JOSETAKI CAMA, EMORI NAQOVA, ASESELA TAWAKE, KELEPI SERUKALOU v THE STATE (AAU0061 of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

CALANCHINI AP

20 March, 4 May 2012

Criminal law — appeals — leave to appeal against conviction — bail pending appeal — robbery with violence — identification and recognition — joint venture — arguable grounds — matter relevant to bail pending appeal — likelihood of success in appeal — Bail Act ss 3(3), , 3(4), 17(3), 3(2) — Court of Appeal Act ss 21(1)(a), 21(1)(b), 23(1) — Court of Appeal Rules r 39 — Criminal Appeal Act s 2(1) — Penal Code ss 21, 293 (l)(b).

The first three appellants applied for leave to appeal against their convictions for robbery with violence, and bail pending appeal. The main ground of appeal related to whether the judge gave appropriate warnings concerning identification and recognition. The appellants also raised the issue of joint venture.

Held –

(1) Leave to appeal on the grounds of identification and joint venture should be granted as these are both clearly arguable grounds.

(2) Section 17(3) of the Bail Act imposes an obligation on the Court in an application for bail pending appeal to take into account three matters. However, s 17(3) does not preclude a Court from taking into account any other matter which it considers to be relevant to the application. The appellants have not established the likelihood of success to the standard necessary to justify the granting of bail pending appeal.

Leave to appeal against conviction granted. Applications for bail pending appeal refused.

Cases referred to

Apisai Vuniyayawa Tora and Ors v R [1978] 24 FLR 28, applied.

Ilaisa Sousou Cava v State Crim Appl No CAV 0007 of 2010; *Ratu Jope Seniloli and Others v The State* (unreported criminal appeal No 41 of 2004, 23 August 2004), considered.

Kumar v R [1987] SPLR 131; *Ole Jitoko v State* Crim App No AAU0011 of 2010; *R v Cotter* [2003] NSWCCA 273; *R v Turnbull;R v Whitby; R v Roberts* [1976] 3 All ER 549, followed.

Lowe v The Queen [1984] HCA 46; (1984) 154 CLR 606; *R v Goundar* (2001) 127 A Crim R 331, cited.

Sheik M Hussein v The State [2001] FLR 347, explained.

S. Kumar for the First, Second Appellants.

N. Sharma for the Third Appellant.

Fourth Appellant in person.

P. Bulamainaivalu for the Respondent.

Calanchini AP. I have before me applications for leave to appeal by the four Appellants. The first Appellant, Josetaki Cama filed his application for leave to appeal against conviction on 3 June 2011. The second Appellant, Emori Naqova,

filed his application for leave to appeal against conviction also on 3 June 2011. The second Appellant subsequently filed additional grounds of appeal against conviction on 8 September 2011. The third Appellant, Asesela Tawake, also filed an application for leave to appeal against conviction on 3 June 2011. Amended Grounds of Appeal were filed on 23 September 2011 by the Legal Aid Commission on behalf of the third Appellant. The fourth Appellant filed an application for leave to appeal against conviction and sentence on 29 June 2011.

The first three Appellants (Cama, Naqova and Tawake) also filed applications for bail pending appeal on 24 June 2011.

The fourth Appellant, Serukalou, indicated to the Court on 20 March 2012 that he intended to abandon his appeal against conviction and that he wished to continue with his appeal against sentence. He was directed to give the necessary notice in accordance with r 39 of the Court of Appeal Rules. His application to abandon the appeal against conviction will then be listed for the following session of the Court of Appeal. He indicated that he was not making any application for bail. The hearing of his application for leave to appeal against sentence was vacated and will be relisted on a date to be fixed.

The remainder of this Ruling will consider the applications by the first three Appellants (the Appellants) for leave to appeal against conviction and for bail pending appeal.

All four Appellants were charged with the offence of Robbery with Violence. The Appellants pleaded not guilty. The fourth Appellant pleaded guilty. The Appellants were tried and convicted of the offence on 13 May 2011. On 19 May 2011 the learned trial judge sentenced each of the Appellants to a term of imprisonment of 10 years with a non-parole period of 8 years.

The principal ground of appeal relied upon by the Appellants relates to whether the learned judge followed the guidelines set out in *R v Turnball; R v Whitby; R v Roberts* [1976] 3 All ER 549 in respect of the warnings to be given concerning identification and recognition.

In his summing up the learned Judge indicated that the State called two witnesses. The first witness was the victim from whom the money in the form of cash ($62,972.34) and cheques ($1,033.76) *'was snatched by a Fijian youth.'* The judge told the assessors that the culprit was then picked up by a van after a short chase on foot. The victim could not identify *'the youth who grabbed and the people in the getaway van.'*

The second witness was an off duty policeman who happened to be in the vicinity shopping with his wife. The learned judge summarised for the assessors the evidence of this witness in the following manner:

> ***'When he was passing the Westpac bank he had seen a Fijian youth running and an Indian guy was yelling and chasing him. At that time a van had turned in front of him. He had identified 3 inmates of the van, the driver was Asesela Tawake, Emori Naqova was in the front seat and Josetaki was in the rear seat. The van went and picked up the Fijian youth who was running and fled away from the car park towards Nausori.***
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> ***He said he had a clear look of the vehicle for about 15 seconds and identified the inmates of the van. But when the video was played it was about 6 seconds duration that he had to see them. This witness said that he knows these accused persons before this incident very well and he would have seen them more than 100 time. The factual question is can a person identify and recognise a known person within a few seconds. It is a factual issue for you to decide.*** _ _ _

He is a trained police officer attached to the intelligence division of the police. Was this factor made him to make a proper assessment of identification? It is a factual matter for you to decide.'

In its written submissions filed on 5 October 2011 the State concedes that the learned trial judge has failed to caution the assessors as to the danger of relying on the identification evidence of the second witness in accordance with the guidelines set out in *R v Turnbull and Others* (supra). I am satisfied that leave to appeal on the ground of identification should be granted to the Appellants as this is clearly an arguable ground.

It is appropriate at this stage to comment on the submissions filed by the Respondent. In paragraph 3.3 the State refers to the misdirection on identification by failing to follow the guidelines set out in *R v Turnbull* (supra) as an error in law. Then in paragraph 3.4 the State submits that as a result of this error in law the Appellants have an appeal as of right to the Court of Appeal pursuant to s 21 (1) (a) of the Court of Appeal Act Cap 12 (the Act).

However the Supreme Court decision in *Ilaisa Sousou Cava v The State* (unreported criminal appeal CAV 7 of 2010 delivered on 14 November 2011) and this Court's decision in *Ole Jitoko v The State* (Criminal appeal No AAU 11 of 2010 delivered on 8 March 2012) have unequivocally confirmed that identification points are issues of mixed fact and law and *'are very clearly not points of law only.'*

As a result, of course, and contrary to the concession made by the State, the Appellants were required to seek leave to appeal pursuant to s 21 (1) (b) of the Act.

When the applications were called on for hearing on 20 March 2012, Counsel appearing for the Appellants submitted that they had been misled by the concession made by the State and were, as a result, not in a position to fully argue the question of leave. Counsel for the Appellants sought and were granted leave to file written submissions. Submissions were filed by the First, Second and Third Appellants on 2 April 2012.

I have already indicated that leave to appeal should be given to the Appellants on the grounds raised by them in respect of identification. In addition, the notices of appeal appear to raise an additional ground which in the case of the Appellants Cama and Naqova is expressed as:

'That there is no clear nor any direct evidence to prove the elements of the offence the appellant is charged with.'

In the case of the Appellant Tawake the second ground of appeal in his Amended Grounds of Appeal filed on 23 September 2011 is stated as:

'The learned trial Judge erred in law and in fact when he failed to put the defence case fairly/adequately and/or direct the Assessors appropriately on the defence case resulting in substantial miscarriage of justice.'

Although the issue of joint enterprise was referred to by Counsel in the course of submissions, the second ground of appeal has not been sufficiently particularised by the Appellants. However in the interest of justice I intend to consider the ground on the basis that it relates to the issue of joint venture.

The Appellants had been charged with robbery with violence under s 293 (l) (b) of the Penal Code Cap 17 (since repealed). The Fourth Appellant pleaded guilty to the offence. The learned trial judge stated at paragraph 14 of his summing up that:

'In this case the Prosecution and the Accused persons had agreed that there was a robbery of money and force used on the victim. The major ingredient to be proved is the identity of the accused persons.'

