IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APEAL NO. AAU0065 OF 2004S
(High Court HAC0005/04S)

BETWEEN:

RATU INOKE TAKIVEIKATA

APPELLANT

AND:

THE STATE

RESPONDENT

Mr. A. Seru and Mr. K. Vuataki for the Applicant
Ms. A. Prasad for Respondent

Hearing 6 and 7 January 2005
Ruling 11 January 2005

RULING

This is an application for bail pending appeal. The applicant was convicted in the High Court on three counts of inciting mutiny and one of aiding soldiers in an act of mutiny and acquitted on one count of inciting mutiny. He was sentenced on 24 November 2004 to concurrent sentences of life imprisonment on each of the counts of inciting mutiny and 18 months imprisonment concurrent on the count of aiding soldiers in an act of mutiny.

At the trial the assessors' opinions were 4 to 1 and 3 to 2 respectively in favour of acquittal on the first two counts of inciting mutiny, 3 to 2 in favour of conviction on the third count of that offence and unanimously in favour of acquittal on both the count of aiding soldiers in an act of mutiny and the fourth count of inciting mutiny. In his judgment, the trial judge concurred with their opinions and acquitted the applicant on the

fourth court of incitement but convicted him on the remaining counts. Thus his judgment conformed to the majority of the assessors' opinions on two counts and did not on the other three.

The applicant appeals against conviction and sentence. Four of the seven grounds of appeal against conviction relate to the fact the learned judge's verdict differed from the opinions of the assessors. Two others challenge the judge's findings of fact and one refers to remarks alleged to have been made by the judge in a conversation prior to the trial which would suggest he had pre-judged the question of the applicant's guilt.

Leave to appeal was required on all these grounds but application had not been made. This should always be sought first but, rather than delay the hearing of this bail application, counsel for the State has not opposed leave being granted in this case on the issue of the difference between the judge's verdict and the assessors' opinions and also on the appeal against sentence.

I therefore grant leave to appeal on those aspects of the case. Should the applicant wish to appeal grounds (a) and (g) which challenge the judge's findings of fact, he must make proper application for leave. Similarly, leave must be applied for in the proper manner if it is intended to adduce evidence in relation to the pre-trial conversation.

I deal with the latter aspect of the case first. Affidavits have been filed by two deponents as to the conversation and the trial judge has filed one in reply. Whilst there is no dispute that there was a conversation at the time and place suggested, the contents of the conversation are in dispute. The determination of the truth is not a matter for a single judge and will have to be made by the full court at the hearing of the appeal if leave is sought and granted to call the fresh evidence. As it is the subject of an unresolved dispute, it is not a matter I can take into consideration at this stage in the application for bail pending appeal.

The presumption in favour of granting bail as stated in section 3 of the Bail Act is displaced in the case of a person who has been convicted and has appealed the decision.

The burden is, therefore, on the applicant to establish that this is a proper case for the granting of bail pending appeal.

The three mandatory matters the court must consider in such an application are the likelihood of success in the appeal, the likely time before the appeal will be heard and the proportion of the sentence that will have been served by the time the appeal is heard. In the present case, the second two do not help the applicant; the appeal will be able to be heard, at the latest, by the July sitting of the Court this year and the sentence passed was such that very little of the total term of imprisonment will have been served by that time.

The test for the Court when determining the likelihood of success is that bail will only be granted if the issues raised show the appeal has every chance of succeeding and that there are exceptional circumstances such as will drive the court to the conclusion that justice can only be served by the grant of bail.

This application is based solely on the strength of the grounds of appeal. The affidavit in support filed by the applicant raises no special reason for the grant of bail. It is confined to an assurance that he will comply with any conditions imposed - as he has already done throughout the four years he was awaiting trial in the High Court - and that he can raise sufficient, suitable sureties.

There is no doubt that cases where the trial judge has differed from the assessors have frequently been appealed and, in some cases, have been overturned on appeal. I have considered the cases submitted by the applicant in which the court has done so. It is clearly an arguable ground of appeal but it is not for the single judge to consider the actual merits of the appeal. Counsel has filed submissions detailing his challenge to the judge's decision but the determination of the merits of those arguments is a matter for the full court.

I can only grant bail if I am satisfied that the appeal has every chance of succeeding and I do not consider that to be the case here. I also bear in mind that the single count where the trial judge convicted in agreement with the majority of the assessors was one of those for which life imprisonment was ordered.

The application for bail is refused.

Finally I would add that it has been reported in the media that this application was heard "behind closed doors". It was, in fact heard in chambers and I was not advised that any request had been made for any other person to be present. Had such a request been made, I would have considered it.

It was heard in chambers on my direction because of the need to consider the contents of affidavits which may or may not become part of the appeal. Some of the contents of those affidavits had already been released and published in the media. They clearly raised potentially contentious issues in the forthcoming appeal and were sub judice. They should not have been released without the leave of the Court. I cannot fail to notice that it has almost become commonplace for trial documents to be released prior to the trial – even, sometimes, by counsel although I have been assured that was not the case here.

The purpose of the sub judice rule is to avoid any risk of prejudicing the fair trial of the case and must be weighed alongside the right of the media to publish issues of public importance and interest and to do so in such a way that stimulates discussion. However, it is the right of every person to expect a fair and effective trial process and that may all too easily be prejudiced by irresponsible publication of material which is sub judice.

The sub judice rule is not a total ban on publication or discussion. Its purpose is simply to postpone publication and general discussion until the trial is complete or the risk of prejudice has passed. Courts will often hear such matters in chambers. Counsel and parties must realise that no material which may be contentious in any appeal to this Court should be made public without specific leave of the Court. That does not, of course, include any judgments, rulings or orders.

FIJI COURT OF APPEAL

[JUSTICE GORDON WARD]
President
FIJI COURT OF APPEAL

11TH JANUARY, 2006

Solicitors

Mr. A. Seru and Mr. K. Vuataki for the Applicant

Office of the Director of Public Prosecutions, Suva for the Respondent