IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 10 OF 2013
(High Court HAC 39 of 2009 L)

BETWEEN	:	**ERAMI TUIDOMO and LINO LEWADAU**
		Appellants
AND	:	**THE STATE**
		Respondent

Counsel	:	**Ms S Vaniqi for the Appellants** **Mr V Perera for the Respondent**
Date of Hearing	:	**8 October 2014**
Date of Ruling	:	**28 November 2014**

RULING

[1] In this matter there are two applications brought by the Appellant before the Court. The first is an application for leave to appeal against conviction and sentence. The second is an application for leave to adduce fresh evidence in the appeal.

[2] The first application was filed on about 13 March 2013 and is within the time prescribed by section 26 of the Court of Appeal Act Cap 12. The Court's power to grant leave to appeal against conviction and sentence is to be found in section 21 of the Act. Pursuant to section 35(1) of the Act the power of the Court may be exercised by a justice of appeal.

[3] The second application was made by motion filed on about 23 May 2014 and was supported by an affidavit sworn on 23 May 2014 by Lino Lewadau. It would appear that the application is made by the second named Appellant only. The Court's power to grant leave to adduce fresh evidence is to be found in section 28 of the Act. This application must be made to the Court at the hearing of the appeal since there is no jurisdiction vested in a justice of appeal under section 35 of the Act to hear the application.

[4] The Appellants with three (3) others were charged with murder under sections 199 and 200 of the Penal Code Cap 17. It was alleged that they had murdered Leoni Naivi on 28 May 2009 at Nasavu Village in the province of Ra. The Appellants were convicted following a trial in the High Court before a Judge sitting with three assessors.

[5] Of the other three, the charge against two of the co-accused was withdrawn following a ruling rendering their caution interviews inadmissible at the *"voir dire"* stage. As for the remaining co-accused, the learned trial judge upheld a no-case submission at the conclusion of the case for the Respondent. The Appellants were sentenced on 14 February 2013 to life imprisonment. The first Appellant was ordered to serve a non-parole term of 12 years and the second Appellant a term of 15 years.

[6] There appeared not to be any dispute as to the background to the crime. A dispute had existed for some time between two villages in Ra. There was a physical confrontation between the two villages on 28 May 2009 during the course of which the deceased was set upon by a gang and killed.

[7] The Appellants filed an amended notice of appeal on 15 May 2014 setting out the grounds upon which they intend to rely in the event that leave to appeal is granted:

"1. ***THAT*** *the Learned Trial Judge erred in law and fact in not adequately directing the Assessors that there were serious doubts in the prosecution case and as such the benefit of the doubt ought to have been given to the Appellants.*

2. ***THAT*** *the Learned Trial Judge erred in law and fact in not directing the assessors on the issue of joint or common enterprise, in particular that an accused person cannot be found guilty simply by being present at or near the crime scene.*

3. ***THAT*** *the Learned Trial Judge erred in law and fact when he failed to consider in his Voir Dire ruling the inconsistencies and reasonable doubt arising from the prosecutions case that showed the Appellants had been taken to the Rakiraki Hospital according to the Station Diary but no medical report was produced by the police or State to confirm the same.*

4. ***THAT*** *the Learned Trial Judge erred in law and fact when in his Voir Dire Ruling and Judgment he did not direct himself/consider that if indeed three of the five Accused had been physically and verbally abused and oppressed during their caution interviews that their was reasonable doubt that the Appellants may have been subjected to the same treatment at the police station, which resulted in a miscarriage of justice.*

5. ***THAT*** *the Learned Trial Judge erred in fact when at para 46 of the Summing Up he stated,*

> *"In this case you have to decide whether you are acting only on the confession of the Accused persons or other materials to prove the case. I want you to consider contents of the confession is proved by other independent evidence."*

In doing so the Learned Trial Judge misdirected the assessors on the facts as no other evidence linked the Appellants to the crime aside from their caution interviews. which resulted in a grave miscarriage of justice.

6. ***THAT*** *the Learned Trial Judge erred in law when at para 9 of the Judgment he stated that the contents of the Appellants caution interviews were admissible because of corroboration by the "evidence of the Accused Persons." In doing so the Learned Trial Judge misdirected himself on the law regarding corroboration from a co-accused caution interview.*

7. ***THAT*** *the Learned Trial Judge erred in fact when he ruled at para 9 of the Judgment that,*

'_ _ _ the statements of the 1st and 3rd Accused was made voluntarily, further some of the contents were independently corroborated by other witnesses _ _ _'.

as none of the witnesses present at the crime scene identified the Appellants. In doing so there was a substantial miscarriage of justice.

8. ***THAT*** *the Appellants reserve the right to appeal such further and other grounds as may be advised upon receipt of the court record.*

9. ***THAT*** *the appellants sentence is harsh and excessive.*

10. ***THAT*** *the Learned Trial Judge erred in law and fact in taking into account irrelevant matters when sentencing the appellants."*

[8] Since the grounds of appeal against conviction raise questions of mixed law and fact or fact alone, the Appellants are required to seek leave to appeal these grounds (section 21 (1) (b) and (c) of the Court of Appeal Act). Leave is required to appeal against sentence, however there is no right to appeal against sentence if it is one fixed by law. In this case the offence for which the Appellants were convicted and sentence was murder. Under section 200 of the Penal Code, any person convicted of murder shall be sentenced to imprisonment for life. The sentence is one fixed by law as a mandatory sentence and therefore there was no right to appeal against such a sentence. However, since 2010, under section 237 of the Crimes Decree 2009, the sentencing judge is given a discretion to set a minimum term which must be served before pardon may be considered.

[9] Ground 1 claims that the learned trial Judge failed to adequately direct the assessors that there were serious doubts in the prosecution case. This ground is not arguable since it is not for the trial judge to comment on the quality of the evidence presented by the prosecution. The duty of the trial Judge is to refer to the salient points of the evidence. It may be appropriate to comment on the quality of the evidence in his judgment in the event that he disagrees with a guilty opinion of the assessors. Leave is refused on this ground.

[10] Ground 2 concerns the direction given to the assessors on the issue of joint enterprise in a murder trial. The legal explanation of the concept is given in paragraph 18 of the summing up using an example of four bank robbers. There is a further brief

explanation in paragraph 47. The assessors should be directed that a person who is a party to a joint enterprise the pursuance of which results in the death of a person may be criminally responsible for that death. However it is also necessary to indicate that the assessors must be satisfied that (i) the accused was party to the act which caused the death and (ii) his state of mind was such as to make him guilty of murder. Whilst there is no formula for expressing these matters, it is arguable that the learned trial Judge's direction on joint enterprise resulting in death was inadequate. To the extent that it is a question of mixed law and fact, leave is granted.

[11] Ground 3 relates to the finding made by the learned Judge in his voir dire ruling that the caution statements of the Appellants were voluntary. The Appellants' submissions on this ground refer to the duty of the trial judge to direct the assessors as to the quality of the prosecution case based only on the admissions in the caution interview. The submissions do not address ground 3 in the amended notice. There is no basis for the argument that the decision to admit the caution interviews into evidence was wrong. The ground is not arguable.

[12] Ground 4 relates to the issue of whether the Appellants were assaulted. It relies on the fact that other accused had been. It does not follow that the Appellants were assaulted. This ground is not arguable.

[13] Grounds 5 and 7 are considered together by both Counsels in their submissions. The grounds together indicate that the learned Judge directed the assessors that the admissions in the caution interviews were corroborated by other witnesses called by the Respondent. The material available at this stage indicates that the direction was not factually correct. The grounds are arguable and the Respondent concedes the point.

[14] Ground 6 relates to paragraph 9 in the judgment of the learned trial Judge. Paragraph 9 is ambiguous to say the least. In Fiji it is the learned trial Judge who is the ultimate decision maker in respect of both the facts and the law. It is therefore an arguable ground.

[15] As for the grounds of appeal against sentence, there is no apparent error in the trial Judge exercising his discretion to impose a minimum term and therefore I do not consider that ground 9 in arguable. Ground 10 is arguable to the extent that it is claimed that the trial Judge should not have considered previous convictions when determining the minimum term.

[16] The Court may take the opportunity to consider whether the power to fix a minimum term under section 237 of the Crimes Decree 2009 precludes or but to similar to the power to fix a non-parole term under section 18 of the Sentencing and Penalties Decree. A further question arises in the event that a judge exercises the discretion not to impose a minimum term under section 237 of the Crimes Decree. Does life imprisonment mean imprisonment for life and what if any remission can be granted under the Corrections Service Act 2006 in the case of a life sentence without a minimum term being fixed.

As a result I order that:

(1) Leave is granted to appeal against conviction on grounds 2, 5, 6 and 7.

(2) Leave is granted to appeal against sentence on ground 10.

(3) Leave to appeal is refused on grounds 1, 3, 4 and 9 under section 35 (3) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL