Office.

IN THE FIJI COURT OF APPEAL
AT SUVA

Criminal Appeal No: AAU0038/2008
High Court Action No. HAA 120 of 2007

BETWEEN:

PITA MATAI

Appellant/Applicant

AND

THE STATE

Respondent

Appearances:
Appellant/Applicant: Mr I. Khan of Counsel
Respondent: Mr A. Elliott for Director of Public Prosecutions

Date of Hearing: 15 December 2008
Date of Judgment: 22 December 2008

Coram: Scutt, JA

JUDGMENT (BAIL)

Headnote
Bail Act 2002, ss. 3(3), 3(4)(b), 17(3); ***Court of Appeal Act*** (Cap 12), ss. 33(c), 35(1)(d); Application for bail pending appeal; Conviction as accessory to murder after the fact; Assessors unanimous on conviction; Judge convicts consistent with opinion of assessors; Credibility vis-à-vis accused's caution statement; Directions re media coverage – use of 'read' media coverage vs 'read', 'saw' and 'heard' media coverage; Contentions as to inadequate directions on circumstantial evidence; Contention that completion of sentence before appeal heard is 'special circumstance/s' or 'exceptional circumstance/s' warranting bail; Completion of sentence not a factor in isolation from appeal's prospects of success; 'Sentence' must be full sentence, not sentence minus remissions; Verdict after trial not 'provisional'; ***Criminal Procedure Code*** (Cap 21), s. 299(2); Comment on jury trial and assessor-judge trial; Comment on role of assessors

Amina Koya v. State (CrimApp AAU0011/96)
Apisai Tora v. R. [1978] 24 FLR 28
Chamberlain v R (No 1) [1983] HCA 13; (1983) 153 CLR 514 (2 May 1983)
In re Cooper's Application for Bail (1961) ALR 584

Edward Fitzgerald [1924] 17 CrAppR

Gruffydd (1972) 56 CrAppR 585
Hayes v. The Queen (1974) 48 ALJR 455
Joseph Davidson 20 CrAppR 66
Koya v. State (CrimApp No. AAU0011/96)
Re Kulari (1978) VR 276 (Victorian Supreme Court)

Lole Vulaca, Rusiate Korovusere and Pita Matai v. The State (CrimApp No. AAU0038 of 2008S, HCt CrimAction No. HAC 120 of 2007S, 3 July 2008)
Luke Mariano v. The Queen (CrimApp No. 9 of 1980, 16 July 1980)

Macartney v. State (CrimApp No. AAU0103 of 2008, 12 December 2008)
Mudaliar v. The State [2006] FJCA 50; AAU0032U.2006S (218 July 2006)
Mutch v. State (CrimApp No. AAU0060/99)
Praveen Ram v. The State (CrimApp No. AAU0096 of 2008; HCt CrimAction No. HAC 88 of 2007, 4 November 2008)
The Queen v. Alich Charles Green (CA No. 364/94; Qld Ct Appeal)

R. v. Birks (1990) 19 NSWLR 677
R. v. Byrne (1937) QWN 30
R. v. Macdonald (1930) 21 CrAppR 26
R. v. Patmoy (1944) 62 WN (NSW) 1
R. v. Ryan (1930) SASR 125
R. v. Salon 91952) ALR (CN7) 1054
R. v. Starkie 24 CrAppR 1
R. v. Tarran, *The Times* 16 December 1947; ref. ***Archbold on Criminal Pleading Evidence & Practice*** 38th Edn,, para 882
R. v. Watton (1978) 68 CrAppR 293; (1979) Crim Law Rev 246
R. v. Wise (1922) 17 CrAppR 17
Rajendra Samy v. The State (CrimApp No. AAU 119 of 2007; HCt CrCase No. HAC 029 of 20006, 12 December 2008)
Ratu Jope Seniloi, Ratu Rakuit AV Akalalabure, Ratu Viliame Volavola, Peceli Rinakama and Viliame Savu v. The State (CrimApp No. AAU0041/04S, High Ct CrApp No. 002S/003, 23 August 2004)
Reg v. Lawrence (1978) 22 ALR 573
Reg v. Southgate (1960) 78 WN (NSW) 44
Reg v. Wood (1970) QWN 3

Sankar v. Trinidad and Tabago [1995] 1 WLR 194
Sharda Nand v. DPP (FCA Application No. 3 of 1979)
State v. Lole Vulaca, Waisale Boletawa, Maika Rauqera, Rusiate Korovusere, Jone Cama, Eronimo Susunikoro, Eremasi Naraga and Pita Matai (Summing Up) (CrimCas No. HAC 120 of 2007, 22 April 2008)
State v. Lole Vulaca, Waisale Boletawa, Maika Rauqera, Rusiate Korovusere, Jone Cama, Eronimo Susunikoro, Eremasi Naraga and Pita Matai (Judgment) (CrimCas No. HAC 120 of 2007, 22 April 2008)
State v. Lole Vulaca, Rusiate Korovusere and Pita Matai (Sentence) (CrimCas No. HAC 120 of 2007, 23 April 2008)
The State v. Ratu Inoke Takiveikata (No 5) (Cr Case HAC005.04S, 1 November 2004)

Willword Bonner v. The Queen (CrimApp No. 7 of 1979, 1 June 1979)

1. BAIL APPLICATION - PRELIMINARY

This application commenced by the filing and serving of a Notice of Motion for Application for Bail Pending Appeal. The Notice of Motion relates to three Appellants/Applicants, namely Pita Matai – the Applicant herein, Lole Vulaca and Rusiate Korovusere.

1.1 On 15 December 2008, the return date of the Notice of Motion, the bail application proceeded in respect of Mr Matai only. This was due to:

- The need to deal, by way of a timetable going into 2009, with an application for leave in respect of new grounds of appeal sought to be filed and served by the Applicants/Appellants; and

- The passage of time vis-à-vis Mr Matai's sentence, which (taking into account remissions) would be or likely be substantially served by the date of appeal and also the hearing vis-à-vis the new grounds of appeal, due to necessities of that timetable.

1.2 Hence, this decision relates to Mr Matai's application for bail only.

2. BACKGROUND – CONVICTIONS & SENTENCE

The Appellant and Applicant, Pita Matai, was convicted at the conclusion of a lengthy trial, extending from 25 March to 22 April 2008. He was one of eight accused persons charged jointly, where seven (7) were tried on a charge of murder, Mr Matai's being tried on the charge of being an accessory to murder after the fact. The murder of a prisoner in custody, Tevita Malesebe, being the subject of the charges, was said to have occurred on 4 and 5 June 2007 at Valelevu in the Central Division.

2.1 On the final day of the trial, the assessors delivered their opinions and on that day the Court delivered judgment, finding two of the seven (Lole Vulaca and Rusiate Korovusere) guilty of murder, and Mr Matai guilty as an accessory after the fact.

2.2 *(a)* ***The Convictions:*** The assessors were unanimous in their opinion that Mr Matai was guilty as an accessory after the fact. They were unanimous in their opinion that Mr Vulaca and Mr Korovusere were guilty of murder. Their opinions differed only in relation to the other accused, in that one assessor found all guilty as charged, whilst two found five of those charged with murder – Mr Boletawa, Mr Rauqere, Mr Cama, Mr Susinikoro and Mr Naraga - not guilty. The Court's judgment was consistent with the assessors' findings (opinions), insofar as these were unanimous.

2.3 In this determination, the Court observed that the role of assessors 'is to advise the judge'. This is different from the situation pertaining in countries where a judge and jury sit in criminal matters. A jury does not have an opinion only, rather making a determination as to 'guilt'. The jury is the final arbiter, determining the facts and guided by the judge's directions as to the law. This is an important distinction not necessarily understood from outside the Fiji system of criminal justice. This is so for those – particularly lawyers and judges – coming from the jury system of criminal justice.

2.4 In this country, albeit assessors do not make a determination binding upon the judge and theirs is not the final 'say', as the Court said in delivering judgment in the present case:

> ... the greatest weight is given to the opinion of assessors by the judge because they are the judges of fact, and because they represent the community: ***State v. Lole Vulaca, Waisale Boletawa, Maika Rauqera, Rusiate Korovusere, Jone Cama, Eronimo Susunikoro, Eremasi Naraga and Pita Matai (Judgment)*** (CrimCas No. HAC 120 of 2007, 22 April 2008), at 1

2.5 The unanimous findings that two of the seven were guilty of murder and that the one was guilty as an accessory after the fact (whilst there were differences in the findings as to five of the seven) were, said the Court, 'not perverse and [were] possible on the evidence led'.

2.6 That the assessors' opinions are unanimous in respect of persons convicted, sentenced and subsequently appealing, is a factor to be taken into account in any application for bail: ***Macartney v. State*** (CrimApp No. AAU0103 of 2008, 12 December 2008) As Mr Matai is convicted as an accessory, it seems to me that the unanimity of the assessors is, per ***Macartney v. State***, relevant to the findings in respect not only of him, but of those in relation to the crime of which he is convicted as accessory.

