IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 44 OF 2013
(High Court HAC 364 of 2012 with HAC 323, 324 and 325/2012)

BETWEEN	:	**JASON ZHONG**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P**
Counsel	:	**Ms B Malimali for the Appellant** **Mr V Perera for the Respondent**
Date of Hearing	:	**16 June 2014**
Date of Decision	:	**15 July 2014**

DECISION

[1] The Appellant was convicted on 13 December 2012 on two counts of sexual servitude contrary to section 106(1) of the Crimes Decree 2009. He was sentenced on 25 January 2013 to terms of imprisonment of eleven (11) years and nine (9) months in

respect of each count to be served concurrently with effect from 13 December 2012 with a non-parole term of ten years.

[2] The Appellant's conviction followed a trial by Judge sitting with assessors that commenced on 19 November and was completed on 13 December 2012. He was tried with three others who were convicted of offences that related to the same subject matter. Two of the co-accused were each convicted on two counts of trafficking in persons contrary to sections 112 (2) and (5) and 113 (1) (a) (i) of the Crimes Decree 2009. The third co-accused was convicted on two counts of domestic trafficking in persons contrary to section 115(3) of the Crimes Decree 2009.

[3] The Appellant filed a notice of appeal on 15 February 2013. Although the Appellant had failed to comply with Rule 43 (1), a second notice of appeal filed on 6 May 2013 complied with Rule 44 (13) and as a result the appeal was within time. The grounds of appeal against both conviction and sentence are the same in both notices.

[4] On 14 March 2014 the Appellant filed a summons seeking an order for bail pending appeal. The application was supported by an affidavit sworn on 14 March 2014 by Jason Zhong. The Respondent filed an answering affidavit sworn on 9 April 2014 by Aminiasi Cula.

[5] The Appellant's Counsel filed written submissions on both the application for leave to appeal against conviction and sentence and the application for bail pending appeal on 8 May 2014. The Respondent filed written submissions on 30 May 2014. Counsel for the Appellant provided the Court with a copy of *"skeletal submissions"* during the course of the hearing of the applications on 16 June 2014.

[6] In this decision I propose first to consider the issue of leave to appeal and then consider the application for bail pending appeal.

[7] The appeal filed by the Appellant is against both conviction and sentence. Pursuant to section 21(1) of the Court of Appeal Act Cap 12 (the Act) the Appellant must first obtain the leave of the Court unless the ground of appeal against conviction involves a question of law alone. If the ground of appeal involves a question of fact alone, or a

question of mixed law and fact the Appellant must first seek leave to appeal. An application for leave to appeal may be heard by a single judge of the Court pursuant to section 35 (1) of the Act.

[8] In the case of the appeal against sentence the Appellant must first obtain leave to appeal from the Court. Again, a single judge may determine an application for leave to appeal against sentence. There is no right of appeal against sentence where the sentence imposed is one fixed by law.

[9] There are a total of six grounds of appeal. There are four grounds against conviction and two grounds against sentence. The submissions on leave to appeal raise a minor inconsistency. In paragraph 2.1 of the submissions filed on 8 May 2014 it is stated that the appeal is on the grounds of both law and facts. Then in paragraph 2.2 it is stated that there are 6 grounds of appeal and all are on questions of law. Then in paragraph 2.3 it stated that although leave is not required the submissions will address the question of leave on all grounds. It needs to be stated at the outset that leave is required in respect of any appeal against sentence (section21 (1) (c)).

[10] At this stage it is convenient to set out in full the six grounds of appeal relied upon by the Appellant:

> *"1. That the learned trial Judge erred in law and misdirected the assessors in respect of evidence of PW1, being the 1st Complainant in the case in that certain words were attributed to her by the learned trial judge in his summing up that she had not stated in her evidence in Court, and in particular the words 'At one time during the 2 or 3 nights they stayed there, Jason brought a "client"/ It was his friend – Jason pushed the guy into her room and said "you have to work" as contained in paragraph 28 on page 10 of the summing up.*
>
> *2. That the learned trial Judge erred in law and misdirected the assessors in not directing the assessors that if they were satisfied that Jason Zhong was acting as a translator for another then he should be found to be not guilty after Counsel during the hearing of this matter had requested for such a direction.*
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> *3. That the learned trial Judge erred in law and misdirected the assessors in that there were certain witness statements*

available to him and not available to the assessors that reliance was placed upon in some of the summary of facts put forward as part of the summing up, and by mentioning these unattested to facts the assessors were given evidence that should not have been available to them.

4. *That the learned trial Judge erred in law in failing to ensure that at all times there was a competent and accurate translator present for the portion of proceedings conducted in the Thai language leading to an inability to properly follow what the complainants were actually saying and that led to a substantial miscarriage of justice in that the evidence of the two complainants as stated in Thai were not properly communicated to the accused persons who spoke no Thai including the Appellant herein.*

5. *That the learned trial Judge erred in law in imposing a sentence of eleven years and nine months imprisonment on the Appellant when in similar fact cases sentences had been significantly lesser.*

6. *That the sentence imposed was harsh and excessive in all the circumstances of the matter in that the learned trial Judge failed to consider that all accused persons were ostensibly charged in a joint enterprise and the sentence for each ought to have been more equivalent to the other accused persons."*

[11] I should indicate that whether leave is required and/or whether leave should be granted to appeal against both conviction and sentence will be determined upon a consideration of the six grounds of appeal that have been specified in the notice of appeal.

[12] As for the four grounds of appeal against conviction, there are two issues to be determined in respect of each ground. The first is whether the ground involves a question of law alone. If the answer is yes, then leave is not required. If the answer is no then it is necessary to determine whether the ground of appeal raises an arguable point worthy of a contested hearing before the Court of Appeal.

[13] At the outset it needs to be clearly stated that the mere fact that the ground of appeal is stated in the notice to raise an error of law does not necessarily mean that the ground involves a question of law alone. In **Hinds –v- R** (1962) 46 Cr. App. R 327 Winn J

at page 331 when commenting on section 3(a) of Criminal Appeal Act 1907 (the terms of which are similar to section 21 (1) (a) of the Court of Appeal Act) noted:

> *"The court is very clearly of the opinion that the proper construction of those words (against conviction "on any ground of appeal which involves a question of law alone") is that there must be, in order that the right given by that subsection can be claimed, a ground of appeal raised which is a question of law, and that the section cannot be effectively invoked merely by raising a ground which the grounds of appeal or the submissions of counsel at any later stage describe as a ground of law."*

[14] That each ground of appeal against conviction is described as an error in law does not in any way assist this Court to determine whether any ground against conviction involves a question of law alone. As the Court of Criminal Appeal noted in the **Hinds** decision (supra) at page 333:

> *"Whether or not such a ground so stated is to be regarded as a question of law alone or whether it is a ground of law mixed with fact or of mixed law and fact may, in any particular case, not be an easy question to determine."*

[15] The Court of Criminal Appeal in **Hinds** (supra) relying on the ground of appeal under discussion in that case provided a most useful example of the difference between a ground of appeal involving a question of law alone and a ground of appeal involving a question of law mixed with fact or a ground of mixed law and fact at page 333:

> *"If the question were: Is hearsay evidence admissible on a criminal trial in England? that would plainly be a pure question of law or a question of law alone. If the question were : Was hearsay evidence admitted at this trial, or did the answers given by a witness on page so-and-so and so-and-so of the transcript constitute hearsay? then it might be that the natural approach would be to suppose that there were questions of fact to be determined, and after the determination of those facts the law of hearsay evidence, including the proper definition of hearsay, would have to be applied to those facts."*

[16] In my judgment upon a careful reading of each of the four grounds of appeal against conviction there is in each case a question of law mixed with a considerable amount

of fact. In my judgment none of the four grounds involves a question of pure law or a question of law alone.

[17] So far as ground 1 is concerned, there is a claim that the trial Judge had referred in his summing up to evidence given by the first complainant that was not part of her evidence. This involves a factual investigation as to what evidence was given by the first complainant. There is therefore initially a claim that amounts to an error of fact. The ground may well then become a ground involving mixed law and fact. It does not involve a question of law alone. Without access to the record, the issue cannot be resolved at this stage and needs to be considered by the Court of Appeal. Leave is given to argue this ground.

[18] Ground 2 involves a question of mixed law and fact. Whether or not such a direction should have been given is a question that can only be determined after a consideration of all the evidence. The issue also involves the question: what was the evidence at the trial concerning the role of the Appellant as a translator. Leave to appeal is given on the basis that the ground raises an arguable point.

[19] Ground 3 raises issues involving witnesses statements, evidence placed before the assessors and the directions given by the trial Judge to the assessors on evidence. The ground does not raise a question of law alone. Leave to appeal is given since it raises an arguable point.

[20] Ground 4 also raises issues of fact. The issues include which witnesses or accused needed translation assistance. Was a request made at any stage during the trial for a translator? These facts need to be determined as part of this ground of appeal. Leave to appeal is given on the basis that an arguable point has been raised.

[21] In written submissions and before the Court Counsel for the Appellant placed substantial reliance on the Supreme Court decision in **Naisua –v- The State** (unreported CAV 10 of 2013; 20 November 2013). It is sufficient for me to state at this stage that in my judgment my findings concerning the grounds of appeal against conviction in this case are unrelated to that part of the decision in **Naisua** (supra) which is of binding authority on the Court of Appeal. Furthermore, I do not consider

the findings in this case to be inconsistent with other observations of the Supreme Court that may be described as persuasive as obiter dicta.

[22] So far as the two grounds of appeal against sentence are concerned, the Appellant must establish an arguable point that the sentencing discretion exercised by the trial judge has miscarried resulting in an error of law. In other words, that the sentence was wrong in law. The severity of the sentence raises an arguable point in ground 5 and the suggestion that irrelevant matters were considered raises an arguable point in ground 6.

[23] In summary I have concluded that the four grounds of appeal against conviction raise questions of law mixed with fact or questions of mixed law and fact. Leave to appeal under section 21(1) (b) of the Court of Appeal Act is required and is granted. Leave to appeal against sentence is required under section 21(1) (c) of the Act and is granted.

[24] Turning to the application for bail pending appeal. The application is made pursuant to section 33(2) of the Court of Appeal Act and comes before me pursuant to the jurisdiction given to a single judge of the Court under section 35(1) of the Act. It is appropriate to outline the principles upon which such an application is determined by this Court. In doing so I am content to quote in part from an earlier decision in **Balaggan –v- The State** (unreported AAU 48 of 2012; 3 December 2012) involving a similar application.

[25] Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to bail pending appeal. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.

[26] The starting point in considering an application for bail pending appeal is to recall the distinction between a person who has not been convicted and enjoys the presumption

of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.

[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:

> *"When a court is considering the granting of bail to a person who has appealed against 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 appellant when the appeal is heard."*

[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:

> *"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."*

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there

may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.

[30] This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others –v- The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:

> *"The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and 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 the single judge on an application for bail pending appeal to delve into the actual merits of the appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] It follows that the long standing requirement that bail pending appeal will only be granted in exceptional circumstances is the reason why *"the chances of the appeal succeeding"* factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success.

[32] Counsel for the Appellant relies on the chances of the appeal succeeding and the poor health and medical care as exceptional circumstances. Although the issues raised by the Appellant's grounds of appeal against conviction do require a consideration of the court record by the Court of Appeal and the benefit of full argument it does not follow that any one of the grounds has a very high likelihood of success. Having read the submissions filed by Counsel and after careful consideration of the submissions made before me I am not satisfied that the Appellant has discharged the burden to the necessary standard in order to show exceptional circumstances in respect of any ground of appeal against either conviction or sentence.

[33] The remaining issue is whether the Appellant's poor health and need for medical care can be considered exceptional circumstances such as to justify granting bail pending

appeal even though the Appellant had failed to establish exceptional circumstances under section 17 (3) of the Bail Act.