Although the Fourth Appellant had pleaded guilty to the robbery and to the use of force (ie personal violence), there were in fact two matters to be considered in relation to the three Appellants. First, their identification as the three persons in the get away vehicle and secondly whether they were involved in the enterprise.

The issue of identification has already been discussed. The issue of joint enterprise was considered by the learned trial judge in paragraphs 15 to 17 of his summing up. It is paragraphs 15 and 16 that set out the learned judge's direction to the assessors on the law.

'15_ _ _ In law it is not only the person who actually does the acts constituting the offence who can be guilty of that offence. Other people present and participating can also be liable. People who help or encourage another person to commit an offence are also guilty of that offence.

16 If several people decide to commit an offence together, and all of them participate and assist each other in doing it – each of them is guilty of the crime that is committed. This is so, even though individually, some of them may not actually do the acts that constitute the offence.'

Whether the alleged participation of the Appellants is viewed as principals in the second degree or as aiders and abettors, as a result of s 21 of the Penal Code, no distinction is to be made in respect of the various levels or degrees of involvement in the commission of an offence. As the Court of Appeal noted in *Kumar v R* [1987] SPLR 131:

'Under s 21 of the Penal Code they may all be charged and convicted as principal offenders provided there is evidence of participation with the necessary [intention].'

In the event that the agreed enterprise is carried out by one of the parties to the joint criminal venture, all parties are equally guilty of the crime regardless of the part played by each person in its commission. (see *R v Cotter* [2003] NSWCCA 273). Therefore where a robbery proceeds according to plan without violence beyond that which was intended or threatened then each participant shares equal responsibility. (See *R v Goundar* (2001) 127 A Crim R 331). On the other hand, matters such as the age, background, criminal history and character of a particular convicted accused and the level of involvement or participation in the commission of the offence may result in different sentences for those convicted for the same robbery. See *Lowe v R* (1984) 154 CLR 606 at 623.

Furthermore, this Court in *Sheik M Hussein v The State* [2001] FLR 347 at 352 said:

'_ _ _ an adequate direction on the topic should also refer to the necessary state of mind of the accused, that is knowledge, in broad terms, what it is the principal offender is doing, or intending to do, and doing the act in question (that is, the act said to constitute the aiding or abetting) with the intention or encouraging the other in that activity. However _ _ _ it is not a prerequisite to guilt on the basis of aiding and abetting that the alleged secondary party did an act or acts as part of a joint plan with the other to commit it.'

In my judgment it is arguable that the summing up by the learned judge did not constitute a sufficient explanation of the law for the purpose of alerting the assessors as to what must be established beyond reasonable doubt by the prosecution to convict the three Appellants. I consider there is an arguable point on this ground and leave is granted.

Leave to appeal having been granted to the Appellants it is now necessary to consider the question of bail pending appeal.

Section 33 (2) of the Act gives the Court a discretion to admit the Appellants to bail pending the determination of their appeals. Pursuant to s 35 such an application may be determined by a single judge of the Court. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in earlier cases determining such applications. Furthermore the discretion given to the Court under s 33(2) is subject to the provisions of the Bail Act 2002.

At one stage during the course of oral argument Counsel appeared to be submitting that if leave were granted then bail pending appeal should as a matter of course also be granted. That submission has no basis when the requirement for establishing leave to appeal is compared with the requirements for granting bail pending appeal.

The requirement set out in s 17(3) of the Bail Act for the Court, when considering an application for bail pending appeal, is to consider, amongst other things, the likelihood of success in the appeal. Even without a consideration of the case law on the matter, it is apparent that this is a higher threshold than the requirement to establish an arguable ground in order to obtain leave to appeal. Clearly a standard higher than arguable applies in an application for bail pending appeal.

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 s 3 (3) of the Bail Act there is a rebuttal presumption in favour of granting bail. In the latter case, under s 3 (4) the presumption in favour of granting bail is displaced.

The statutory provision that is relevant to an application for bail pending appeal is s 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 well have been served by the appellant when the appeal is heard.'***

Upon a reading of the authorities dealing with an application for bail pending appeal decided prior to the passing of the Bail Act, it becomes apparent that the matters specified in s 17(3) were some of the matters that courts took into account when considering the earlier applications.