2.7 ***(b) The Sentences:*** Imprisonment for life being mandatory upon a conviction for murder, the Court necessarily applied that sentence to Mr Matai's co-offenders. However, although invited by the State to do so, the Court declined to set a minimum term, saying:

> I would accede to the prosecution's request for a minimum term except for one factor. The evidence against you was that of secondary offenders, that is, that you were part of a joint enterprise to assault [Mr] Malesebe. There was no evidence that either of you inflicted any of the assaults yourselves. It is impossible in these circumstances to apportion responsibility to either offender.
>
> For that reason I will not set a minimum term for either of you. You are each sentenced to life imprisonment: ***State v. Lole Vulaca, Rusiate Korovusere and Pita Matai (Sentence)*** (CrimCas No. HAC 120 of 2007, 23 April 2008), at 1-2

2.8 The maximum sentence under section 388 of the ***Penal Code*** (Cap 17), the provision under which Mr Matai was charged and convicted, is three years. The Court recognised that Mr Matai was a 'well-respected member of the Police Force with an excellent record' and that the conviction alone was punishment because he would not be able to re-enter the Police Force. Mr Matai had been 'an exemplary and respected police officer with no disciplinary record', added the Court, referring also to other matters put in mitigation as to Mr Matai's character and antecedents.

2.9 However, said the Court:

> Perhaps we will never know who inflicted the terrible injuries on [Mr] Malasebe in the Crime Office, because of your act of assisting your men to cover the incident up. There is a blanket of silence over what occurred in the Crime Office that night. Your conduct contributed to that silence.
>
> In these circumstances, I cannot order a non-custodial sentence for you: ***State v. Lole Vulaca, Rusiate Korovusere and Pita Matai (Sentence)*** (CrimCas No. HAC 120 of 2007, 23 April 2008), at 3

2.10 The Court went on to determine the 'starting point' as imprisonment for 2½ years, taking into account that the offence in relation to which Mr Matai was convicted as accessory was that

of murder. The sentence of two years was imposed 'taking into account all the mitigating and aggravating factors': ***State v. Lole Vulaca, Rusiate Korovusere and Pita Matai (Sentence)*** (CrimCas No. HAC 120 of 2007, 23 April 2008), at 3

3. LEAVE TO APPEAL

Leave to appeal against sentence and conviction was heard on 30 June 2008 by the Court of Appeal upon application of Mr Vulaca, Mr Korovusere and Mr Matai: ***Lole Vulaca, Rusiate Korovusere and Pita Matai v. The State*** (CrimApp No. AAU0038 of 2008S; HCt CrimAction No. HAC 120 of 2007S, 3 July 2008) The Court of Appeal said that although the grounds of appeal were not particularised, they 'raise[d] questions of law which when properly particularised would constitute arguable grounds':

> As for the first two applicants, that is, Lole Vulaca and Rusiate Korovusere, the appeal on conviction and sentence, being for murder, does not require leave under s. 21(1)(a) and (c). In relation to the third applicant Pita Matai leave is required as his sentence is not one fixed by law.
>
> As the appeal was filed in time and as there would appear to be some strength in the grounds of appeal, consistently with the principles espoused in cases such as ***R. v. Knight*** (1995) CRNZ 332 and ***Ilaisa Sousou v. The State*** [2003] FJCA 41; AAU0002/2003, I grant leave to appeal for all three applicants: ***Lole Vulaca, Rusiate Korovusere and Pita Matai v. The State*** (CrimApp No. AAU0038 of 2008S; HCt CrimAction No. HAC 120 of 2007S, 3 July 2008), at paras **[11-13]**

3.1 At that stage, the grounds of appeal (as filed on 2 May 2008) were:

APPEAL AGAINST CONVICTION

a) **That** the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting the Assessors on law regarding the charge of murder.

b) **That** the Learned Trial judge erred in law and in fact in not adequately directing/misdirecting the assessors on law regarding accessory after the fact to the murder.

c) **That** the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting on the law on circumstantial evidence.

d) **That** the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting on the law on joint enterprise.

e) **That** the Learned Trial Judge erred in law and in fact in not adequately directing to disregard all the media reports including TV coverage that existed before the trial and during the trial of the Appellants.

f) **That** the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting that the prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the prosecution case and as such the benefit of doubt ought to have been given to the Appellants.

g) **That** the Learned Trial Judge erred in law and in fact in not adequately directing the Assessors [on] the significance of Prosecution Witnesses conflicting evidence during the trial.

APPEAL AGAINST SENTENCE

h) **That** the Appellants appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

i) **That** the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellants and not taking into [account] relevant consideration[s].

j) **That** the Appellants reserve their right to add to the above grounds of appeal upon receipt of the Court record in this matter.

3.1 On 15 December 2008 at the mention and hearing (in relation to Mr Matai) of the Notice of Motion for Application for Bail Pending Appeal, Counsel for the Appellants/Applicants handed up further Grounds of Appeal. These were the subject of preliminary argument with Orders made in relation to them setting a timetable for hearing in April 2009. This and the Grounds are referred to later.

4. BAIL PENDING APPEAL - PRINCIPLES

Bail in appeals is governed by legislation and common law authority.

4.1 *(a)* ***Legislative Provisions Governing Bail:*** Bail in Court of Appeal applications is governed both by the ***Court of Appeal Act*** (Cap 12) and the ***Bail Act*** 2002. The former extends to the Court of Appeal – whether the Full Court of a single Judge of the Court - discretion to admit an Appellant to bail pending determination of the appeal, if the Court 'sees fit': ss. 33(c), 35(1)(d)

4.2 As for the latter, section 17(3) of the Bail Act sets out those matters to be taken into account by a court in considering an application for bail:

> When a Court is considering the granting of bail to a person who has appealed against conviction or a 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 will have been served by the Applicant when the appeal is heard.

4.3 This is not, however, the whole picture for bail applications pending appeal.

4.4 Generally courts are obliged to begin from the standpoint of an entitlement to bail. The Bail Act is clear:

Entitlement to bail

> **3.**-(1) Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted.
>
> (2) ...

(3) There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption.

4.5 Nonetheless, as section 3(4) goes on to provide, the presumption in favour of granting of bail is displaced where –

(a) the person seeking bail has previously breached a bail undertaking or bail condition; or
(b) the person has been convicted and has appealed against the conviction.

4.6 The situation pertaining under section 3(4)(b) thus applies to Mr Matai's application.

4.7 ***(b) Common Law Authority:*** Bearing this in mind, as was said by His Lordship Justice Byrne in ***Macartney v. State*** (CrimApp No. AAU0103 of 2008, 12 December 2008):

> ... any applicant for bail [appealing] a conviction is asking the Court to show leniency to him or her because of the particular circumstances of his case: at para **[4]**

4.8 In ***Ratu Jope Seniloi, Ratu Rakuit AV Akalalabure, Ratu Viliame Volavola, Peceli Rinakama and Viliame Savu v. The State*** (CrimApp No. AAU0041/04S, High Ct CrApp No. 002S/003, 23 August 2004) His Lordship Justice Ward, President of the Court of Appeal observed that the exercise of discretion in bail determinations pending appeal:

> ... involves a judicial and not a personal decision and the court must exercise it in accordance with established guidelines ... to be found in earlier cases ... and .. subject to the terms of the Bail Act ...
>
> However, there is a considerable difference between a person who has not been convicted and to whom the presumption of innocence still applies and a person who has been convicted and sentenced to a term of imprisonment ...: at 1-2

4.9 Ward, J. cited ***Amina Koya v. State*** CrimApp No. AAU0011/96, where His Lordship Sir Moti Tikaram, President of the Court of Appeal said:

> I have borne in mind the fundamental difference between a bail applicant waiting trial and one who has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all, the conviction. It therefore follows that a convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal: cited ***Ratu Jope Seniloi & Ors v. The State***, at 2

4.10 Further, said Ward, JA:

> It has been a rule of practice for many years that where an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pendancy of an appeal. This is still the rule in Fiji. The mere fact an appeal is brought can never of itself be such an exceptional circumstance: ***Apisai Tora v. R.*** [1978] 24 FLR 28, per Gould VP; ***Koya v. State*** (CrimApp No. AAU0011/96), per Tikaram, P.

4.11 And again:

> In appeals, bail 'will be granted in exceptional and rare cases only': ***Mutch v. State*** (CrimApp No. AAU0060/99), per Reddy, P.

4.12 *(c)* ***Macartney v. The State:*** In ***Macartney v. The State***, Byrne, JA went on to provide a short but comprehensive compendium of decisions both in Fiji and in the United Kingdom identifying courts' approaches to the grant or refusal of bail in appeals, and to provide his own recitation of matters particular to the case with which he was dealing, namely where the applicant was appealing against a conviction for murder:

- ... to adjudicate on ... bail it is useful to see if there is any prospect of success on appeal, or ... where it would be of assistance for the preparing of a real case for appeal if the Appellant was released: ***R. v. Wise*** (1922) 17 CrAppR 17

- ... bail will not be granted to a prospective Appellant except in very special circumstances: ***Joseph Davidson*** 20 CrAppR 66

- ... exceptional circumstances are those which 'which will drive the Court to the conclusion that justice can be done only by granting bail ...': ***R. v. Watton*** (1978) 68 CrAppR 293, per Geoffrey Lane, LJ

- ... bail will not be granted to a prospective Appellant unless there are exceptional and unusual reasons: ***Edward Fitzgerald*** [1924] 17 CrAppR 147

- ... the general restriction on granting bail pending appeal .. is that it may be granted where there are exceptional circumstances: ***Ratu Jope Seniloi, Ratu Rakuit AV Akalalabure, Ratu Viliame Volavola, Peceli Rinakama and Viliame Savu v. The State*** (CrimApp No. AAU0041/04S, High Ct CrApp No. 002S/003, 23 August 2004)

- ... one of the biggest problems faced in attempting to persuade the Court bail should be granted is the unanimous opinion of the assessors with which the trial Judge agreed: ***McCartney v. The State***, at para **[14]**

- Another factor to be considered is that, in reaching their opinion, the assessors and the Judge heard and saw the Appellant give evidence and be cross-examined on his evidence, the verdict showing clearly that they did not believe the Appellant: ***McCartney v. The State***, at para **[14]**

- The unanimous opinion of assessors and agreement by the trial Judge, and seeking and hearing an Appellant give evidence and be subjected to cross-examination, and not believing him/her are not decisive in themselves but create difficulty for an Appellant seeking to persuade the Court that indulgence should be shown him/her by the grant of bail: ***McCartney v. The State***, at para **[15]**

3.13 *(d)* ***Additional Authority:*** In ***Chamberlain v. R (No 1)*** [1983] HCA 13; (1983) 153 CLR 514 (2 May 1983) sets out the principles as applied in various common law jurisdictions, including Australia and the United Kingdom:

- ... the cases are uniform that bail will not be granted after conviction and pending appeal unless exceptional circumstances are shown: ***In re Cooper's Application for Bail*** (1961) ALR 584, per Fullagar, J. (Australian High Court)

- ... bail after conviction is granted 'in an exceptional case only': ***Hayes v. The Queen*** (1974) 48 ALJR 455, at 591, per Mason, J. (Australian High Court)

- ... the modern practice is to grant bail pending an appeal only where it appears prima facie that the appeal is likely to be successful or where there is a risk that the sentence will have been served by the time the appeal is heard: ***Watton*** (1978) 68 CrAppR 293, at 296-297 (English Court of Appeal)

- ... the power to grant bail pending appeal will be exercised in 'very exceptional' circumstances only: ***Re Kulari*** (1978) VR 276 (Victorian Supreme Court)

- ... exercise of the power in 'exceptional' circumstances: ***R. v. Ryan*** (1930) SASR 125; ***R. v. Patmoy*** (1944) 62 WN (NSW) 1; ***Reg v. Lawrence*** (1978) 22 ALR 573; ***Reg v. Wood*** (1970) QWN 3 (South Australian Supreme Court, NSW Supreme Court, Queensland Supreme Court)

- ... power will be exercised in 'exceptional or unusual' circumstances only: ***R. v. Byrne*** (1937) QWN 30 (Queensland Supreme Court)

- ... power to be exercised only in 'special' circumstances: ***R. v. Salon*** 91952) ALR (CN7), at 1054; ***Reg v. Southgate*** (1960) 78 WN (NSW) 44 (NSW Supreme Court)

3.14 *(e)* ***Length of Sentence & Time Pending Appeal:*** In ***Willword Bonner v. The Queen*** (CrimApp No. 7 of 1979, 1 June 1979), the Court of Appeal of Belize dealt with an application for bail pending appeal, where the principle ground was that the proportion of sentence served qualified as a 'special' or 'exceptional' circumstances in combination with the delay in hearing of the appeal. The Court set out comprehensively authorities directed toward that question whether the sentenced to be served and the time it would take for an appeal to be heard could constitute 'special' or 'exceptional' circumstances. Then, in ***Luke Mariano v. The Queen*** (CrimApp No. 9 of 1980, 16 July 1980) that Court of Appeal Court, constituted by the same judge, the President of the Court of Appeal of Belize, Clifford Inniss, JA, revisited the same question and his own judgment in ***Willword Bonner v. The Queen***. Because of the nature of the application in the present proceeding, it is useful to refer to ***Luke Mariano v. The Queen and Willword Bonner v. The Queen*** in some detail.

3.15 In ***Willword Bonner v. The Queen*** (CrimApp No. 7 of 1979, 1 June 1979), the Appellant/Applicant, Mr Bonner, was convicted of negligently allowing a prisoner to escape contrary to section 44 of the ***Prisons Ordinance*** (Ch 68) and sentences to one year's imprisonment with hard labour. By the time the Court of Appeal came to Belize City he would have served a substantial part of his sentence:

> As additional grounds ..., Counsel urged that there were substantial grounds of appeal, including one (as in ***Charavanmuttu*** 21 CrAppR 184) relating to the absence of corroboration, and that the crime for which [he] had been convicted was a crime of omission, whereas in all the cases in which bail had been granted the crimes had been crimes of commission. [Counsel] also stressed the previous good character of [Mr

> Bonner] and ... that he had been on bail for four months since the date on which he had been charged and had never once failed to attend the Court: at 1

3.16 In opposition, it was said that as a matter of principle bail should not be granted as 'the general rule of the Court of Appeal in England and also of [Belize] has been to refuse bail ...' The sole case where bail had been granted, ***Bhojwani***, was distinguished by reference to two passages in the Ruling:

> We are particularly influenced by the relationship between the sentence and the period of time that must elapse before the appeal can be determined.
>
> [Counsel for Mr Bhojwani] stressed particularly the length of time that must elapse before the appeal is heard and the comparatively short sentence imposed which could mean that the appellant, if successful, could have served a very substantial part of his sentence.

3.17 In respect of Mr Bonner's application, it was said that on calculations of the sittings of the Court of Appeal, there would be an interval of three months between the date of conviction and the next sitting. However, that was the 'normal interval' between Sessions of the Court of Appeal, and 'if that delay were treated as an exceptional circumstance then almost every case would qualify for bail'. However, that Mr Bhojwani would have served about half his one year sentence, whilst Mr Bonner would have served three months of his one year sentence meant, submitted Counsel for the Crown, that there was no 'exceptional circumstance' in Mr Bonner's case.

3.18 In response to this, the Court said that as it understood ***Bhojwani***, the Court:

> Did not lay down any interval during which the Applicant would be imprisoned as constituting a limit to consideration of the relationship between the sentence and the period of time that must elapse before the appeal can be determined, although ... it emerges that the interval must be substantial. The Court was, of course, considering a case in which the sentence was a short one: at 3

3.19 In ***Luke Mariano v. The Queen*** (CrimApp No. 9 of 1980, 16 July 1980) the Court clarified what had been said in ***Willword Bonner***. In the latter, the Court said:

> It seems to me to emerge from the relevant authorities that where an applicant for bail has previously been of good character and has been sentenced to a comparatively short term of imprisonment and where an interval must elapse before his appeal can be heard which is so long that the applicant will have served a substantial proportion of his imprisonment before the hearing of his appeal, these are circumstances which the Court will regard as special and such as to justify the granting of bail.

3.20 In ***Luke Mariano*** the Court observed of this passage (whilst noting that in ***Willword Bonner*** the grounds of appeal had been argued as 'substantial'):

> ... the words 'comparatively short' were used advisedly, for my review of the authorities had included ***Macdonald*** (1930) 21 CrAppR 26, in which the sentence had been one of 18 months. That is not really, in my view, a short sentence;

> ... the passage ... contains no reference to grounds of appeal in this regard, although it may be consistent with the reports of the cases of ***Turner*** and ***King*** and ***Macdonald***, the passage, as I see it, on further reflection, states the principle somewhat too widely. It seems to me to go without saying that for an appellant to qualify for bail, his grounds of appeal must, at least on the face of them, be of a substantial nature, for injustice would only result to him if, having served a substantial portion of his sentence before his appeal could be heard, he then had his appeal allowed. That could hardly happen if his ground of appeal were frivolous or plainly unsubstantial: at 3-4

3.21 The Court considered the question whether the principle of granting bail when a substantial period of the sentence would be served prior to hearing of the appeal in the case of a short or comparatively short sentence could be applied in that of a long sentence. The Court held that it could:

> Logically, there would seem to be no good reason why ... not; ... [Although] the longer the sentence, the smaller would be the chance that the applicant would have served as substantial portion of it before his appeal could be heard ... It seems to me fair and just that the same principle should be applied regardless of the length of the sentence; but I would not wish to be taken as excluding other exceptional circumstances: at 4

3.22 In both ***Willword Bonner v. The Queen*** and ***Luke Mariano v. The Queen*** bail was granted. In ***Luke Mariano***, the conviction was on two counts of 'stealing from employer' contrary to section 156(a) of the ***Criminal Code***, for which Mr Mariano was sentenced to concurrent sentences of three years imprisonment with hard labour in respect of each conviction. The Court said:

