

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0030 OF 2000S
(High Court Criminal Case No.HAC006 of 1999s)

BETWEEN:

SIKELI TAMANI

Appellant

AND:

THE STATE

Respondent

Coram:

Hon. Jai Ram Reddy, President
Hon. Sir Rodney Gallen, Justice of Appeal
Hon. Robert Smellie, Justice of Appeal

Hearing:

Wednesday, 21st August 2002, Suva

Counsel:

Appellant in Person
Ms. J. Hamilton-White for the Respondent

Date of Judgment:

Friday, 30th August, 2002

JUDGMENT OF THE COURT

This is an application pursuant to Article 122(2)(a) of the Constitution for leave to appeal to the Supreme Court.

The decision of the Court of Appeal in Criminal Appeal No. AAU0030/2000S was delivered on the 22nd of November 2001 when the applicant's appeal was disallowed.

The judgment in the Court of Appeal recorded that the conviction of the

applicant rested entirely on the identification evidence of one witness at an identity parade.

Before the Court of Appeal the applicant had submitted as follows:

"The identification parade was unreliable and unfair because all people involved were from the USP Campus, excluding myself. All people in the parade excluding myself were USP students including the Identifying Witness (Nawal Prakash) who is a Security Officer at USP. Your Lordship, there is strong possibility that the Identifying Witness knows everybody at least by face in the parade - I was the only outsider in that parade..... this is not fair Your Lordship....."

Your Lordship, Police Officers just picked students from USP for the parade whereas the Identifying Witness was also from USP. There is strong possibility that the Identifying Witness (Nawal Prakash) knows all the nine USP students in the parade, at least by face. This is not fair Your Lordship."

At the trial the applicant had called a student witness whose evidence in part was as follows:

"On 23/7/98 I was in identification parade. One Indo-Fijian man conducted the parade. I was at USP. One police asked us to go to Central Police Station for the parade. Police just asked us. So we went to Central Police Station. During the parade I gave Accused 1 (i.e. Tamani) my T'shirt. Before the change you were talking to police. Police asked me if I could change clothes with Accused 1."

The Court of Appeal in its judgment recognized that one person in the line up was a student and drew the inference that there was at least one other. The judgment then went on to recognize that identity parades must be conducted with scrupulous

fairness ".....especially in a case such as this where the prosecution case rests almost entirely if not entirely on the evidence of one witness." The Court cited Cross on Evidence and the decision of the Court of Appeal of New Zealand in R. v. Jeffries [1949] NZLR 595 in support.

It was also noted that the challenges to the make up and conduct of the identity parade advanced on appeal, had not been developed at trial where the applicant was not represented.

The Court of Appeal added significantly at pages 10 and 11 of its judgment the following:

"Had we been able to see from the record that more than 2 of the nine people who lined up with the appellant could have been students, we may have been prepared to set the verdict aside. But the record does not so disclose and there was no application to call further evidence to support such a proposition."

On this application, Mr Tamani referred to an original internal statement of the Police Officer who conducted the parade. Ms. Hamilton-White for the respondent properly and helpfully made that statement available to us. In that statement the names, ages and occupations of all the nine members of the parade exclusive of the accused are recorded. With one exception they were all younger than the accused, (the majority significantly so), and without exception they were all students from the University of the South Pacific.

Mr Tamani did not have this document in his possession at the time of his appeal. He produced a letter from the Director of Legal Aid to the Officer in Charge of the Prison where Mr. Tamani was held, copies of which were sent to Mr Tamani and the Chief Registrar of the High Court. In that letter the Director explained that because of delays in forwarding the prisoner's correspondence and his failure to advise the date of the appeal Mr. Tamani's papers were not returned to him until after the Court of Appeal hearing.

In all the circumstances, it is clear that the appeal may have been allowed if the information regarding the make up of the parade, placed before us, had been available to the Court of Appeal.

Article 122(2) of the Constitution provides as follows:

“(2) An appeal may not be brought from a final judgment of the Court of Appeal unless:

- (a) The Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or***
- (b) The Supreme Court gives special leave to appeal.***

In line with earlier decisions of this Court we regret we are unable to certify that “a question..... of significant public importance” is involved.

The Supreme Court, however, as is apparent from Article 122(2)(b) has a

much wider jurisdiction. The Supreme Court Act (No.14) of 1998 in section 7 subsection 2 under the general heading:

"Part 3 - Appeals to Supreme Court by Leave or Special Leave" provides as follows:

"7(2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless -

- (a) a question of general legal importance is involved;***
- (b) a substantial question of principle affecting the administration of criminal justice is involved; or***
- (c) substantial and grave injustice may otherwise occur."***

Without presuming in any way to trespass upon the jurisdiction of the Supreme Court, nonetheless it appears to us that the applicant has a prospect of success pursuant to s.7(2)(c) above on an application to the Supreme Court for leave to appeal, which application we note can be dealt with by a single Judge pursuant to sections 8 and 11 of the Supreme Court Act.

The applicant has also applied to us for bail. He has already served approximately 50% of his sentence and is not due for release until 2004. He says he can provide two sureties.

We propose to grant leave pending the filing and hearing of an application

for leave direct to the Supreme Court. The bail will continue until the disposal of the application for leave by the Supreme Court after which, whether it should continue or not, will be for the Supreme Court to say.

The bail is granted on the following terms:

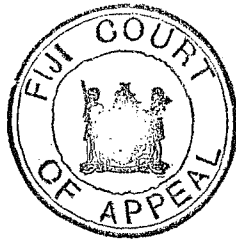
- (1) Mr Tamani's own recognizance of \$1,000 .
- (2) Two sureties of \$2,000 each.
- (3) The appellant to live and work where directed by the Registrar of the High Court.
- (4) The appellant to report on Mondays, Wednesdays and Fridays between 5 p.m. to 7 p.m. to the manned police station nearest to where he is living.
- (5) The appellant within 14 days of release on bail to write again to the Registrar of the Supreme Court, P O Box 2215, Government Buildings, Suva requesting that the application to the Court of Appeal for leave to appeal to the Supreme Court be now treated as an application for leave addressed to the Supreme Court

itself pursuant to s.7(2) of the Supreme Court Act and that the Court of Appeal file on this application together with this judgment be placed before the Chief Justice for his consideration.

- (6) The appellant to surrender any passport he has to the Registrar of the High Court and the said Registrar to inform the Immigration Authorities.
- (7) Leave reserved to further apply should there be any difficulty in the implementation of the above terms.



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Hon. Jai Ram Reddy, President



.....
Hon. Sir Rodney Callen, Justice of Appeal



.....
Hon. Robert Smellie, Justice of Appeal

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent