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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 7 of 1984

BETWEEN : RAMSAMI NAIDU f/n Venkatsami Naidu Appellant

A N D : R E G I N A M Respondent

Mr. J. Reddy Counsel for the Appellant

Mr. M. Raza Counsel for the Respondent

J U D G M E N T

Cases referred to:

(1) Abdul Aziz Khan v R 13 FLR 79
(2) R v Durham Quarter Sessions, Ex Parte Virgo (1952) 1 All E.R.466
(3) Akuila Nacoloiviu v The Police Cr. App. 57/1956
(4) Aporosa Rokovalu v The Police Cr. App. 12/1957
(5) R v West Kent Quarter Sessions Appeal Committee (1951) 2 All E.R.728
(6) R v Ingleson (1915) 1 KB 512
(7) Turner v R (1970) 54 Cr. App. R. 35
(8) Sheikh Liaquat Saheb v R Civil Action 17/1980
(9) Sylvester Joseph & Ors. v DPP 18 FLR 23
(10) Peni Rakorako v R Cr. App. 85/1978
(11) R v Mohammed Khalil and Anor. Labasa Cr. App. 10-11/1978
(12) R v Gyan Deo Labasa Cr. App. 12/1975
(13) Michael Iro v R 12 FLR 104

This is an appeal from the magistrate's court at Nadi. The appellant pleaded guilty to a count of burglary and larceny and a second count of office breaking, entering and larceny. He has appealed against both convictions. The question arises as to whether the court can entertain such an appeal.

Section 309(1) of the Criminal Procedure Code reads as follows:-

> "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a magistrate's court, except as to the extent or legality of the sentence."

I have no doubt that a strict literal interpretation of those provisions would lead to injustice in some cases. What is an appellate court to do in a situation where a plea is plainly equivocal, either in the words used by the appellant or in the absence of a prima facie case being disclosed in the statement of facts, or where an appellant has been convicted on his own plea of no offence known to law?

It seems to me that had the legislature intended an absolute prohibition of appeals against conviction, where the court below had rightly or wrongly recorded a plea of guilty, the subsection might have read,

> "No appeal shall be allowed in the case of an accused person who has been convicted by a magistrate's court after recording that the accused person has pleaded guilty."

In my view the present words in the subsection, that is, "who has pleaded guilty," must be interpreted to mean an unequivocal plea. The learned Counsel for the respondent, Mr. Raza, Principal Legal Officer, has very properly subscribed to the latter view.

Even if it is the case that the subsection is to be construed literally, it seems to me that a plea of guilty could still be impugned, simply by appealing against the legality of the sentence. For example, a court would have no power to impose punishment after a purported conviction based on a plea of guilty in respect of no offence known to law. On the hearing of such appeal I do not see how this Court could resist the argument that the sentence was a nullity because it was based on a conviction and plea which were also nullities.

In the case of Abdul Aziz Khan v R (1) Hammett J. entertained and allowed an appeal against conviction on a plea of guilty on the ground that the plea was equivocal. The following passage appears in the judgment (at pp. 80/81):

> "Learned Counsel for the appellant concedes that the provisions of section 315(1) (Now 309(1)) of the Criminal Procedure Code preclude any appeal against conviction by an accused person who has pleaded guilty. He submits, however, that what the appellant said in the Court below did not amount to an unequivocal plea of guilty.....
> .....
>
> The appellant submits that in these circumstances the conviction was a nullity and should be set aside on the authority of R v Durham Quarter Sessions Ex parte Virgo (2) which was followed by this Court in Akuila Nacolaiviu v The Police (3) and Aporosa Rokovalu v The Police (4)."

In the case of R v Durham Quarter Sessions Ex parte Virgo, (2) Lord Goddard C.J. distinguished the earlier case of R v West Kent Quarter Sessions Appeal Committee (5) in which his judgment was approved by the other judges of the King's Bench. Those decisions were based on the provisions of section 36(1) of the Criminal Justice Act, 1948, which precluded an appeal against conviction where the convicted person had "pleaded Guilty or admitted the truth of the information".

In the case of R v Durham Quarter Sessions Ex parte Virgo, (2) Lord Goddard C.J. observed (at p.469 at D),

> "Where the question in the case is whether or not the plea which was put in by the prisoner at the hearing before the justices amounted to a plea of Guilty or Not Guilty, that is a matter which the court can entertain,"

and further on (at p.469 at H),

> "Quarter sessions came to the conclusion that the plea of Guilty was wrongly recorded, not because the defendant did not understand or did not intend to plead otherwise than he did, but because taking the whole of his plea together, they were satisfied that in law it amounted to a plea of Not Guilty. I think they were right in entertaining the appeal to that extent, and that, as the defendant had never been tried on a plea of Not Guilty, they were entitled to treat the conviction as a nullity, as the court did in R.v Ingleson (6)."

Again, in the case of Turner v R. (7) the Court of Appeal ordered a venire de novo at Quarter Sessions, because a message emanating from the court was conveyed to the appellant, causing him to change his plea of not guilty to one of guilty.

The learned Counsel for the respondent, Mr. Raza has referred me to the case of Sheikh Saheb v R (8) decided by Kermode J, in which Turner v R. (7) and other authorities were considered. I have read the judgment of my learned brother with much interest: that case, however, was one of certiorari, to which of course different considerations apply.

In the case of Sylvester Joseph and Others v DPP (9), in which Turner v R. (7) was quoted with approval, this Court entertained and dismissed appeals against convictions based on pleas of guilty. The ground of appeal against the convictions was that the pleas of guilty were nullities due to a lack of free choice in the matter, arising out of the advice given to the appellants by their lawyer. The judgment does not however indicate that the provisions of section 309(1) (then 290(1)) of the Criminal Procedure Code were considered by the Court.

Those provisions were however considered by Grant C.J. in the case of Peni Rakorako v R (10) where he entertained and dismissed an appeal against conviction, based on the grounds that,

(i) the appellant did not fully understand the nature on the charge and that

(ii) upon the admitted facts he could not in law have been convicted of the offence.

Grant C.J. observed (at p.2) that "on the face of it the petition of appeal filed herein by counsel was acceptable." The above grounds were apparently never seriously argued. I find myself nonetheless in complete agreement with the observations of Grant C.J. in his judgment (at p.1), in reference to the provisions of section 309(1) (then 290(1)):

> "That section presupposes that the offence to which an accused has pleaded guilty is one known to law, that the admitted facts substantiate the offence charged, and that the accused understood the charge and unequivocally admitted his guilt; and this Court can entertain an appeal against conviction after a plea of guilty only if the grounds relate to one or other of these elements (R v Mohammed Khalil and Anor. (11); R v Gyan Deo (12))."

In the present case the record reads as follows:

"Charges read and explained.

Accused: I choose Magistrate's Court both counts.

(1) It is true.

(2) It is true.

Guilty Pleas entered."

Subsequently a statement of facts was read out in respect of both counts. The record then reads,

"Accused - correct".

In mitigation the accused's statement is recorded thus:

"I admit I have done wrong and promise to reform as from to-day. Single. Father's farm."

The relevant part of section 206 of the Criminal Procedure Code, which section relates to the procedure in trials before magistrates' courts, reads as follows:

> "206.-(1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
>
> (2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary."

In the case of Michael Iro v R (13) the Court of Appeal observed (at p.107 at A & B):

> "The obligations on the part of the Court in cases of this character are stated in 10 Halsbury 3rd Ed. p.408, para. 742:
>
> > "Plea of guilty. A prisoner is not to be taken to admit an offence unless he pleads guilty to it in unmistakeable terms with appreciation of the essential elements of the offence.....
> >
> > In the case of undefended prisoner care must be taken that he fully understands the elements of the crime to which he is pleading guilty, especially if a good defence is disclosed in the depositions." "

These observations embrace a trial before a superior court of record: they apply a fortiori to a subordinate court of record. It seems to me that the provisions of sub-section (1) of section 206 of the Criminal Procedure Code serve to underline the requirement in sub-section (2) to record as nearly as possible the words used by the accused: to do so ensures that the accused does understand the charge which the court has explained to him: it also provides a basis for relief on appeal should it transpire that the plea in fact was equivocal. It may be that having explained the charge to the accused, simply by way of narrative rather than question and answer, the answer to the question "Do you understand the charge?", may simply be "Yes" and the answer to the question "Do you admit or deny the truth of the charge?", may simply be "I admit", or "I am guilty," or in the present case, "It is true". In such circumstances, it may well be that the accused does not understand the charge at all, that is, that he does not appreciate "the essential elements of the offence", and that there has not been a sufficient compliance with the provisions of section 206.

I consider therefore that in order to comply with the provisions of section 206 the accused's understanding of each and every essential ingredient of the offence should be elicited by way of question and answer, recording such in narrative form. For example, I would consider the following to amount to an unequivocal plea to a charge of burglary and larceny:

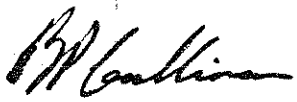
> "I understand the charge. I admit that I broke into the house of the complainant during the night. It was about midnight. I got into the house by breaking and opening a window, I intended to steal in the house. I took (item) from the house. I intended to keep the (item) and not to return it. I knew that I had no lawful right to take the (item)."

In the present case there is the bare statement "It is true" recorded after the entry "Charges read and explained." I do not see that such record constitutes a sufficient compliance with section 206, particularly in view of the fact that the appellant at the time was

unrepresented. The learned Counsel for the appellant Mr. Reddy submits that the pleas are equivocal. I agree with him. The learned Counsel for the respondent Mr. Raza submits that the appellant subsequently agreed with a statement of facts and even addressed the Court in mitigation. The Criminal Procedure Code provides for two distinct procedures after a plea of guilty or not guilty. The plea is the whole basis of the criminal trial. An equivocal plea of guilty is in reality a plea of not guilty and a court should so record it. There is no provision in the Criminal Procedure Code or at common law whereby, upon a plea of not guilty, an accused person can be convicted simply by calling upon the prosecutor to make an unsworn invariably hearsay statement and thereafter calling upon the perhaps unwilling accused to indicate his agreement with the statement, modified or otherwise. A subsequent acceptance by an accused of a statement of facts cannot remedy an equivocal plea. It remains a nullity as do any subsequent proceedings.

I consider that the pleas in this case were nullities, as were the convictions and sentences. For the avoidance of doubt I order that they be set aside. I also order that the appellant be re-tried by a court of competent jurisdiction before another magistrate.

Delivered In Open Court At Lautoka This 6th Day of April, 1984



(B. P. Cullinan)

Judge