> On applications of this kind, the principle ... is that [this Court] will not usually grant bail, and will only do so in exceptional circumstances. Exceptional circumstances mean circumstances which the Court considers exceptional and such as to take the case out of the rule that the Court does not usually grant bail ...; or ... such as will drive the Court to the conclusion that justice can be done only by the granting of bail: at 1

3.23 The consequence of timing for Court of Appeal sessions was that Mr Mariano would have served approximately six months or a little more of his sentence before the appeal could be heard. This was the main ground of the bail application:

> Indeed, apart from reference to his good character previous to the convictions now under appeal, and to the fact that during his Trial and from 10 February 1979 [Mr Mariano] had been on bail without absconding, no other circumstances [have] been urged: at 2

3.24 The grounds of appeal not having been referred to by Counsel, the Court looked at them, saying they 'appear to me to be arguable, although, like the Court in ***Bhojwani***, on the material before me I am not really in a position to anticipate their chances of success'. The Court made its final determination by reference to:

- good character prior to convictions now under appeal;
- grounds of appeal appear to be arguable;
- before appeal can be heard, Mr Mariano will have served approximately six months or a little more of the three year sentence – this being accepted as 'a substantial portion';

- there is no positive suggestion that if admitted to bail, Mr Mariano 'is unlikely to answer to it: at 4

3.25 On this basis 'the circumstances are exceptional and such as to take the case out of the rule that the Court does not usually grant bail': at 4

3.26 As to ***Willword Bonner v. The Queen*** (CrimApp No. 7 of 1979, 1 June 1979), the Court said (albeit not noting here the 'substantial' nature of the appeal grounds):

> [Mr Bonner], who was convicted on 11 May 1979 will unless bailed have served some 3 months of his sentence of one year before his appeal can be heard. That would amount to one quarter of his sentence, which in my view is certainly a substantial portion of it. In addition, all the indications are that he was previously of good character, and there is no suggestion that he is unlikely to appear for the hearing of his appeal. In my view the circumstances ... are such that bail ought to be granted. To hold otherwise, in my opinion, would be to fly in the face of such cases as ***Harding, Turner and King*** and ***Macdonald***: at 5

3.27 *(e)* ***Examples re Length of Sentence & Time Pending Appeal:*** Various examples are cited in ***Willword Bonner v. The Queen*** and ***Luke Mariano v. The Queen*** where bail was either granted or refused. A number of examples is also provided in the comprehensive Written Submissions provided by Counsel for Mr Matai.

3.28 A consistency which appears to arise where bail is granted is that they related to crimes against property, rather than against the person. This is not a matter that appears to be noted or remarked upon as determinative or a relevant factor in the cases themselves, and was not an issue observed in ***Willword Bonner*** or ***Luke Mariano*** by the Belize Court of Appeal. To provide an indication of the circumstances/types of case where bail was granted or refused:

- plea of guilty to three counts of receiving metal knowing it to be stolen; concurrent sentences of 12 months imprisonment. Leave to appeal granted and direction that hearing be expedited, bail reused. Bail application to Full Court on various grounds: 'no exceptional circumstances which would drive the Court to the conclusion that justice could be done only by the granting of bail': in ***Willword Bonner*** the Court commented that as the Judge had directed expedition of the hearing, there 'was no reason to anticipate any appreciable delay before the appeal could be heard': ***Watton*** (1979) Crim Law Rev 246

- three applications for bail – Harding convicted on 30 November and sentenced to 12 months imprisonment with hard labour; Turner convicted on 28 November, sentenced to 8 months' imprisonment in the second division; King convicted on 10 December, sentenced to 6 months' imprisonment in the second division. Bail granted to each: 'The interval of the Christmas Vacation before an appeal can be heard may be a ground for the Court's granting bail' (headnote): in ***Willword Bonner*** the Court commented as to (a) the festive season interval's interfering with the hearing of appeals; (b) the relationship between the Christmas Vacation interval and the short sentences: ***Harding, Turner and King*** 23 CrAppR 143

- conviction in July for knowingly receiving stolen property, sentence of 18 months imprisonment with hard labour; bail granted as appeal could not be heard until the end of the Long Vacation: ***R. v. Macdonald*** (1930) 21 CrAppR 26n

- sentence of 18 months' imprisonment for using an instrument with intent to produce miscarriage; previous convictions of administering drugs with intent to procure abortion and trafficking in dangerous drugs – bad character taken into account and bail refused – the mere fact of the existence of the Long Vacation is not of itself such an exceptional circumstance as to justify bail: ***R. v. Starkie*** 24 CrAppR 1

- bail granted as owing to length of transcript of shorthand notes the appeal would probably not be heard until the end or after the expiration of sentence: ***R. v. Tarran***, *The Times* 16 December 1947; referred to ***Archbold on Criminal Pleading Evidence & Practice*** 38th Edn,, para 882

