

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

CRIMINAL APPEAL NO: AAU0045/2014
[High Court Case No: HAC 042/2012S]

BETWEEN : **DEVENDRA NAICKER** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr. A. K. Singh for Appellant
Mr. L. J. Burney for the Respondent

Date of Hearing : 11 March 2016

Date of Ruling : 21 March 2016

RULING

- [1] On 18 June 2015, I granted the appellant leave to appeal against his conviction and sentence. In that ruling, I also urged counsel for the appellant to perfect his grounds of appeal after receipt of the court record.
- [2] On 21 January 2016, counsel for the appellant filed amended grounds of appeal and a notice of motion seeking bail pending appeal. The amended grounds of appeal are as follows:

Voir dire appeal grounds

Ground 1 – *That the learned Trial Judge erred in law in disallowing cross examination questions on prior inconsistent statement arising from voir dire evidence and leaving it for determination by the Assessors.*

Ground 2 - *That the learned Judge erred in law and in fact in ruling that the caution interview was admissible on evidence and failed to consider*

the evidence of Doctor Upendra Singh in cross examination, when he gave evidence that the rib cage tenderness may have been caused by a punch and that the Appellant who was not suffering from Arthritis.

Ground 3 – *That the learned Judge erred in law and in fact in admitting the caution interview statement into evidence when there was evidence by Pastor Ronald Ram of having been told about the assault of the Appellant by the Police as confirmed to him by the father of the Appellant on the day of the arrest and interview of the Appellant.*

Trial Appeal grounds

Ground 4 – *That the learned Judge erred in law in refusing to note down the Appellant's record as requested by the Appellant.*

Ground 5 – *That the learned Judge erred in law in failing to give the assessors the correct warning in dock identification evidence.*

Ground 6 – *That the learned Judge erred in law in failing to direct the assessors of the absence of fingerprints and blood samples evidence from the evidence taken at the crime scene.*

Ground 7 – *That the learned trial Judge erred in law when he disallowed Nilesh Kumar to give evidence for the appellant.*

Ground 8 – *The above acts and or omissions by the learned Trial Judge caused the Appellant prejudice and denied him the right to a fair trial.*

Sentence Appeal Ground

Ground 8 (sic) – *That the sentence was harsh and excessive in the circumstances and failed to take into account that such lengthy sentences do not support rehabilitation of prisoners.*

- [3] In exercising my discretion in relation to the granting of bail pending appeal, I am obliged to consider the provisions of the Bail Act 2002. I bear in mind that in the case of the appellant, the presumption in favour of granting of bail is displaced following his conviction and sentence. Section 17(3) of the Bail Act states that the court must consider the following factors:

- (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.*

- [4] Section 17 (3) factors are not an exhaustive list. Section 17(3) factors are an extension of the well recognized common law practice that “bail pending appeal should only be granted where there are exceptional circumstances” (**Apisai Vuniyayawa Tora and Others v R** (1978) 24 FLR 28, **Zhong v The State** unreported Cr App No. AAU44 of 2013; 15 July 2014, **Viliame Tiritiri v The State** unreported Cr App No. AAU9 of 2011; 17 July 2015). The burden is on the appellant to show that exceptional circumstances exist, namely, circumstances which drive the court of the conclusion that justice can only be done by granting bail (**Sachida Nand Mudaliar v The State** Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P).
- [5] Returning to section 17(3), the appellant is serving life imprisonment with a non-parole period of 20 years. So far he has served about two years of his non-parole period. The appeal is almost ready for hearing and could be heard at least by the end of this year. The possibility of the appellant having served his sentence before the appeal is heard is very unlikely.
- [6] In deciding the likelihood of success in the appeal, I bear in mind that it is for the appellant to show that his appeal on the face of it has every chance of success (**Seniloli & Others v The State** Cr App No. AAU0041/04S; 23 August 2004), or that there is a very high likelihood of success (**Zhong**, supra and **Tiritiri**, supra). Clearly, the appeal presented by the appellant raises some arguable issues but I am not satisfied that the grounds, either considered singly or in light of their cumulative effect, show every chance of success or a very high likelihood of success.
- [7] In his first ground of appeal against conviction, the appellant contends that the trial judge disallowed him to cross-examine on prior inconsistent statements arising from *voir dire* evidence. Whether or not to allow cross-examination on prior inconsistent statement was within the discretion of the trial judge. The appellant will have to show that the trial judge did not judiciously exercise that discretion in order to succeed with this ground.
- [8] Grounds 2 and 3 deal with the trial judge’s decision to admit the appellant’s confession made under caution. The trial judge made appropriate findings of fact after hearing the

evidence of the prosecution witnesses and rejecting the evidence of the appellant. The appellant will have to show that the trial judge made a complete wrong assessment of the evidence or the correct principles were not applied for the Court of Appeal to disturb the trial judge's findings of fact (Ajendra Kumar Singh v The State Cr App No. 46 of 1979, 30 June 1980).

- [9] The error alleged in ground 4 is that the trial judge refused to note down the appellant's record as requested by him. At this stage there is no evidence that the trial judge had refused to note down the appellant's record. But even if there was some truth in this allegation, I cannot see how the error affects the conviction.
- [10] Grounds 5 and 6 relate to misdirections in the Summing-Up. At trial, the appellant was represented by counsel of his choice. It looks like the trial counsel did not seek re-directions on matters that the appellant now complains are errors. Even if the grounds of appeal are upheld, that does not mean that the appellant will be acquitted. The Court of Appeal may still dismiss the appeal if satisfied that no substantial miscarriage of justice has occurred. This approach may also apply to the alleged error in ground 7.
- [11] Ground 8 is merely an extension of grounds 1-7. Taking all these matters into account, I am not satisfied that this is a case where bail should be granted and the application is refused.

Result

- [12] Bail pending appeal refused.



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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Singh and Singh Lawyers for the Appellant
Office of the Director of Public Prosecutions for the State