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

CRIMINAL APPEAL NO. AAU0032 OF 2006
(High Court Criminal Case No. 15 of 2005)

BETWEEN: **SACHIDA NAND MUDALIAR** *Appellant*

AND : **THE STATE** *Respondent*

Coram: **Ward, President**
Wood, JA
McPherson, JA

Hearing: **Tuesday 21 November 2006**

Counsel: **J Haig QC with A Herman for the appellant/applicant**
R Gibson with H Tabete for the respondent

Decision: **Friday 24 November 2006**

DECISION

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[1] Following a trial in the High Court in Suva, the applicant was convicted of one count of manslaughter and sentenced, on 17 May 2006, to three years

imprisonment. He has filed an appeal against conviction and sentence and now applies for leave to adduce fresh evidence in the appeal.

Background

[2] The applicant is a registered medical practitioner with a practice in Suva. The deceased was a final year student at the University of the South Pacific who had been pregnant and had consulted the applicant in his professional capacity. She died in a resting room at the applicant's practice.

[3] The prosecution case was that her death was the result of a negligently conducted unlawful abortion. The defence was that the deceased had already had a miscarriage at home and the applicant had treated her to evacuate medically the remaining products of the pregnancy.

[4] The prosecution called a number of medical witnesses. Its case was that the cause of death was shock as a result of a major uterine haemorrhage together with air embolism as a contributory factor. The defence did not call any further medical witness but the applicant made an unsworn statement at the trial in which he said that he considered the cause of death was air embolism.

[5] It is not necessary to set out the details of the evidence but two aspects are relevant to this application; the medical witnesses and the suggested failure of the application to make or keep any notes of what was clearly a significant medical procedure.

[6] The prosecution called five medical witnesses including a forensic pathologist, a toxicologist and a gynaecologist from Auckland, Dr Whittaker. The latter had not seen the body but was asked to give his opinion from a number of documents and photographs. He was principally asked to say whether, in his opinion, the evidence pointed to an abortion or an evacuation following a miscarriage. His conclusion was:

"The opinion I came to is that I believe that this woman had a termination of pregnancy carried out quite late in the pregnancy and that as a result of the forceful dilation of the cervix an injury occurred to her cervix leading to major blood loss. At that point I believe she should have been transferred to a major hospital but that did not occur and as a result of absence of good care from that point onwards she has bled to death. Shock is the result of major blood loss."

[7] The death was reported to the police. A search was conducted of the rooms at the applicant's practice the same morning and a number of papers seized by the police. They found no notes of the treatment of the deceased and the prosecution attached some significance to their absence. No suggestion was made by the defence at the trial that notes had been made.

[8] Since the conviction, the defence has sent the papers in the case to another gynaecologist in Auckland, Dr Mackintosh, asking his opinion and now seek to adduce his evidence at the appeal. In his affidavit, Dr Mackintosh explains he has been given copies of the documentary evidence at the trial and also the evidence of ten of the witnesses at the trial including the medical witnesses. He continues:

"I have also had the opportunity to discuss the series of events with Dr Whittaker and other Obstetricians and Gynaecologists and Anaesthetists who have experience in similar events to what is referred to in the material."

[9] We were advised from the bar table that a coroner was also included in these discussions.

[10] The form of the discussions, how much of his opinion was based on the opinions of the others with whom it was discussed and the nature of the "similar events" which had been experienced by them is not explained. Dr Mackintosh's conclusion was, inter alia:

"I do not believe the pregnancy was terminated by Dr Mudaliar. It is more likely that Dr Mudaliar carried out the removal of retained products of conception after a partial miscarriage by the patient at home. ... In my view the most probable cause of death is respiratory failure caused by a number of factors including the synergic effects of the medications given".

[11] This is also an application to adduce further evidence from Dr Whittaker. He has not, in the available time, been able to make an affidavit but he has written a letter setting out the nature of the evidence he now wishes to give. The letter starts:

"I have looked at additional written material pertaining to the trial of Dr Mudaliar at which I was employed as an expert witness for the prosecution. This material was not available to me at that time and after discussing the material with Dr Mackintosh I do agree that there are some areas of uncertainty that were not apparent to me at the time of the trial."

[12] Again there is no explanation of what was the additional written material or whether "pertaining to the trial" means it had been in the trial material or simply relevant to the discussions that have been held since. Neither does it reveal the nature of the discussion with Dr Mackintosh which resulted in his agreement. In the remainder of the letter, he points out that he is now uncertain or has doubts about the conclusions he reached at the trial.

[13] The final evidence for which leave is sought consists of some notes made by Dr Mudaliar of his examination and treatment of the deceased. Their provenance is explained by the affidavit of Dr Mudaliar. In it, he states that he made the notes at the time and, when the police searched his rooms, they were on a table in a thick writing pad. He was taken to the police station and detained in custody for some days. On his release, he opened his rooms and saw the notes still on the table. He telephoned his defence counsel and was advised to take them to him. Subsequently counsel advised him that he considered it would not be wise to mention them in the trial. He considered that the prosecution would suggest they

were prepared after the applicant's release and so his "strong advice was that the notes should not be referred to … and the defence should proceed on the basis that in effect no notes were recorded". The applicant reluctantly accepted that advice. Mr Haig addressed us on the effect of this decision but we do not consider it necessary to comment on it further. As will be seen, our decision on this application is based on the nature of the evidence. The effect of counsel's decision will no doubt be considered at the appeal.

[14] The prosecution at the trial, as has been said, attached some significance to the lack of notes. The evidence was that the applicant was present at the time the police found and seized other papers but found no notes of the treatment of the deceased. The learned judge also referred to the possible significance of the absence of any such notes.

The Application

[15] This application is to adduce the evidence of Drs Mackintosh and Whittaker and to produce the notes.

[16] Section 28 of the Court of Appeal Act provides;

> "28 In the exercise of their jurisdiction under this Part the Court of Appeal may, if they think it necessary or expedient in the interest of justice – …
>
> (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness …
>
> and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal in civil matters."

[17] The "other powers" in civil proceedings are covered by rule 22(2) of the Court of Appeal Rules:

> "(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact …
> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

[18] It has been pointed out in this Court in Loganandan Pillay v Subhash Chand and Anor, Civ App ABU 64/96, 28 August 1998, in respect to that rule:

> *"While it is conceded that this Court does have "full discretionary power" ... the proviso limitations referred to above must not be overlooked. The principles to be applied were stated by Lord Denning in Ladd v Marshall [1954] 3 All ER 745 and adopted by this Court in Coir Industries Ltd v Louvre Industries Ltd [1984] 30 FLR 45 as follows:*
>
> *(a) the evidence could not have been obtained prior to the trial by reasonable diligence;*
> *(b) It must be such as could have had a substantial influence on the result;*
> *(c) It must be apparently credible.*
>
> *There can be no doubt that where there has been a full hearing as in this case it would be 'a grave injustice if a successful party were deprived of his judgment by the emergence of material which should have been before the court originally', refer: Australia and New Zealand Banking Group Ltd v Merchant Bank of Fiji [1994] FCA."*

[19] In a criminal appeal, _Waisake Tuimereke and Anor v State_ [1998] Cr App _AAU 11/97_, 14 August 1998, the Court (including two of the same judges as in _Pillay's case_) had dealt with a further aspect :

> *"Section 23(1) of the Court of Appeal Act provides that, on an appeal against conviction, the Court must allow the appeal if it thinks that the verdict should be set aside because, inter alia, "on any ground, there was a miscarriage of justice". In Ratten v R [1974] 131 CLR 510, 516 Barwick CJ observed that the meaning of miscarriage of justice had been "fairly worked out in decided cases". One of the situations where there was a miscarriage of justice was where 'the jury did not have before it evidence not available to the appellant at the time of his trial which, if believed by the jury, was likely to lead to an acquittal, the jury not being satisfied beyond reasonable doubt of guilt'. At page 516 he said:*
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> *'There will be no miscarriage of justice simply because evidence which was available to him actually or constructively was not called by the accused, even though it may appear that if that evidence had been called and been believed a different verdict would most likely have resulted'. ...*
>
> *In Lawless v R [1979] 142 CLR 659 Stephen J referred to Ratten's case and said that it contained "a definitive pronouncement of appropriate principle" in respect of the concept of fresh evidence. He said that it requires "that the evidence in question, not being before the jury at the trial, was not then available to be called by the defence'."*

[20] In _Ratten's case_, Barwick CJ also pointed out :

> *"...if there is fresh evidence which in the court's view is properly capable of acceptance and likely to be accepted by a jury and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered as a remedy for the miscarriage."*

[21] This has been accepted in Fiji by the Supreme Court in _Swadesh Singh v State_ [2005] CAV 7/05:

"The well established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict: Ratten v The Queen; Davies and Cody v The King [1937] 57 CLR 170."

[22] Similar views were expressed in the New Zealand case of R v Bain [2004] 1 NZLR 638 where Tipping J added a caution:

"Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation."

The Issues

[23] The first issue for the applicant is whether the evidence of Drs Mackintosh and Whittaker is fresh evidence that was not available at the trial. Whilst Mr Haig acknowledges that other medical evidence could have been sought at the trial, the applicant deposes to the fact that counsel took the decision not to call any such evidence; a decision Mr Haig describes as incompetent.

[24] We must decide whether the evidence is fresh in the sense that it could not have been ascertained prior to the trial with reasonable diligence. With respect to Mr Haig's submission, his suggestion about the competence of counsel tends to negate his suggestion that it is fresh. The fact it was not obtained because of the decision of counsel, incompetent or not, demonstrates that such evidence was available before the trial.

[25] The applicant deposes that he discussed this issue with his counsel a number of times in the period of nearly three years between his arrest and the trial.

Counsel's advice, which he accepted, was that the defence should not call any separate medical evidence and should seek instead to discredit the prosecution evidence by cross examination.

[26] A further hurdle is that the affidavit makes it clear enquires were in fact made and a report obtained but rejected by counsel because he felt it "was unsatisfactory". It is also relevant that alternative medical opinions could have been obtained from specialists available at the time in Fiji, two of whom were called by the defence in mitigation.

[27] There could have been a number of reasons why counsel took that course. In the appeal it will no doubt be argued fully and we do not speculate further. However, we bear in mind that defence counsel also had the assistance of his own client's expertise on all professional medical matters whether or not additional witnesses were called.

[28] The affidavit of Dr Mackintosh does not raise any fresh matters of fact. It is simply an opinion based on information which was supplied to him and which could equally have been supplied before the trial.

[29] Dr Whittaker refers to additional (unspecified) written material. He gives no explanation of the actual grounds for his change of opinion; he simply sets out what he suggests are the six components of the two questions he had originally been asked and, in respect of four, states he is uncertain and in another that he no longer holds the same view.

[30] Where any witness has second thoughts about his evidence based on nothing more than a reconsideration of the same information, we cannot accept that satisfies the test of fresh evidence. Mr Gibson for the respondent has told the Court that, should there be a retrial he would not call this witness. That is not surprising as the witness is likely to be considered to have been discredited. The same problem will face the defence if it should seek to call him instead.

[31] In R v Flower [1965] 1QB 146 it was stated:

> *"Witnesses may have second thoughts for a variety of reasons. Some become emotionally disturbed, others brood on the effect of their evidence, whilst others are subject to more tangible pressures to induce them to depart from the truth. It is the witness's state of mind at the trial which matters and this ought to be judged by reference to the circumstances prevailing at the time. It is trite to say that every case depends on its own facts but in our view there is no general requirement for a new trial merely because the witness's account in this court differs from that given in the court below. So much depends in every case upon the reason, if any, given by the witness for having changed his or her testimony. ... [The witness] gives no acceptable explanation of the reasons for her having changed her story and we feel compelled to reject the evidence."*

[32] The position where the witness seeking to change his evidence is an expert involves further considerations. Clearly any expert may consider that recent professional research or newly informed specialist opinion means that his previous opinion is consequently suspect. In such a case, the court would be likely to consider that a sufficient reason for the change and, if the other tests are satisfied, allow it to be introduced to the appeal. But Dr Whittaker's new evidence does not fall into that category. He does not suggest any new facts or advances in medical knowledge since the trial to persuade him away from this earlier opinion. He has simply developed doubts. That may be understandable in the case of a lay witness but an expert witness is in a special position. He has given his professional opinion and any change will only be credible if it is clearly stated to be based on fresh information either about the facts upon which it was founded or in the specialist expertise upon which the determination was based.

[33] We refuse the application to adduce the evidence of Dr Mackintosh or Dr Whittaker.

[34] Passing to the medical notes, the application must fall at the same hurdle. The affidavit of the applicant states that he realised the notes were still in his rooms when he was released from custody nearly three weeks after the death and he took them to his counsel a few days later. There is no way in which they can be considered to be fresh evidence and the fact that they were available to the defence cannot be disputed. Defence counsel decided that it would be better to make no reference to them. Whilst we can see that counsel may have considered the explanation of their provenance might not be readily accepted by the assessors, whether it was or was not a reasonable course to take is matter which should be argued at the appeal.

[35] We refuse leave to adduce the medical notes.

[36] We have been advised that the effect of the suggested incompetence of counsel will be a ground of appeal. This application was to produce the medical notes at the appeal hearing. Their present existence will no doubt be accepted by the respondent but any evaluation of their contents and of when they were made cannot be determined by the appeal court and must be for the trial court should the appeal be allowed and a retrial ordered.

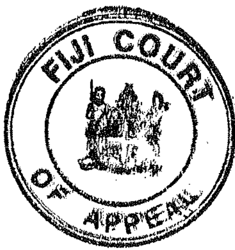
[37] The application to adduce further evidence is refused.

[38] An application for bail pending appeal has also been filed. Counsel acknowledged that it would depend to some extent on the result of this application and so we did not hear it. If it is to be pursued, the application may be made to a single judge under section 35(1).

Ward, President

Wood, JA

McPherson, JA



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