IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

Criminal Appeal No: AAU0109 of 2015
[High Court Case No. HAC247 of 2013S]

BETWEEN	:	**JESSICA HILL**
		Appellant
AND	:	**THE STATE**
		Respondent
Before	:	**Hon. Mr. Justice Daniel Goundar**
Counsel	:	**Mr. S. Singh for the Appellant** **Ms P. Madanavosa for the State**
Date of Hearing	:	**3 November 2016**
Date of Ruling	:	**11 November 2016**

RULING

[1] On 12 August 2015, the High Court sentenced the appellant to 7 years' imprisonment with a non-parole period of 5 years after convicting her on one count each of manslaughter, dangerous driving occasioning grievous harm and failing to undergo sufficient breath analysis on direction of a police officer. This is an application for leave to appeal against conviction and sentence. The appeal is timely. The appellant also seeks bail pending appeal.

[2] The appeal is governed by section 21 (1) of the Court of Appeal Act, Cap 12. Leave is required on any ground that involves a question of mixed law and fact or fact alone. The test is whether the ground of appeal is arguable. Leave is also required to appeal against sentence. The test is whether there is an arguable error in the sentencing discretion. A single judge has power to grant leave or release the appellant on bail pending appeal under section 35(1) of the Court of Appeal Act, Cap. 12.

[3] The facts are succinctly summarized in the sentencing remarks and the State's written submissions. I reproduce them in this ruling.

[4] On 24 May 2013, Sereana Lesi Pratap (deceased) was returning from a school concert and dinner at Laucala Bay at about 11pm. She was driving a motor vehicle registration no. VM 385 and inside the car in the front passenger seat was her daughter, Natasha and in the back seat were Natalia, Jokapeci Bale and Safaira Tiko.

[5] The deceased was driving from Nokonoko Road, round the roundabout towards the Nadera side. Suddenly, the sound of a speeding vehicle coming from Nokonoko Road was heard. A car came speeding from Nokonoko Road, on the wrong side of the road, which 'flew' towards the roundabout approaching it on the wrong side. The car landed and bounced up again and landed again on the side of the concrete middle of the roundabout. The deceased's car was positioned travelling towards Nadera side, in front of this black car, registration number FB 073.

[6] The black car then sped towards VM 385, and smashed into the driver's door of VM 385 and part of its right rear door. The force of the impact pushed VM 385 off the roundabout, over the footpath, over the drain and onto the right side of VM 385's driver's door, and part of the right rear door. The black car was driven by the appellant. The deceased suffered massive, brain, liver and other injuries, and died at the scene. Jokapeci Bale was knocked unconscious and suffered a fractured jaw, a fractured cheek bone and other injuries.

[7] The appellant smelt heavily of liquor at the scene. She was taken by police to Nabua Police Station to be tested for drunk driving. On 25 May 2013, at Nabua Police Station, Corporal 3472 Seniloli requested the appellant to provide a sample of her breath for analysis of the Dragger Alcotest 7110 machine but the appellant failed to provide a sample.

[8] At trial, the appellant was represented by counsel of her choice. She elected not to give evidence or call witnesses.

[9] The grounds of appeal are:

Appeal against Conviction

1. The Learned Trial Judge erred in law and in fact when he failed to scrutinize and/or analysed in detail the inconsistencies in the evidence of Sakeo Wainiu and Safaira Agnes Dimiri Tiko and to instruct the Assessors to assess it against her own credibility including the credibility of the Appellant in particular the following:

    a) The police statement of Sakeo Wainiu indicated that the time of the accident, the vehicle driven by the deceased was head towards Laucala Beach.
    b) According to the evidence of Safaira Agnes Dimiri Tiko, the deceased was travelling towards Nadera;
    c) There was a collision involving the motor vehicle driven by the Appellant FB073 and VM385 and no regard had been given to the speed and manner of the vehicle driven by the deceased.
    d) The oral evidence of Sakeo Wainiu in Court was an incredible account of the details of the accident which details were not provided by him at least 2 years before when the accident took place. Sakeo Wainiu's account of the incident that vehicle registration number FB 073 came from the wrong side of Nokonoko road, flew towards the roundabout, landed and bounced up again and landed on again on the side of the concrete middle of the roundabout and then sped towards motor vehicle VM385 and smashing into it.

2. The learned Trial Judge erred in law and in fact when he failed to make an independent assessment of the evidence as a whole in (a) above before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence in view of the inconsistencies giving rise to a grave miscarriage of justice.

3. The Learned Trial Judge erred in law and in fact by misdirecting himself and the Assessors on the test required of a manslaughter charge contrary to Section 239 of the Crimes Decree 2009.

4. The Learned Trial Judge erred in fact by accepting that the Appellant was allegedly drunk at the time of the accident and that she was aware of the substantial risk that a person may die if she allegedly drove in the drunk state.

5. The Learned Judge erred in law and in fact by accepting that the Appellant drove motor vehicle registration number FB073 in a manner dangerous to other persons and causing grievous harm.

6. The Learned Judge erred in law and in fact by accepting that the Accused has failed to supply sufficient breath sample for the dragger test when the evidence was that she did in fact try to provide the sample at least 3 times shortly after the accident.

7. Such further and other grounds as may be apparent on the availability of the Court record.

Appeal against Sentence

8. The Learned Judge erred in law when he sentenced your Petitioner to a term of imprisonment which is harsh and excessive considering the facts of the offending.

[10] In any contested trial, there are bound to be some inconsistencies in the evidence of the witnesses and their out of court statements. The law is that when a witness's evidence materially departs from his or her out of court statement, then the out of court statement can be used to impeach the credibility of the witness. There is a special procedure involved to impeach the credibility of the witness using an out of court statement.

[11] In the present case, while the appellant's trial counsel cross-examined the witnesses on inconsistencies using their out of court statements, it is not clear whether any material inconsistency was established. A material inconsistency is one that goes to the root of the issues presented at the trial. The first alleged inconsistency relates to the direction the deceased's vehicle was travelling when the impact occurred (towards Nadera or Laucala Beach). In my judgment, there was overwhelming evidence that the deceased was travelling towards Nadera. In any event, if there was an inconsistency, the inconsistency was immaterial.

[12] The appellant's second contention that no regard had been given to the speed and the manner of the deceased's driving is speculative and not evidence of a material inconsistency.

[13] The third alleged inconsistency relates to lack of details in a witness's police statement regarding the manner of the appellant's driving. The police statement, of course, was not evidence. Evidence was what the witness told the court. The appellant

has failed to satisfy that the omission was material requiring special direction in the summing-up by the trial judge. If there were material omissions, the appellant's trial counsel could have sought special direction from the trial judge. The appellant's trial counsel did not seek redirections and one could fairly conclude that the omissions, if there were any, were immaterial. I also bear in mind that there is no suggestion that the appellant's trial counsel was flagrantly incompetent. Ground one is unarguable.

[14] The second ground of appeal alleges that the trial judge was required by law to make an independent assessment of the evidence before accepting the unanimous guilty opinion of the assessors. This alleged error is based on the decision in *Praveen Ram v The State* [2012] FJSC 12 in which Marsoof JA said at [80]:

> A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the [entirety] of the evidence led at the trial … In independently assessing the evidence in the case, it is necessary for a trial judge … to be satisfied that the ultimate verdict is supported by the evidence and is not perverse …

[15] However, in *Chandra v State* unreported Criminal Petition No. CAV 21 of 2015; 10 December 2015, Keith JA said at [36]-[37]:

> I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. In my opinion, by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are, and I urge all judges to do that. I unreservedly endorse what Calanchini JA said in *Sheik Mohammed v The State* [2013] FJSC 2 at [32]:
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> "An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."
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> But it is dangerous to elevate what should be best practice into a rule of law. The best practice about the form of the judge's judgment does not mean that the law compels the judge to do that in every single case. I do not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) *and* (b) his evaluation of the evidence and his reasons for convicting

> or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.

[16] As Keith JA said in *Chandra*, the critical question is whether the trial judge's evaluation of the evidence and his reasons for convicting can readily be inferred from the summing-up. In the present case, there is no complaint that the trial judge did not evaluate the evidence in the summing-up before convicting the appellant. Ground two is unarguable.

[17] Ground three alleges misdirection on the elements of manslaughter, although no complaint was made by the appellant's trial counsel after the summing-up was delivered. At paragraph 11 of the summing up, the trial judge directed the assessors to consider whether the appellant was reckless as to a risk that her conduct (driving a motor vehicle) will cause serious harm to another person. The trial judge then pointed out to the evidence relied upon by the prosecution to prove that the appellant was aware of a substantial risk that serious harm will occur to another person and having regard to the circumstances (speeding in a state of intoxication) known to her, there was no justification to take the risk. In my judgment, the direction is correct. Ground three is unarguable.

[18] Grounds four, five and six relate to findings of fact made by the trial court. The question is whether it was open on the evidence for the assessors and the trial judge to make those findings. In my judgment, it was open on the evidence to make the findings of fact that the appellant now takes issue on appeal. I am satisfied these grounds are unarguable.

[19] Manslaughter is punishable by 25 years imprisonment. The learned trial judge pitched the appellant's criminality in the middle range of tariff for manslaughter (suspended sentence – 12 years' imprisonment). A human life was lost as a result of the appellant's conduct. She expressed no remorse for her conduct. Apart from her previous good character, she did not have any compelling mitigating factors to justify

a lenient sentence. The primary purpose of the sentence was deterrence, both special and general. In my judgment, the sentence reflects these factors. For these reasons, I am satisfied that there is no arguable error in the sentencing discretion.

[20] Given my conclusion that the appeal against conviction and sentence is unarguable, the application for bail pending appeal must fail. The test for bail pending appeal is more stringent than the test for leave. The test for bail for a convicted person is whether there appeal has every chance of success or has a very high likelihood of success (*Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014, *Tiritiri v The State* unreported Cr App No. AAU9 of 2011; 17 July 2015). In my judgment, the appeal has no prospect of success and for that reason bail is refused.

Result

[21] Leave refused.

Bail refused.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Shelvin Singh Lawyers for the Appellant
Office of the Director of Public Prosecutions for the State