

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL AAU 63 of 2010**  
**(High Court HAC 54 of 2009)**

**BETWEEN** : **MESULAME WAQABACA**  
**TIKO UATE**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Chandra RJA**

**Counsel** : **Appellant in person**  
**Mr L. Fotofili for the Respondent**

**Date of Hearing** : **20 June 2013**

**Date of Ruling** : **9 August 2013**

**RULING**

1. The Appellants were charged with three others on the count of murder contrary to section 199 and 200 of the Penal Code (Cap.17).
2. After trial before the High Court at Suva, the Appellants were convicted of the charge of murder and sentenced to life imprisonment with non-parole periods of 14 years for the 1<sup>st</sup> Appellant and 12 years for the 2<sup>nd</sup> Appellant. The other three accused were acquitted.
3. The 1<sup>st</sup> Appellant has applied for bail pending appeal as well as by his amended petition for leave to appeal against his conviction and sentence.
4. The 2<sup>nd</sup> Appellant has also filed an application seeking leave to appeal against conviction and sentence.

5. In the 1<sup>st</sup> Appellant's amended petition he has urged the following grounds in seeking leave to appeal:
  1. That the learned trial judge erred in law and in fact when his Lordship wrongfully admitted inadmissible evidence of photocopy caution interview and charge interview statements.
  2. That the learned trial judge erred in law in not directing the assessors properly and/or insufficiently on the defence of provocation and intoxication.
  3. That the learned trial Judge erred in law in failing to direct the assessors adequately on all the evidence and circumstances of the case.
  4. That the improper and insufficient directions and warning on accomplice's evidence was given.
  5. That the sentence is wrong in principle in all the circumstances of the case passed on errors of law.
  
6. The 2<sup>nd</sup> Appellant in his application for leave to appeal has urged the following grounds:
  1. That the learned trial judge erred in law and in fact in not adequately directing the assessors in respect of the law regarding the charge of murder.
  2. That the prosecution evidence failed to prove beyond reasonable doubt the case against the Appellant and as such the benefit of doubt ought to have been given to the Appellant.
  3. That the learned trial Judge erred in law and in fact in adequately directing on the law on circumstantial evidence.
  4. That the learned trial Judge erred in law and in fact, given all the circumstances of the case, the charge of murder should be reduced to manslaughter.

5. That the sentence being harsh and excessive and wrong in principle in the circumstances of the case.
6. That the learned trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking relevant factors into account.

### **Application of 1<sup>st</sup> Appellant for leave to appeal against conviction**

7. The first ground of appeal is that the learned trial judge erred in allowing photocopies of caution interview and charge interview statements to be admitted at the trial. The Appellant was represented by Counsel at the trial and if there were any discrepancies in the statements that were produced, they could have been challenged. No objection seems to have been taken regarding the production of these statements and therefore this ground lacks merit.
8. The second ground of appeal is regarding the direction of the learned trial judge being inadequate regarding the direction on provocation and intoxication. The deceased had been set upon by the Appellants and attacked when he was walking along and there has been no provocation on the part of the deceased. Therefore there was no need for any direction regarding provocation. On the other hand the Appellants had been intoxicated at the time of the incident and the learned trial judge had directed the Assessors to that effect. The fact as to whether such direction was adequate is arguable and therefore leave can be granted on that aspect.
9. The third ground is widely framed in that there has been an inadequate direction to the assessors on all the evidence and circumstances of the case. The 1<sup>st</sup> Appellant had punched the deceased while he was held by the 2<sup>nd</sup> Appellant and they had left the deceased and fled which resulted in the death of the deceased. The deceased had died of

haemorrhage of the brain which according to the medical evidence would have been caused by a hard blow to the head. The question whether the direction to the Assessors was sufficient as regards manslaughter was concerned is arguable in those circumstances and leave can be granted.

10. The fourth ground is that there had been improper and insufficient directions and warnings on accomplice's evidence. The 4<sup>th</sup> accused, Lolohea Napau Kaulotu gave evidence and stated that he was not present at the scene of the crime and the prosecution witness who had seen the 1<sup>st</sup> and 2<sup>nd</sup> Appellants attacking the deceased had also stated that he had not seen the 4<sup>th</sup> accused. This raises the question as to whether the 4<sup>th</sup> accused was an accomplice although he was charged along with the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. In those circumstances, the failure to give a direction to the Assessors regarding accomplice's evidence would not be material. The learned trial Judge in his summing up had stated that a reasonable doubt was created regarding the 4<sup>th</sup> accused's presence at the scene of the crime. Therefore this ground lacks merit.
  
11. The 5<sup>th</sup> ground urging that the sentence is wrong in principle has no merit since in a conviction for murder the punishment is life imprisonment and the learned trial judge has imposed life imprisonment with a non parole period of 14 years on the 1<sup>st</sup> Appellant.

#### **Application of 1<sup>st</sup> Appellant for bail pending appeal**

12. The 1<sup>st</sup> Appellant has sought bail pending appeal on the basis that he is a first offender, that the charge is flawed, he is young, that the sentence is harsh and excessive and that he comes from a decent family.

13. Section 17(3) of the Bail Act provides that:

When a court is considering the granting of bail to a person who has appealed against the conviction or 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.

14. According to section 3(4) of the Bail Act 2002, the presumption in favour of the granting of bail is displaced where a person has been convicted and has appealed against the conviction.

15. The threshold for granting bail pending appeal is very high and will only be allowed where there are exceptional circumstances.

16. The mere fact that the grounds of appeal are arguable is not sufficient and there must be real likelihood of success as required by section 17(3)(a) of the Bail Act and sections 17(2) and (3) become otiose if there is no real likelihood of success.

17. The grounds urged by the 1<sup>st</sup> Appellant regarding his application for leave are arguable and there is no real likelihood of success. Further the grounds adduced by him in his application for bail do not take his application any further to qualify himself under exceptional circumstances.

18. Therefore the application for bail pending appeal is refused.

## **Application of 2<sup>nd</sup> Appellant for leave to appeal**

19. The first ground of appeal is as regards the direction of the learned trial Judge to the Assessors on the law regarding the charge of murder. In his written submission the Appellant has submitted that the learned trial Judge had not adequately dealt with the aspect of malice aforethought on the part of the Appellant in directing the Assessors on the elements of the charge of murder. This submission is based on the fact that the Appellant according to the evidence had held the deceased while the 1<sup>st</sup> Appellant had punched and dealt the fatal blows, the Appellant's position being that he held the deceased for the purpose of robbing and had not expected the 1<sup>st</sup> Appellant to punch the deceased. As to whether the Appellant had the requisite intention may be a matter that can be considered even though he was charged for murder along with the 1<sup>st</sup> Appellant. This aspect would be arguable and it would be best dealt with by the full court.
  
20. The second ground of appeal is as regards the direction of the learned trial Judge to the Assessors on burden of proof. The learned trial Judge has adequately dealt with the aspect of burden of proof in his summing up to the Assessors and therefore leave cannot be granted on this ground.
  
21. The third ground is that the learned trial Judge had not directed the Assessors adequately on circumstantial evidence. The learned trial Judge in his direction dealt with the evidence placed before Court at the trial which included accounts of the incident by an eye witness too and therefore this ground has no merit.
  
22. The fourth ground of appeal is that in all the circumstances of the case the charge should have been manslaughter and not murder. The Appellant at the commencement of the trial pleaded not guilty to the charge of murder and pleaded guilty to manslaughter. The trial

proceeded against all five accused and three of them were acquitted while the first and second appellants were convicted of murder. Taking into account all the circumstances of the case it is arguable whether the Appellant should have been found guilty of murder or manslaughter. That would be a matter which can be dealt with by the full court.

23. The fifth and sixth grounds relate to sentence and the sentencing cannot be faulted as the verdict was murder and the sentence for murder is life imprisonment. The laying down of a non-parole period was left to the discretion of the trial judge. The grounds of appeal regarding sentence have no merit.

#### **Orders of Court**

1. The 1<sup>st</sup> Appellant's application for leave to appeal against conviction is allowed.
2. The 1<sup>st</sup> Applicant's application for bail pending appeal is refused.
3. The 2<sup>nd</sup> Appellant's application for leave to appeal against conviction is allowed.

Suresh Chandra  
**Resident Justice of Appeal**