IN THE COURT OF APPEAL, FIJI ISLANDS AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0103 of 2008

BETWEEN	:	**SIMON JOHN MACARTNEY**	*Appellant*
AND	:	**THE STATE**	*Respondent*

Before the Honourable Judge of Appeal, Mr Justice John E Byrne

Counsels	:	S. Valenitabua for the Appellant Ms P. Madanavosa for the Respondent
Date of Hearing	:	1st December 2008
Date of Ruling	:	12th December 2008

RULING ON APPLICATION FOR BAIL

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[1] **Introduction**

The *Appellant* was charged with the murder of his wife Ashika Lata Macartney. The Amended Information filed by the Prosecution in the High Court stated that the *Appellant* murdered his wife on 22nd October 2007 at Deuba.

[2] The Appellant denied the charge. A trial was held in the High Court in Suva. The trial started on the 6th of October 2008. The trial Judge summed up on the 4th of November 2008. The five assessors gave unanimous opinions of guilt on the same date. The trial Judge upheld the assessors' respective opinions of guilt. The *Appellant* was sentenced on

the 5th of November 2008 to life imprisonment for a minimum term of 18 years.

[3] The *Appellant* filed a Notice of Appeal on the 5th of November 2008, within two hours of the verdict being given. The notice of appeal sets out seven grounds some of which in my view are matters of law and the remainder matters of mixed fact and law. I will discuss this shortly. On the 12th of November 2008 the Appellant filed a Notice of Motion being an application for bail pending the hearing of his appeal. The Notice of Motion was filed with a Supporting Affidavit sworn by the Appellant on the 11th of November 2008. The Appellant says he seeks this Court's indulgence to grant him bail pending the hearing of his appeal. *"Indulgence"* is the correct word to describe the *Appellant's* application because although Section 3(3) of the Bail Act 2002 states:

> ***"there is a presumption in favour of the granting of bail to a person .... ",***

Section 3(4)(b) states:

> ***"the presumption in favour of the granting of bail is displaced where ... (b) the person has been convicted and has appealed against the conviction".***

[4] Thus any applicant for bail pending a conviction is asking the Court to show leniency to him or her because of the particular circumstances of his case. The question I have to decide is whether I should grant the Applicant's request.

[5] Section 17(3) of the Bail Act states:

> ***"When a Court is considering the granting of bail to a person who has appealed against conviction or a sentence the Court must take into account –***
>
> ***(a) The likelihood of success in the appeal;***
> ***(b) The likely time before the appeal hearing;***
> ***(c) The proportion of the original sentence which will have been served by the Applicant when the appeal is heard".***

[6] **<u>The Court of Appeal Act Cap 12</u>**

Section 33(c)of this Act states:

> ***"The Court of Appeal may, if it sees fit, on the application of an Appellant admit the Appellant to bail pending determination of his appeal".***

[7] Section 35(1)(d) of the Court of Appeal (Amendment) Act, 1998 (Act No. 13 of 1998) grants power to a single Judge of Appeal as follows:

> ***"35(1) – A Judge of the Court may exercise the following powers of the Court ...***
>
> ***(d) Admit an Applicant to bail".***

[8] **The Common Law**

Some examples of the Common Law principles relative to bail may be deduced from the following cases:

(1) Wise 17 Cr. App. 17 where it was stated by the Lord Chief Justice;

> ***"In order to adjudicate on the question of bail it is useful to see if there is any prospect of success on appeal, or it is a case where it would be of assistance for the preparing of a real case for appeal if the Appellant was released".***

(2) In Joseph Davidson 20 Cr.App.R 66 where the Court of Criminal Appeal stated at page 67:

> ***"This Court has repeatedly laid it down that it will not grant bail to a prospective Appellant except in very special circumstances".***

[9] The Court referred to an earlier case, **Edward Fitzgerald** in [1924] 17 Criminal Appeal Reports in which the Court of Criminal Appeal laid it down that it would not grant bail to a prospective Appellant unless there are exceptional and unusual reasons.

[10] In **Ratu Jope Seniloli and Others –v- The State**, Criminal Appeal No. AAU0041 of 2004S, Ward J.A. stated:

"The general restriction on granting bail pending appeal as established by cases in Fiji and many other common law jurisdictions is this that it may be granted where there are exceptional circumstances"

[11] *"Exceptional circumstances"* is defined in **R –v- Watlon** [1978] Cr. App. R.293 as those circumstances which will drive the Court to the conclusion that justice can only be done by granting bail.

[12] **The Likelihood of Success**

According to Ward J.A. in **Ratu Jope Seniloli –v- The State** *(supra)* this has long been a factor which the Court has considered in applications for bail pending appeal and Section 17(3)(a) of the Bail Act, 2002 now enacts that requirement. His Lordship said that:

"The Courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for a single Judge on the application for bail pending appeal to delve into the actual merits of the appeal".

[13] In **Sarda Nand –v- DPP**, FCA Application 3 of 1979, Marsack J.A. said:

"All that is necessary . . . is to decide whether (the issues) show, on the face of it, that the appeal has every chance of success".

[14] In the instant case, I pointed out in argument to counsel for the *Appellant* that one of the biggest problems he faces in attempting to persuade this

Court that he should be granted bail pending his appeal was the unanimous opinion of the assessors with which the trial Judge agreed. Another factor to be considered is that, in reaching their opinion the assessors and the Judge heard and saw the *Appellant* give evidence and be cross-examined on his evidence. The verdict shows clearly that they did not believe the *Appellant.*

[15] That of course is not a decisive factor in itself but it illustrates one of the difficulties the *Appellant* faces in his attempt to persuade this Court that it should show him indulgence in granting him bail pending his appeal.

[16] The other factor weighing against granting the *Appellant* bail is that in the research I have conducted since argument concluded I have not found one case where a person convicted of murder was granted bail pending an appeal to the Court of Appeal, nor for that matter was any such case cited to me by either the Appellant or the Respondent. In my view this is a matter which has some significance on this application.

[17] **The Grounds of Appeal**

The grounds of appeal are as follows:

1. That the trial Judge erred in law in holding that the e-mail message received by the Appellant from Ashika Lata Macartney's e-mail address was hearsay evidence.

2. That the trial Judge erred in law in holding that the e-mail message was inadmissible as evidence on the basis that there was no proof that it was sent by Ashika Lata Macartney and that the e-mail message could have

been sent by anyone when it was the onus of the Prosecution to prove beyond reasonable doubt that the e-mail was not sent by Ashika Lata Macartney.

3. That the trial Judge erred in law in not directing the Assessors that the Post Mortem Report produced by Doctor Shambekar Prashant and produced and tendered in Court by Doctor Eka Buadromo was the "best evidence" available to the Court regarding the circumstances and date of Ashika Lata Macartney's death.

4. That the trial Judge failed to direct the Assessors on the "best evidence rule" relative to the post mortem report for Ashika Lata Macartney.

5. That the trial Judge erred in law in failing to direct the Assessors on the creation of doubt by the Appellant's evidence which had to be rebutted and proven beyond reasonable doubt by the Prosecution.

6. That the trial Judge erred in law in failing to direct the Assessors that reasonable doubt, as to Ashika Lata Macartney's alleged murder by the Appellant, could be created by the evidence that:-

    6.1 an e-mail message was received by the Appellant from Ashika Lata Macartney's e-mail address on 23.10.07.

6.2 the post mortem report written by Dr Shambekar Prashant stated that Ashika Lata Macartney died within 5 to 10 days before 2.11.07.

6.3 according to the post mortem report Ashika Lata Macartney could have died between 24.10.07 and 29.10.07.

6.4 Biriana Vatucicila and Anaseini Tavola saw the white car, which they had seen earlier at 7.00pm on 22.10.07, still at Vunibuabua Road in Deuba after 8.30pm on the same night when evidence was led on behalf of the Appellant that the Appellant arrived at 36 Berry Road in Suva at about 8.00pm on the same night.

6.5 The Apellant's pair of brown sandals was always at the Appellant's father's Veisari home between 23.9.07 and 8.10.07 and that it was only brought to the Central Police Station in Suva by Allan Macartney for the Appellant's use at CPS.

7. That the trial Judge erred in law in accepting Biriana Vatucicila's evidence relative to the brown sandals when the brown sandals were first ever mentioned by Biriana nine hours after the sandals were released to the police investigating team by an officer at CPS.

[18] Section 21 of the Court of Appeal Act Cap. 12 states:

> ***"A person convicted on a trial before the High Court may appeal under this part to the Court of Appeal -***
>
> ***(a) against his conviction on any ground of appeal which involves a question of law alone;***
>
> ***(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and***
>
> ***(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law".***

[19] It was submitted by the *Respondent* that the only grounds of appeal involving questions of law are numbers 1, 4 and 5 and that grounds of appeal 2, 3, 6 & 7 involve questions of mixed fact and law. In the circumstances I granted the *Appellant* leave to file all these grounds so that the nature of the appeal will be clear to the Court. It is also in the interest of justice that the *Appellant* should not be denied any ground of appeal which is properly open to him. I shall now discuss these grounds in their order.