It is clear that s 17(3) imposes an obligation on the Court in such an application, to take into account those three matters. However, in my judgment, s 17 (3) 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 and in other common law jurisdictions that bail pending appeal should only be granted where there are exceptional circumstances. In *Apisai Vuniyayawa Tora & Ors v Reginam* [1978] 24 FLR 28 decided almost 25 years prior to the passing of the Bail Act, the Court of Appeal outlined the principles to be applied by the Court when considering an application for bail pending appeal:

'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 pendency of an appeal. This is still the rule in Fiji. The mere fact that an appeal is brought can never of itself be such an exceptional circumstance and a court to which an application for such bail is made is very seldom in a position to assess the appellant's chances of success in his appeal. _ _ _'

The first question is the likelihood of success in the appeal. In respect of the grounds for which leave has been granted I accept that the learned judge's directions or lack of directions to the assessors on identification and joint venture raise arguable points for the Court to consider at the hearing of the appeal. Although the concession made by the State went further than was proper by encroaching on what was the function of the Court, there was nevertheless agreement by the State that identification was a ground which should be considered by the Court of Appeal.

However, in considering the likelihood of success in the appeal, the observations made by Ward P in *Ratu Jope Seniloli and Others v The State* (unreported criminal appeal No 41 of 2004 delivered on 23 August 2004) are relevant. At page 4 the learned President said:

'The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and s 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 v The State*** unreported criminal appeal No 1 of 1996), is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it.'

However, in my judgment the chances of the appeal succeeding must also be considered in the context of the proviso to s 23 (1) of the Act which states:

'Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction _ _ _ might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.'

In his summing up to the assessors, the learned judge made reference to a van that drove slowly, stopped and allowed the fourth appellant to get inside the van. The fourth appellant had pleaded guilty as the person who had snatched the money from the employee. There was clearly at least one other person in the van. It appeared not to be disputed that there were three people in the van when it stopped to pick up the fourth Appellant. The appellants maintained that it was not them. However no evidence was called. No alibi notices were served.

On the question of the manner in which the trial proceeded before the learned trial judge, there is some material filed by some of the four Appellants that would indicate that some of them did have alibis. It would also appear from the High Court documents that all four Appellants were represented by Counsel. At least one of the Appellants has indicated that Counsel's advice was that it was not necessary for them to call alibi witnesses or for them to give evidence. However this issue is not raised by any of the Appellants in their filed Applications for leave to appeal against convictions. In *R v Clinton* (1993) 97 Cr App Rep 320 the Court of Appeal discussed under what circumstances such an appeal may succeed under s 2 (1) of the Criminal Appeal Act 1968. Under s 23 (1) of the Court of

Appeal Act the Court may allow an appeal if it thinks that on any ground there has been a miscarriage of justice. To that extent the decision in **Clinton** (supra) does provide some guidance in determining whether or not the conduct of Counsel would lead to a conclusion that there had been a miscarriage of justice. However, in the present application, not only is this issue not raised as a ground of appeal, it is also apparent that there are evidentiary issues which would need to be resolved, if necessary, by an application to this Court.

As a result I find that the Appellants have not established the likelihood of success to the standard necessary to justify the granting of bail pending appeal.

The two remaining factors set out in s 17 (3) need only be considered if the Appellants overcome the first factor. However, I make the following observation on the other two factors. The sentences were imposed on 19 May 2011. The sentences imposed were for a long term of imprisonment. Subject to the preparation of the record, it is possible that the appeal could be listed in one of the remaining sessions of the Court this year. Under those circumstances the risk of injustice to the Appellants who will have served only a small proportion of their sentences is considerably less by comparison with an appellant who may have served the whole or most of the term for which he had been sentenced.

The applications for bail pending appeal are refused.

I make the following Orders:

1. The first three Appellants are granted leave to appeal against conviction on the issues of identification and joint venture.

2. Applications for bail pending appeal are refused.

3. The hearing of the Fourth Appellant's application for leave to appeal sentence is to be relisted on a date to be fixed.

Leave to appeal granted. Bail pending appeal refused.