence before the court to the extent, if necessary, of making positive suggestions to other witnesses."*

**[21]** William Marshall JA in paragraph 71, 72 and 73 raises the question "*who was lawyer D.Prasad representing?"* and observed that D. Prasad was retained and paid by the hostile faction of the family and was representing their interest and their agenda. The pressure from the family through D. Prasad resulted in an involuntary plea.

**[22]** It is important to note that the Appellant appeared in person in this Appeal. He did not make any complaint against his lawyer that he was misled by him in relation to the charges or that he was pressurised to plead guilty to the charges. Appellant is the best person who can speak to this fact rather than an Appeal Court going on a voyage of discovery looking in to the case record and drawing inferences. As the Appellant had not raised these issues in appeal I do not think an Appeal Court in the given circumstances can come to the conclusion that the plea was involuntary.

**[23]** In *R v Gadaloff* (CA(Qld)) No. 24 of 1999, 24 September 1999, unreported, BC9906144), the court stated at[4]:

> *"[4] The applicant, having pleaded guilty to the charges against him, now requires leave of the court to withdraw his pleas to those charges: and that, coming as the appeal does after his conviction on such pleas, the onus lies on him to establish that a miscarriage of justice took place when the court accepted and acted on his pleas … The essential question … is whether the entering of the plea of guilty should be regarded, in all the circumstances, as attended by such unfairness as to warrant a new trial.*
>
> *[5] ……A plea of guilty which is the product of intimidation, duress, improper pressure or improper inducement, or harassment is not free and voluntary plea on which a court may properly act…..But, because the law regards a plea of guilty made by a person in possession of all the facts and intending to plead guilty as "the most cogent admission that can be made"…. It is necessary that a miscarriage of justice be demonstrated before leave is granted to withdraw such a plea."*

**[24]** The sentence of 9 years for an attempted murder charge where the victim has suffered serious injuries is a justifiable sentence. My brother Judge William Marshall JA also in paragraph 81 states that *"I have no quarrels at all with 9 years imprisonment for a bad case of attempted murder"*.

**[25]** Section 23 of the Court of Appeal Act provides that the Court of Appeal may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. There is no miscarriage of justice caused to the Appellant by charging him for the offence of attempted murder of Mrs Ram Kuar and convicting him on his own plea, therefore the appeal of the appellant in relation to the conviction on Count 1 and sentence be dismissed.

*Appellant's Intention to kill Amit and Ashneel*

**[26]** William Marshall JA in his judgment has expressed concern on the charges of attempted murder levelled against the Appellant in relation to Amit and Ashneel. His contention is that the charges are wrongly framed, instead of the charge of attempted murder a charge of committing grievous bodily harm should have been brought against the Appellant. Therefore he concluded that the conviction and sentence of the Appellant for the offence of attempted murder of Amit and Ashneel cannot be held valid in law.

**[27]** The fact that the names of Amit and Ashneel did not appear in the written plan recorded in a note book of the Appellant only shows that he has not planned to kill Amit and Ashneel. Analysis of the statements of the victims Mrs Ram Kuar, Amit Samy and Ashneel Chand will be helpful to ascertain the intention of the Appellant. Mrs Ram Kuar in her statement said:

> "*I saw Master back into my flat with a chopper knife in his hand. He held the knife in his right hand. I then asked him as to what he will do with the knife. He just said I will chop you. Then he striked the knife at me with his right hand. I was standing in the kitchen. I quickly held his hand with my left hand. He kept on striking on my face and neck and head area. He then held me by my hair and again striked the knife on my face and head. I kept on yelling for help calling Amit and Ashneel names. He then pushed me down and I fell face down. He again striked at me on my head. I was bleeding and shocked.*
>
> *Then I suddenly put my face up and noticed that he was striking Amit with the same knife outside on the porch, just at the front door. I then manage to stand up and opened the back door grill locked and ran out of the house yelling for help. I also received cut on my right hand little and ring finger."*

Amit Sami in his statement said:

> "*As soon as I went inside the house I saw Rajen hitting my grandmother with something. That time I was not clear whether Rajen was using his fist or a chopper. That time my grandmother was in the kitchen laying downwards and making unusual sound saying Aa Aa. When I went inside the kitchen at the same time I turn around to pick something to save my grandmother. As soon as I turn around my uncle (Rajen) hit me with a chopper on my neck. Then the blood started coming. That time I was black out. Then I open my eyes and saw him again trying to hit me with the same chopper then I got hold of the chopper and threw it straight outside and the chopper landed on the porch. He then got hold of my leg and started to pull and again he got hold of the chopper and hit on my forehead. Again he hit on my neck, then I put my left hand on my neck to save myself but my three (3) fingers were chopped and started bleeding. I would like to say about the time I got hold of the chopper and threw it outside. That time I yelled out saying Ashneel, Ashneel who is my cousin. I only heard Ashneel saying "Mama" (means uncle) What are you doing? "That time I was laying down and at the same time I stood up ran toward the main road.*

Ashneel Chand in his statement said:

> ""*As I sat down to study I heard someone calling my name. I could make out that my cousin Amit was calling me so I lowered the volume of my radio. Then again I heard*

*the sound someone was calling Ashneel, Ashneel, Ashneel. Then I lowered the volume and left out and rushed to the house of Amit as what was happening. Then I entered the compound and whilst reaching the steps of the porch of the house I saw Rajend was hitting Amit with the chopper. Since Rajend was facing Amit's house and his back was facing me, I then got hold of him from the back. When I held Rajend from the back, then he tried to free himself and as a result we both fell down in my grandmother's room which is under construction. We then faced each other whilst I was still holding his hand in which he was holding the chopper. He then plead to me to join hands and promise him and not to tell what he did to anyone. Whilst I was trying to hold his other hand, he turned around and strike the chopper on my head at once. I kept on holding him. Then on the same time he again strike me on the head for the several time. I was blacked out but I was still holding him. In about 14 seconds later I regain conscious and he tried to push me on the barb wire i.e. the fence of my compound. I kept on holding him and dragged him to the driveway. Then he tripped and I fell down on the ground. Then when he realised that he has struck me and said that he didn't mean to hit me, but he believed that I was Amit as his intention was to hit Amit. Then I asked him why you hit Amit. Then he picked up a stone and hit me on my head. Whilst I was on the ground that he lifted me up and told me that he is willing to take me to the hospital. I told him that I will not go to the hospital but you give me the chopper. Then I snatched the chopper from him and Rajend ran into his house. Then I went to the Sunrise Taxi Base with the chopper."*

**[28]** The question is whether the Appellant had the intention to kill Amit and Ashneel to justify a charge of attempted murder in respect of Amit and Ashneel.

**[29]** An intention to kill is an essential element of an offence of attempted murder although an intent to cause grievous bodily harm may suffice to establish murder: *Cutter v R* (1997) 143 ALR 498. Brennan J in *He Kaw Teh v R* (1985) 157 CLR 523 when discussing 'intent' observed:

> *"Intent, in one form, connotes a decision to bring about a situation so far as is possible to do so – to bring about …a particular result. Such a decision implies a desire or wish to … bring about such a result. … Intent, in another form connotes knowledge. … But existing circumstances can be known more certainly than the probability of the occurrence of a future result and therefore specific intent is usually established by proof a desire or wish to cause the prescribed result …*
>
> *Nevertheless, in some cases, It will be necessary to distinguish desire from intention. There will be cases where an accused acts for a different purpose knowing the particular results will occur but not desiring it. Desire is not a necessary element of intention: Willmot v R* (1985) 18 A Crim Rep 42."

**[30]** Analysis of the statements of Mrs Ram Kuar, Amit and Ashneel shows that the Appellant on the day of incident entered the flat where Ram Kuar was living and dealt several blows on her with a chopper causing grievous injuries to her when she called for help Amit came to the flat when he came Ram Kuar was severely injured and had fallen on the ground. When the Appellant started the attack on Amit, Ram Kuar managed to escape through the back door. While Amit was under attack by the Appellant he called for Ashneel and when Ashneel came to the scene Amit had received serious injuries. When Ashneel tried to prevent the Appellant attacking Amit, the Appellant attacked Ashneel when Ashneel was under attack Amit ran out of the flat to the road. The attack on Ashneel continued until Ashneel was able to disarm the Appellant.

**[31]** That the Appellant commenced the attack on Mrs Ram Kuar for the purpose of killing her but his continuous attack individually on Amit and Ashneel with a deadly weapon causing serious injuries to them shows that he knows that the injuries were so serious that would cause the death of Amit and Ashneel even though he may not have desired it. As per Brennan J in *He Kaw Teh v R* (supra)

this knowledge imputes the necessary intention on the Appellant to commit attempted murder of Amit and Ashneel.

**[32]** For the above reasons there is no error in the decision of the DPP to indict the Appellant for the commission of an offence of attempted murder of Amit and Ashneel.

**[33]** I have already dealt with the voluntariness of the plea of guilt of the Appellant and there is no ambiguity in the plea of the Appellant. The Appellant had not made any complaint against the Counsel who appeared for him on the day he pleaded guilty. I am once again reiterating the fact that the Appellant is the best person who can decide on the charges based on the intention he had at the time of committing the offence. When these charges were read to the Appellant, he had pleaded guilty to the charges. When the Appellant himself had come forward and accepted that he had committed attempted murder of Amit and Ashneel, can one argue that the Appellant had no intention to kill Amit and Ashneel? When the charges are admitted the ingredients of the charges are also admitted.

**[34]** William Marshall JA in his judgment observed that instead of the charge of attempted murder a charge of committing grievous bodily harm should have been brought against the Appellant. The Criminal Procedure Code Chapter 21 is the procedural law that was applicable at the relevant time. Section 208 of the Criminal Procedure Code provides:

> *"208. Where a person is charged with any offence and can lawfully be convicted on such charge of some other offence not included in the charge, he may plead not guilty of the offence charged, but guilty of such other offence".*
>
> In view of the above provision even if the Appellant was charged with an offence of attempted murder he could have pleaded not guilty to that charge and pleaded guilty of committing grievous bodily harm to Amit and Ashneel if he is of the view that his intention is only to cause bodily harm to Amit and Ashneel but he has chosen to plead guilty to the charge of attempted murder.

**[35]** In view of Section 23 of the Court of Appeal Act as there is no miscarriage of justice caused to the Appellant by charging him for the offence of attempted murder of Amit and Ashneel and convicting him on his own plea, the appeal of the Appellant against Counts 2 and 3 be dismissed.

**[36]** The sentence imposed to the Appellant could be justified by the nature of the injuries inflicted on the victims and the permanent impediment suffered by Amit. There is no provocation that could be considered for mitigation; in these circumstances a sentence of 9 years is justifiable for each Count. As these sentences are imposed to run concurrently I have no hesitation in affirming these sentences.

**[37]** For the reason stated above I refuse leave to appeal against conviction and sentence of Rajendra Samy and I dismiss this appeal without cost.

*Appeal allowed.*

Michael Wells
Solicitor