[20] Ground 1 relates to an e-mail message received by the *Appellant* from Ashika Macartney's e-mail address on 23rd October 2007. The trial Judge ruled that this message was hearsay and could not be admitted as evidence. The *Appellant* argues that the learned trial Judge was wrong in that he should have followed the well known decision of the Privy Council in **Subramaniam –v- Public Prosecutor** [1956] 1WLR 965 and directed the assessors that the e-mail was admissible, not to establish the truth of the statement in it, but the fact that it was made.

[21] The *Appellant* submits that it is common knowledge to e-mail users that the date of the e-mail would be the date it was sent. This evidence by the *Appellant* was to show that he received the e-mail on the 23rd of October 2007, the day after the *Appellant's* wife was alleged to have been killed. The trial Judge also held the e-mail message inadmissible as evidence on the ground that there was no proof that it was sent by Ashika Macartney and that the message could have been sent by anyone. The *Appellant* said he printed the message from his e-mail address on 26th October 2007 and gave a copy to the Police at the Central Police Station when he was called there after Ashika Macartney was reported missing. The *Appellant* said that as far as he was concerned he received the e-mail message from his late wife because it came from her e-mail address and he had no reason to believe, let alone know, that she was dead.

[22] Against this the *Respondent* argues that the e-mail message was not a print-out containing records produced without human intervention, and therefore it was inadmissible. It is also submitted that this hearsay evidence does not come under one of the exceptions to the rule being the principle of res gestae because it is not relevant nor is it an event that was close in time or space to the matter being proved as to be inseparable from it.

[23] I was told by Mr Valenitabua, and this was not denied by Ms Madanavosa, that on a Saturday morning soon after he received instructions from the *Appellant* he telephoned Ms Madanavosa in her chambers and told her that he had spoken to a technician who said that he could "break-in to the equipment" with the view to establishing who sent the e-mail but preferred not to do so because he thought that only the police should do this. Mr Valenitabua said that Ms Madanavosa promised to tell the police about this request.

[24] She told me that she remembered the telephone conversation with Mr Valenitabua and had a diary entry of it but could not remember whether she had asked the police to make the enquiry requested by Mr Valenitabua.

[25] The *Appellant* submits that the failure by the Prosecution to call an IT expert to explain to the Court the origin of the e-mail constitutes an exceptional circumstance which together with others entitles the *Appellant* to be released on bail. I am not satisfied that this constitutes an exceptional circumstance in that it was open to the assessors to find that the message could have been sent by anyone. It would appear from the verdict that they accepted this. However, that does not end the matter because this submission can be made to the Full Court which will then have to consider its relevance and the weight of this evidence. It is not my function as a single Judge to do so.

[26] Still dealing with this evidence, counsel for the *Appellant* made a very strange submission when he said that the Judge should have encouraged the Prosecution to prove beyond reasonable doubt that Ashika Macartney did not personally send the e-mail message. My only comment on this is

that it is not for a Judge to encourage either the Prosecution or the Defence to take a certain course of action during a trial. The Judge's function is to be neutral at all times and I am satisfied on the summing up that the Judge was fair over all in the way he directed the assessors. In my judgment the refusal to admit the e-mail is not an exceptional circumstance to warrant my granting the *Appellant* bail.

[27] Grounds 3 and 4 relate to the *"best evidence rule"*. In Halsbury Volume 17, 4th Edition, paragraph 412 it is said that this rule has a long historical background and it seems to go back at least as far as the case of **Lynch –v- Clearke** [1697] 3 Salk 154. The principle is that evidence should be the best that the nature of the case will allow which is a matter of obvious prudence. The Appellant submits that in directing the assessors that the author of the report had left Fiji and was no longer available, he should also have directed them that the contents of the report were the best evidence available and that no oral evidence to the contrary was to be considered by the assessors.

[28] The post mortem report stated that Ashika Macartney died within five to ten days before the 2nd of November 2007, the date on which her body was found. As the pathologist who conducted the examination was not available, a doctor Eka Buadromo another pathologist gave evidence after reading the original pathologist's report. Dr Buadromo said that it was difficult to ascertain the actual time of death. The *Appellant* submits that the trial Judge should have directed the assessors that there was evidence Ashika Macartney died within five to ten days before the 2nd of November 2007 and that would have placed the date and time of death between the 24th of October and 29th of October 2007. It is submitted that the trial Judge should have told the assessors that this was a matter for them to

consider. The trial Judge dealt with this in paragraphs 33 and 34 of his summing up when he said:

> ***"Evidence has been given about a post-mortem examination of the deceased's body. That examination was conducted by Dr Prashant at the CWM Hospital and he prepared a report of his findings (P27). Normally he would have given evidence himself about the examination. However, he has left Fiji and as he is no longer available, details of what he included in his post-mortem report have been given in evidence. This means, of course that we have not had the advantage of hearing Dr Prashant's evidence on oath and the defence has not had the opportunity to cross-examine him about his findings.***
>
> ***However, the evidence is properly before you and you should have regard to all the circumstances in deciding the weight to be given to it. The report was prepared by a pathologist who conducted a routine post mortem examination. It is entirely a matter for you but you may feel that there is no reason to doubt the accuracy of the report".***

[29] The *Appellant* submits that by allowing another pathologist to give evidence and his failure to direct the assessors that Dr Buadromo's oral evidence was only secondary evidence, he should have addressed the assessors on the best evidence rule and he failed to do so. The *Appellant*

submits that this is also an exceptional circumstance which would warrant his being released on bail.

[30] I do not agree. All these matters referred to by the *Appellant* and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for bail pending appeal should attempt even to comment on. They are matters for the Full Court which will also have the benefit of the court record which I do not.

[31] A similar comment applies to the evidence of Biriana Vatucicila and Anaseini Tavola who said they saw the same white car at Vunibuabua Road in Deuba after 8.30pm when according to the *Appellant* he arrived at his father's home in Suva at 8.10pm. The *Appellant* submits that the trial Judge could have directed the assessors that this could create doubt. A similar criticism is made of the *Appellant's* pair of brown sandals which were at Veisari; they were brought by the *Appellant's* father to the Central Police Station on the 8th of November 2007 and were released to the investigating team after 4.00pm on the 10th of November.

[32] It is argued that the trial Judge should have directed the assessors that this contradictory evidence could create doubt and that it was a matter for them.

[33] Again I hold that such a submission is not properly made on an application for bail. It can and no doubt will be made to the Full Court on the appeal. I note however paragraphs 31 and 39 of the learned trial Judge's summing up which deal with the evidence the assessors had to consider. Paragraph 31 reads:

"On the basis of these legal principles that I have explained to you, you must consider the evidence in this case and decide what has been proved. As I said earlier, it is your job to assess the credibility of the witnesses. You decide who is truthful and to be believed. However, there are some comments that I must make on a few items of evidence".

[34] In paragraph 39 the learned Judge said:

"In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submissions made by counsel. I will summarise the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel, that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case".

[35] Summing up after a long trial is always a difficult task for a trial Judge. The Judge cannot be expected to remind the assessors of all the evidence which has been given and, as I said earlier, in my view the summing up in this case which covered 90 paragraphs was generally fair. Whether or not the Full Court will hold that his failure to direct specifically on the matters emphasised in the *Appellant's* submissions to me constitutes sufficient doubt as to justify the appeal being upheld remains to be seen. I am in no doubt that such failure if it be true is not an exceptional circumstance to justify my releasing the *Appellant* on bail and I refuse to do so on that ground.

[36] **The Likely Time Before the Appeal Hearing**

The *Appellant* submits that from experience it would take at least 12 months for this appeal to be heard. I said during argument that, as far as I was concerned, if the Court record is ready in time there is no reason why this appeal should not be heard in the March-April session of the Court. There will be a call-over of the list on the 13th of January 2009 and if the record is ready by then I will give directions as to the filing of submissions which, I now give notice, I will require to be strictly adhered to. I do not know at this time the number of criminal appeals which are ready for the first session of the Court but, if the *Appellant's* case is ready then I see no reason why the appeal should not be heard in that session.

[37] The *Appellant* submits that his appeal has a high likelihood of success. I am not prepared to go so far but I certainly do not consider it an appeal which has not even the faintest prospect of success. In short, there are doubtless many arguable grounds but in my judgment there is nothing exceptional about them which would justify my releasing the *Appellant* on bail pending his appeal. The application is therefore refused.

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[John E Byrne]
JUDGE OF APPEAL

At Suva
12th December 2008