[34] The affidavit sworn on 14 March 2014 by the Appellant states that he is 40 years old. The hearing of the application for bail pending appeal was heard on 16 June 2014. Although the affidavit exhibited some medical reports that pre-dated the date of swearing of the affidavit, there was no further medical evidence adduced at the hearing. The Appellant did not give evidence at the hearing. Apart from summarizing the contents of the medical reports, the Appellant deposes that he has spent time in hospital since the trial, that he has lost weight, that he is frightened and scared, and that he needs better diagnosis, treatment and prognosis than that available to him as a convicted prisoner. However it must be noted that both the institutions to which and the doctors to whom the Appellant makes reference in his affidavit are not accused of any form of incompetence in their diagnoses or management of the Appellant.

[35] The reports exhibited to the affidavit are relied upon by the Appellant to establish exceptional circumstances. There is a Radiology report dated 3 March 2014 from the Fiji Ministry of Health signed by Paula Nakabea, Radiologist. His conclusion includes seven "*differential*" diagnoses: (1) Lymphoma, (2) Leukemia, (3) Metastatic disease, (4) Bacterial infection, (5) Fungal infection, (6) Parasitic infection and (7) Sarcoid.

[36] There is also a report dated 10 March 2014 from the Fiji Dialysis Centre at the Colonial War Memorial (CWM) Hospital signed by Dr Joji Malani. Dr Malani's report is detailed in his overall evaluation of the Appellant's condition. The ultra sound of the liver and the abdominal CT scan were suggestive of a number of diagnoses such as lymphoma, metastatic disease, bacterial disease and sarcoid. The report indicates that chronic liver disease can probably be ruled out. The abnormal liver function test was "*more suggestive of obstructive picture.*" It was suggested by Dr Malani that the Appellant should undergo an upper and lower endoscopy. The doctor concluded by saying that it is quite likely that further evaluation and management would be required with this gentleman to rule in and rule out possibly underlying malignancy or infection.

[37] There is also a report dated 13 March 2014 from the Suva Private Hospital signed by Dr Ying Hong, Consultant Surgeon. Unlike the report from Dr Malani, this report is remarkable for its brevity. Dr Hong states that he saw the Appellant on 12 February 2014 at the request of Dr Kama, a radiologist. The Appellant had been seen on 18 February 2014 in clinic by Dr Malani, some 6 days after the Appellant had been examined by Dr Hong, although Dr Hong's report post dates Dr Malani's report by 3 days.

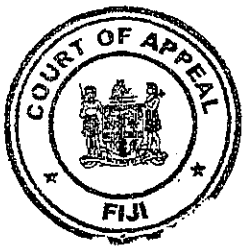
[38] Dr Hong states that the Appellant had been sick for half a year. It is surprising that no medical history was obtained to indicate what medical treatment or management had been sought or provided up to February 2014. Although having seen the Appellant some six days prior to Dr Malani's examination of him and presumably in possession of similar ultra sound and CT scan material, Dr Hong's diagnosis is unequivocal and anything but differential. He states that the clinical diagnosis is lymphoma and ultra-abdominal malignancy with metastatic. Dr Hong concluded that the Appellant needed to see a specialist oncologist, is seriously ill and overseas referral is recommended.

[39] Although Dr Hong's report presents a diabolical picture of the Appellant, I am somewhat concerned by the fact that the diagnosis and recommendations of Dr Malani were more conservative. As noted, Dr Malani examined the Appellant six days after Dr Hong had examined him. The procedures recommended by Dr Malani as being a pre-requisite before a more definitive diagnosis could be made should be undertaken and can be undertaken in Fiji whilst the Appellant remains a serving prisoner having been convicted and sentenced for a serious offence. I am not satisfied that the circumstances are sufficiently exceptional at the present time to justify granting bail pending appeal.

Orders:

(1) *Leave to appeal against conviction and sentence is granted in respect of the six grounds in the Notice of Appeal.*

(2) *Bail pending appeal is refused.*



W. Calanchini

HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL