

**AIYAZ ALI v STATE (CAV0006 of 2009)**

SUPREME COURT — CRIMINAL JURISDICTION

5 GATES P, HETTIGE and MARSHALL JJ

14 October 2010, 9 February 2012

10 **Criminal law — appeals — special leave to appeal against conviction and sentence — multiple counts — guilty plea — concurrent sentence — totality of sentence — involuntary pleas of guilty — Court of Appeal Act s 35(2) — Supreme Court Act s 7(2).**

15 The appellant was charged with multiple counts relating to several cases. The appellant pleaded guilty and was convicted and sentenced for the offences. All sentences were ordered to be concurrent to any other terms being served. The appellant's appeals against conviction and sentence were dismissed by the Court of Appeal. The appellant sought special leave to appeal the convictions and sentence.

**Held —**

20 (1) A total of 10 years' sentence was correct in principle given the offences, the need for deterrence, the need of society to have these crimes appropriately punished, and the record of serial offending and recidivism of the appellant. There was also leniency in not nominating a minimum term to be served.

(2) If the judge did make remarks about considering concurrency with existing sentences, it could not amount to an inducement that put such pressure that it would deny free choice between 'guilty' and 'not guilty'.

25 (3) This case had no chance of success and was vexatious from the moment leave was sought to appeal to the Court of Appeal. Further, none of the public interest criteria set out in s 7(2) of the Supreme Court Act Cap 14 were remotely engaged by the appellant's petition.

Petition for special leave to appeal conviction and sentence is refused.

30 **Case referred to**

*R v Turner* [1970] 2 QB 321, followed.

*Petitioner in person.*

35 *M. D. Korovou* for the Respondent.

[1] **Gates P.** I agree with the judgment, the reasons and the proposed order of Justice William Marshall.

40 [2] **Hettige J.** I also agree with the judgment, the reasons and the proposed order of Justice William Marshall.

[3] **Marshall J.** This is an appeal by way of Petition for special leave from the judgment of the Court of Appeal comprising Byrne JA and Randall Powell JA of 1st April 2009 dismissing Aiyaz Ali's appeals against conviction and sentence. Earlier he had been given leave to appeal against conviction and sentence in June 45 2006 by Ward P.

[4] The background to the Padarath Poultry farm and compound robbery of 21st September 2003 is that Aiyaz Ali who has been in prison for most of his adult life had not been long out of prison when he met up with four or five others and planned a robbery with bolt cutters, knives and screw drivers whereby the workers would be attacked, immobilised and robbed. They would then break and enter into Mr Jitendra Padarath's home and office and force the family members 50

to surrender cash, jewellery and other property which they had been informed were there. The farm is at Maruru near Ba, and the intending robbers took the bus there and crept up on the compound indirectly. They robbed and tied up three workers and then entered the main dwelling. Then in the main bedroom the  
5 invaders overpowered the boss Mr Jitendra Padarath. One of them hit him with a knife and then Aiyaz Ali hit him on the head with a bolt cutter. Then he fell on the floor and was unconscious or semi conscious. Mrs Padarath gave them money and then stole other valuable property from a black bag in the bedroom. They also took Mr Padarath's car key and used the vehicle to make their escape from  
10 the area. The properties stolen from Mr and Mrs Padarath were cash of \$1900 and gold jewellery valued at \$4005. The information of 7th March 2005 charged four counts of robbery with violence and one of taking of a vehicle. That was criminal case HAC 025 of 2004L.

[5] Surprisingly Aiyaz Ali was shortly thereafter allowed bail. Together with  
15 others on 17th October 2003, at 2.30 am, Aiyaz Ali invaded the home of Mr and Mrs Navins. The group climbed up a mango tree and forced the door of a prayer room. They then stole the money that was there and also some property. Then they moved to the householder's bedroom where the householder was awake and yelling. There was a safe. When they tried and failed to open it the householder  
20 was pushed to the floor and kicked to induce him to supply the key of the safe. The alarm was raised by the neighbours but the robbers kept kicking the householder until they decided to flee. This incident became Criminal Case 20 of 2004.

[6] On 23rd October 2003 he robbed a lady, Ms Praveena Lata, by going with  
25 others to the house where she worked at about 9.00 am She was held by her hair and was grabbed by Aiyaz Ali and others. Her gold chain pendant was snatched. She suffered multiple linear abrasions and contusions. This became Criminal Case HAC 019/04L.

[7] After transfer from the Magistrates Court there were a number of delays but  
30 on 11th February 2005 before Justice Kishor Govind Aiyaz Ali agreed to plead guilty to HAC 25/05. At that time there was also before the Court an information charging Aiyaz Ali with robbery and injuring Ms Praveena Lata on 23rd October 2003 by invading her workplace and pulling off the chain necklace which she was  
35 wearing. This was HAC 19/04. The information, HAC 20/04, in respect of 17th October 2003 was not before the Court and was not heard on that day.

[8] In case number HAC 25/04 relating to the Padarath chicken farm robbery on 21st September 2003, the record for 11th February 2005 reads:

40 *"Before the Hon Mr Justice Govind on Friday the 11th day of February 2005 at 9.30 o'clock in the forenoon*

For the State: Mr Nand

For the Accused: [3] In Person – Aiyaz Ali

I wish to plead guilty, I am doing so of my own free will.

45 Ct: Mr Ali, I have informed you that the victim in counts 4 and 5 is closely known to me. Do you still wish to plead guilty before me. His family and I have very close association.

Do you still want me to with this matter.

Accused: Yes.

Ct: Sure.

Accused: Yes.

50 Information:

Count 1 - Understand P.G

Count 2 - Understand P.G

Count 3 - Understand P.G

Count 4 - Understand P.G

Count 5 - Understand P.G

5 Count 6 - Understand P.G

Accused: I have received the facts supplied to me [MFI] and agree with it. Wish to tender statement.

Accused: Agree to its tendering.

10 Court: On your own plead to acceptance of facts. I find you guilty and convict on each count as charged”.

[9] Before the mitigation which took place much later on 5th May 2005 the file in the Navin’s case which took place on 17th October 2003 was transferred to Justice Govind on 16th March 2005. This is HAC 20/04. Aiyaz Ali pleaded guilty to the one count in this information. The consequence was that on 5th May 2005 when Mr Koya represented him Aiyaz Ali was facing sentence for 7 counts spread over three information on a spree of offences spread over three dates in a period covering only thirty one days.

20 [10] The task facing Justice Govind was simply a matter of finding the correct totality. At Padaraths, the fourth count involved Mr Jitendra Padarath and his family. It was the most serious. It was a home invasion by night with use of violence and nearly \$6000 worth of property was taken. Justice Govind sentenced Aiyaz Ali to 7 years for this offence. The other three robberies with violence each were given 5 years. The taking of Mr Padarath’s vehicle for the return journey was given 6 months. All these sentences were ordered to be served concurrently as was the sentence of 6 years in HAC 20/2004 in respect of the home invasion robbery with violence, committed at Mr Navin’s property on 17th October 2003. These six sentences were also ordered to be concurrent to any other terms being served. The totality for these offences was found to be seven years. In my view this was correct on principle and, if anything, was on the low side for the offending involved.

35 [11] In respect of HAC 19/04 which involved the injury and assault upon Ms Praveena Lata in order to steal the chain and pendant around her neck at the residence where she worked, Justice Govind decided that 3 years imprisonment was appropriate.

40 [12] Once again totality is in issue. The facts were slightly different and it was the end of an offending spree. Justice Govind decided that for the seven offences 10 years imprisonment was the correct total figure. The Ms Praveena Lata offence was ordered to be served consecutively to the seven years ordered in HAC 25/04 and HAC 20/04. Aiyaz Ali was serving other sentences on 10th May 2005 and if they expired later, the three years would run from the date of their expiry.

45 [13] In my opinion the totality of 10 years was correct in principle given the offences, the need for deterrence, the need of society to have these crimes appropriately punished, and the record of serial offending and recidivism of Aiyaz Ali. There was also leniency in not nominating a minimum term to be served. This would mean that if Aiyaz Ali was of good behavior he would be released after serving close to two thirds of the total imprisonment ordered for these offences. I say “close to” because if there was time still being served from 50 earlier sentences it could not amount to more than a few months.

[14] It is convenient at this point to consider the appeal against sentence. Since the totality was correct and erred, if anything, in favour of Aiyaz Ali, I propose that the appeal in respect of sentence be dismissed.

5 **Petition to Appeal Against Conviction**

[15] Aiyaz Ali petitions for special leave to appeal against conviction. Since he pleaded guilty his remedy would be a *venire de novo*, which would result in the matter being relisted for pleas to be taken again.

10 [16] There is no ambiguity of pleas in this case. I have no doubt that with his experience of the courts, and the relative simplicity of the elements of the offence or robbery with violence Aiyaz Ali had the correct intelligence as to the applicable law and the facts that he accepted were true. This was not a case where on the evidence disclosed Aiyaz Ali had a good defence. See the cases and summary in Archbold 44th Edition (1992) at 4.90 and Blackstone 2011 at para  
15 D12.93 for the applicable principles.

[17] The common law relating to involuntary pleas of guilty was developed in the English case of *R v Turner* [1970] 2 QB 321 and the principles to be applied have been developed in the years since 1970.

[18] What Blackstone (2011) states at paragraph D12.94 is as follows:

20 “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  
25 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’.”

30 [19] What is in evidence from Aiyaz Ali and two other persons appearing before Justice Govind on 7th February 2005 is that Justice Govind said that as Aiyaz Ali was serving 9 years imprisonment at that time the Court on a plea of “Guilty” would consider making sentences imposed concurrent to the sentences of 9 years already ordered in other matters and yet to be fully served.

35 [20] The record of the Padarath offences in HAC 25 of 2004L, shows a remand hearing on 9th February 2005 but they may not be accurate. The prosecutor Mr N Nand gives evidence about 11th February 2005 and does not attest to anything occurring on Monday 7th February 2011 or Wednesday 9th February 2011. Mr N Nand does not refer to any exchange concerning consideration of concurrent  
40 sentences.

[21] In my view if Justice Govind were to have said what Aiyaz Ali alleges on 7th February 2005, it could not possibly amount to “*such pressure that he did not genuinely have a free choice between ‘guilty’ and ‘not guilty’.*”

45 [22] Where a High Court judge in presiding where there is an unrepresented Defendant he is entitled to refer to what any lawyer or judge must ensure is understood by the Defendant in order to make a rational decision as to pleas. Although it does not arise here, an unrepresented defendant may not know that an early plea of guilty usually attracts a sentencing discount of up to one-third.

50 [23] Likewise an unrepresented Defendant may not know that when a number of offences fall to be sentenced on the same day the task of the Court is to achieve totality through making the sentence for each lesser offence in whole or in part

concurrent with the proposed longest sentence. Where as in the case of Aiyaz Ali, the Defendant still has an effective sentence of 9 years to serve in respect of earlier imposed sentences, it is wholly appropriate to indicate whether the sentences not yet imposed, are to be ordered to run consecutively or concurrently to earlier sentences then being served. The balance of authority is that the new sentences should run consecutively to those imposed earlier. So what Justice Govind was said to have mentioned on 7th February 2005 would seem very much in Aiyaz Ali's favour.

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10 [24] If these remarks about "*considering*" concurrency with existing sentences were made it could not amount to an inducement that put "*such pressure*" that would deny "*free choice between 'guilty' and 'not guilty'.*"

[25] On 7th or 9th February 2005 there was no evidence that the Padarath offences in HAC 25/04 (five in number) had yet been listed with the Ms Praveena Lata offence in HAC 19/04. We know the Navins offence, 20 of 2004, was not before Justice Govind until 16th March 2005.

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20 [26] All that Justice Govind is alleged to have said is that he would "*consider*" the issues. If he did so and decided that the 3 years in HAC 19/04 had to be consecutive with the 7 years in 25 of 2004 as long as Justice Govind gave "*consideration*" to the issue, there could not be an expectation that the 3 years must be concurrent with the 7 years.

[27] The situation changed with the plea to a separate serious offence (the Navins information) of robbery with violence on 16th March 2005. This was HAC 20/05. The six years for this was made concurrent to the 7 years in respect 25 of 2004.

[28] It is also the case that in the event, the Ms Praveena Lata offence for which 3 years was made consecutive to the Padarath offences was marginally at most consecutive to the 9 years being served for earlier offences. This because after 7 years on HAC 25/04 and HAC 20/04 had been served, the nine years imposed earlier was quite likely to have been fully served. At most the sentence would extend beyond the nine years being served by a few months. Although Justice Govind only committed to "*considering*" it is substantially the case that his orders in HAC 25/04 and 19/04 were to be served concurrently with earlier sentences. But since Justice Govind only said he would give consideration to the issue, no expectation can arise.

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35 [29] In my opinion this case on conviction and sentence had no chance of success and was vexatious from the moment leave was sought to appeal to the Court of Appeal. An order should have been made under section 35(2) of the Court of Appeal Act. That would have been an appropriate disposal. Instead this has been considered by the full Court of Appeal and now a petition for special leave is being considered by the Supreme Court.

[30] Section 7(2) of the Supreme Court Act Cap 14 sets out the "*public interest*" criteria applicable to petitions for special leave in criminal matters. 45 None of these are remotely engaged by the petition of Aiyaz Ali. The petition for special leave must be dismissed.

[31] During the oral hearing Aiyaz Ali raised an issue as to whether the correctional authorities were calculating his release date in accordance with orders. I am sure there is proper process in ventilating such issues but is not in this petition in the Supreme Court of Fiji which has no jurisdiction to consider such issues or make orders upon them.

**Gates P.****ORDER**

[32] The order of the Court is –

- 5 (1) that the petition of Aiyaz Ali for special leave to appeal conviction and sentence is refused.

*Petition refused.*

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