

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

Criminal Appeal No: AAU0130 of 2015
[High Court Case No. HAA35 of 2013S]

BETWEEN : **UMLESH CHAND**

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 : **1 November 2016**

Date of Ruling : **11 November 2016**

RULING

- [1] This is a timely appeal against a judgment of the High Court in its appellate jurisdiction. The appellant seeks bail pending appeal.
- [2] Following a trial in the Magistrates' Court at Nasinu, the appellant was convicted on four counts of dangerous driving occasioning death and five counts of dangerous driving occasioning grievous bodily harm. On 8 July 2013, he was sentenced to a total term of 2 years' imprisonment suspended for 3 years and partial disqualification from driving for 6 months except Sundays. The appellant was also fined \$450.00.
- [3] The appellant appealed against his conviction to the High Court. The State appealed against the sentence. On 11 September 2015, the High Court dismissed the appellant's appeal against conviction but allowed the State's appeal against sentence. The sentence

imposed in the Magistrates' Court was set aside and substituted with an immediate total term of 5 years' imprisonment and disqualification from driving for life. The paid fine was converted to court costs.

[4] The brief facts of the case were that the appellant was the driver of a truck that collided with a minivan along Princess Road on 24 November 2008. The truck was heading towards Saweni while the minivan was heading towards Suva. As a result of the collision, the driver of the minivan and three passengers were killed at the scene. Five other passengers received bodily injuries, but survived. The prosecution case was that the appellant drove the truck in a dangerous manner by speeding on wet and rainy conditions. The learned trial magistrate accepted the prosecution's case based on the evidence led at the trial.

[5] The grounds of appeal are:

1. The Learned Trial Appellate Judge erred in law affirming the Trial Magistrates decision in convicting the Appellant and failing to evaluate the evidence adduced by the prosecution and the defence adequately and/or at all particularly with regards to numerous material contradictions in relation to the manner of driving of the minivan driver.
2. The Learned Appellate Judge erred in law in upholding the Trial Magistrates misdirecting himself on the burden of proof by stating that he accused needs to give an explanation as to why he was driving in that manner.
3. The Learned Appellate Judge erred in law in upholding the decision of the Trial Magistrate when he misdirected himself on the standard of proof by apportioning the blame and/or cause of accident between the minivan driver and the Appellant.
4. The Learned Appellate Judge erred in law in upholding the decision of the Trial Magistrate he convicted the Appellant despite accepting the evidence of an eye witness PW 8 Ema Kabou as a reliable and truthful whose evidence was consistent with the Appellants Caution Interview and exonerated the Appellant absolutely.
5. The Learned Appeal Judge erred in law in upholding the decision of the Trial Magistrate when he denied the Appellant by his Counsel to make submission on no case to answer which was a right accorded to the Appellant at the close of the

Prosecution case by virtue of section 231(1) of the Criminal Procedure Decree 2009.

6. The Learned Appellate Judge erred in law in upholding the decision of the Magistrate when he failed to follow the proper procedure in the inspection of the scene outside the Courtroom which resulted in material irregularity, that is:-
 - a) Failing to ensure the presence of the Appellant at the scene during the scene visit;
 - b) Failing to adequately record things said or done by any witness as the same;
 - c) Allowing a Prosecution witness (PW 1) to demonstrate how the accident happened without given an opportunity to the accused to agree and/or disagree and/or to rebut the said explanation;
 - d) Failing to ensure the presence of any eye witness (in this case PW 8 Ema Kabou) who could have also explained and or demonstrated how the accident occurred.

7. The Learned Appellate Judge erred in law in substituting the Trial Magistrates' suspended sentence of 3 years and \$450 fine with a custodial sentence of 5 years on Counts 1 – 4 and 2 years on Count 5-8 together with a disqualification for life from driving.

[6] The appeal is governed by section 22 of the Court of Appeal Act, Cap. 12. Under section 22, an appeal against conviction lies as of right on a question of law only. The appellant is not required to seek leave. But a single judge has power to dismiss an appeal that is frivolous or vexatious or bound to fail because there is no right of appeal. There is no suggestion that this is a frivolous or vexatious appeal. The question is whether there is a right of appeal. In my judgment, and counsel for the appellant concedes, that grounds one and four raise questions of mixed law and fact. The appellant has no right of appeal on grounds one and four. However, grounds two, three, five and six raise questions of law alone. The appellant has an automatic right of appeal on these grounds under section 22 (1) of the Court of Appeal Act, Cap. 12.

[7] The High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence. For that reason the appellant has an automatic right of appeal against sentence under section 22(1A) of the Court of Appeal Act, Cap. 12.

[8] I now consider whether the appellant should be released on bail pending appeal. Bail determination is discretionary. Since the appellant is a convicted person, the presumption in favour of grant of bail is displaced under the Bail Act 2002. Section 17(3) sets out the factors to consider:

- (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.

[9] The threshold for the likelihood of success is very high. Bail is granted only if the appeal 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). I do not accept that the grounds of appeal satisfy that high threshold of success for bail to be granted.

[10] It therefore follows that the two remaining factors set out in section 17(3) are less significant when the threshold of a very high likelihood of success has not been met (*Seniloli & Others v The State* unreported Cr App No. AAU0041/04S; 23 August 2004). So far the appellant has served about one fourth of his sentence. If all efforts are made to ensure the appeal is ready for hearing, the appeal could be heard next year.

[11] When considering the factors under section 17(3), the court may also consider exceptional circumstances, that is, "circumstances which drive the court to the conclusion that justice can only be done by granting bail" (*Mudaliar v The State* unreported Cr App.

No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P). The appellant has filed an affidavit stating that he is the sole bread winner for his family. But the impact of incarceration on family is not an exceptional circumstance especially when the appellant has failed to satisfy the threshold of a very high likelihood of success in appeal (*Silatolu v The State* unreported Cr App No. AAU0024 of 2003; 27 September 2004). For these reasons, the application for bail fails.

Result

[12] The appellant has a right of appeal.

Bail pending appeal is 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