IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0014/07
[High Court Action No: HAC 015/05]

BETWEEN:

ORISI TAMANI

Appellant

And:

THE STATE

Respondent

Coram: Byrne JA
Shameem JA
Mataitoga JA

Hearing: 12th February 2008

Counsel: Mr. S. Valenitabua for the appellant
Mr. W. Kuruisaqila for the respondent

Date of Judgment: 7th March 2008

JUDGMENT OF THE COURT

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[1] This is an application for leave to adduce further evidence at the hearing of the appellant's appeal against conviction and sentence. Leave is granted for the reasons we now set out.

History

[2] The appellant was tried on multiple counts of robbery with violence in the Lautoka High Court. He was convicted on two counts after all three assessors expressed their opinions that he was guilty. On the 28th of November 2006, he was sentenced to 5 years imprisonment. On the 30th of January 2007, the appellant filed a notice of appeal. He also applied for bail pending appeal which was refused. On the 7th of September 2007 the appellant made a further two applications before Byrne JA. The first was that the court record should include the station diaries and cell books which were tendered during the trial within a trial. The second was that fresh evidence be adduced for the appeal, in the form of a memorandum dated 10/07/07 from the officer-in-charge of the Lautoka prison to the officer-in-charge of the Minimum prison in Naboro.

[3] Byrne JA granted the first application, and directed that the second be heard before the full court in the February sessions of the Court of Appeal. His Lordship also refused a further application for bail pending appeal. The application was heard on the 12th of February 2008.

The principles

[4] The principles relevant to an application to adduce fresh evidence under section 28(a) of the Court of Appeal Act and Rule 22(2) of the Court of Appeal Rules are well-settled. Rule 22(2) of the Rules provide:

> ***"The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no 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."***

[5] Section 28 of the Court of Appeal Act provides that:

> ***"In the exercise of their jurisdiction under this Part, the Court of Appeal may, if they think it necessary or expedient in the interests of justice - .....***

> ***(c) receive the evidence, if tendered, of any witness (including the appellant) 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."***

[6] Rule 22(2) sets out a power given to the court in civil matters.

[7] The way in which this discretion has been exercised in the past has involved a consideration of the following questions:

a. Could the evidence have been obtained prior to trial by reasonable diligence?
b. Could the evidence substantially alter the result of the case?
c. Is the evidence relevant, admissible and apparently credible?

[8] These were the principles adopted by this Court in ***Loganandan Pillay v. Subhash Chand & Anor.*** Civ. App. ABU0064.1996, and in ***Waisake Tuimereke and Anor. v. State*** [1998] Cr. App. AAU0011.1997. They were the principles set out by Denning LJ in ***Ladd v. Marshall*** [1954] 3 ALL ER 745.

[9] There is however, a qualification. In some cases, the fresh evidence might have been available to the defence at trial, with the exercise of due diligence. However, the compelling principle is the interests of justice. As Tipping J said in ***R v. Bain*** [2004] 1 NZLR 638 (approved by this court in ***Sachida Nand Mudaliar v. The State*** Crim. App. AAU0032 of 2006):

> ***"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 fresh evidence

[10] The fresh evidence which is the subject of this application is set out in the affidavit of the appellant. In it, the appellant says that he gave evidence during his trial in the Lautoka High Court, that he and his co-accused were taken from the Namaka Police Station to the Nadi Magistrates' Court on 7.02.03 where they complained of police assault, and that the magistrate ordered his remand at the Lautoka prison after a medical examination. He further states that contrary to the court order, the police took him with Rodney Silikula (his co-accused) to the Natabua Prison. There, Silikula was admitted but the appellant was denied admission because he had injuries and had not been medically examined. His evidence at the trial was denied by the police witnesses. The presiding judge rejected his evidence and accepted the police evidence. The appellant's confession was ruled admissible and was the subject of the summing up to the assessors.

[11] After the trial, the appellant's solicitor was given a memorandum from the officer-in-charge of the Lautoka Prison. It is dated 10/7/07 and is addressed to the officer-in-charge of the Minimum Security Prison at Naboro. It reads:

> ***"In reference to your MN-A/15 of 2/7/07 here are explanation which required by your office concerning request from prisoner Orisi Tamani.***
>
> 1. ***On Friday 7/2/03 both were refused admission by the gatekeeper officer Lautoka Prison because of the physical injuries sustained that appeared in their bodies. The gatekeeper is enforcing laid down procedures and laws that exists in all Prison around the country.***
>
> 2. ***Rodney Silikula and Waisea Sotia were admit on 7/2/03 for 14 days as remand prisoner.***
>
> 3. ***Police officers were advise to take both that were rejected to any hospital for medical check then we can admit them.***
>
> 4. ***Both were return by Police and I don't know how far they gone that day.***

5. ***On Monday 10/2/03 both were returned to Prison with medical reports which means they were in Police custody for 3 days – 7/2 – 10/2."***

[12] There can be no doubt at all that this evidence is both relevant and apparently credible. It appears to confirm the appellant's version of the facts, it is probative of his account of police assault and it directly contradicts the police denials that the appellant was refused entry at the Natabua Prison. Further, if that evidence had been led at the trial, it may have affected the outcome of the trial within a trial, and therefore of the trial proper.

[13] However the State objects to the admission of the evidence because (counsel argues) the defence could, with reasonable diligence, have obtained this information before the trial. The appellant's counsel disagrees, saying that the memorandum only came into being a year after the trial and could not have been discovered before it was written.

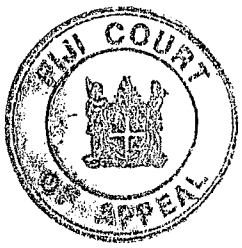
[14] There is some strength in the argument that although the memorandum was not written until July 2007, the information contained in it could have been discovered by the defence if proper enquiries had been conducted by counsel at the Natabua Prison.

[15] However, in practical terms, official information is less easily extracted by persons who are not employed by the State. Indeed if this information was so easily obtained, State counsel could have discovered it at the trial, and disclosed it to the defene. The issue of whether the appellant was refused entry at the Natabua Prison was very much a relevant issue at the trial. It had an impact not only on the question of the existence of injuries on the appellant after several days in police custody, but also on the credibility of the police witnesses called during the voir dire and the trial proper. If there was any evidence crying out for disclosure, it was the official records at Natabua prison. However State counsel did not disclose it. The defence did not discover it.

[16] Further, whether or not the evidence might have been discovered by either party with reasonable diligence, the overriding question must be whether the interests of justice require a consideration of the evidence at the appeal. We think that it does.

[17] For these reasons, leave is granted to the appellant to adduce the evidence of the memorandum written by the officer-in-charge of the Lautoka Prison at the hearing of this appeal in the April sessions of this court.

Hon. Justice John Byrne
Judge of Appeal



Hon. Justice Nazhat Shameem
Judge of Appeal

Hon. Justice Isikeli Mataitoga
Judge of Appeal

Solicitors:

Valenitabua Esq. for the appellant
Director of Public Prosecutions Office for the respondent