- previous good character is not of itself an exceptional circumstance; but previous bad character can severely militate against a case which might otherwise show exceptional circumstances: ***Starkie*** 24 CrAppR 1; ***Willword Bonner v. The Queen***, at 5

3.28 *(f)* ***Section 17(3) Not a 'Code':*** In ***Ratu Jope Seniloi & Ors v. The State*** (CrimApp No. AAU0041/04S, High Ct CrApp No. 002S/003, 23 August 2004), Ward, J. addressed the question whether section 17(3) of the Bail Act was a 'code', operating so as to limit the Court to consideration of those matters specified in paragraphs (a)-(c) alone.

3.29 His Lordship ruled out this interpretation, saying that applicants' personal circumstances, or bad character, or likelihood (or otherwise) of answering to bail, and any previous failures to comply with the terms of bail. The three matters listed in section 17(3) are, said Ward, J., mandatorily required to be taken into account by a Court in grant or denial of bail, '... but ... cannot ... exclude the court from taking into account any other factors it considers properly relevant'. His Lordship went on to re-emphasise the 'exceptional circumstances' factor.

3.30 Ward, J. also concluded that the principal matter arising under section 17(3) was the 'likelihood of success' of the proposed appeal. That 'arguable points' are raised 'is a long way from saying ... they have every chance of success': at 4 Furthermore, and most importantly:

> The two remaining matters set out in section 17(3) [likely time before appeal hearing, and proportion of original sentence served when the appeal is heard] are only directly relevant if the court accepts there is a real likelihood of success. If the court does not, their determination becomes otiose ...: at 4

3.31 Then, having reached conclusions on all the relevant matters, the Court:

> ... must still stand back as it were an consider whether, although those issues in themselves fall short of establishing a reason to grant bail, when considered with any other matters which apply to a particular applicant, they could amount in their totality to exceptional circumstances: at 4

4. MATTERS IN ISSUE – ORIGINAL GROUNDS

The onus rests with Mr Matai to establish the grounds upon which bail should be granted.

4.1 *(a)* ***General Principles:*** That leave to appeal has been granted is not a basis upon which bail should be granted. This the authorities make clear.

4.2 In granting leave to appeal (on the original grounds) the Court of Appeal found only that:

- The grounds '... raise questions of law which when properly particularised would constitute arguable grounds': ***Lole Vulaca, Rusiate Korovusere and Pita Matai v. The State*** (CrimApp No. AAU0038 of 2008S, HCt CrimAction No. HAC 120 of 2007S, 3 July 2008), at para **[11]**

- ... there would appear to be some strength in the grounds of appeal: ***Lole Vulaca & Ors v. The State***, at para **[13]**

4.3 The authorities are clear that this is not sufficient for granting bail. It is not simply whether there is 'some strength' in grounds of appeal, nor 'arguable grounds', but the 'likelihood of success' in the appeal. This appears to be contrary to the position taken by the Court of Appeal of Belize in ***Willword Bonner v. The Queen*** (CrimApp No. 7 of 1979, 1 June 1979) and ***Luke Mariano v. The Queen*** (CrimApp No. 9 of 1980, 16 July 1980). In the former, as noted, 'substantial' was the description used by Counsel for the Mr Bonner, but the Court did not in its final summation granting bail refer to the grounds at all, although in ***Luke Mariano*** when commenting upon ***Willword Bonner*** reference was made to this factor. In ***Luke Mariano***, bail was granted albeit the grounds were simply 'arguable'.

4.4 Not only does this run counter to the authorities applicable in Fiji, but it is contrary to section 17(3) of the Bail Act in the latter's reference to the mandatory requirement of taking into account 'the likelihood of success in the appeal'. Section 17(3)(a) seems clearly to imply that more than 'arguable' is necessary – as the authorities confirm.

4.5 In ***Ratu Jope Seniloli and Ors v. The State*** (CrimApp No. AAU0041/04S, HCt CrApp No. 002S/003, 23 August 2004) the Court of Appeal said:

> The first question is the likelihood of success in the appeal ... The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and section 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's case***, is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it ...
>
> In ***Sharda Nand v. DPP*** (FCA Application No. 3 of 1979), Marsack, JA repeated the warning that the Court should not, on such an application, give any ruling on the legal issues raised and then stated:
>
> > All that is necessary, is to decide whether [the issues] show, on the face of it, that the appeal has every chance of success.
>
> That was confirmed still to be the test by Reddy P. in ***Mitch's case.***

I do not accept the grounds in the present case satisfy that test. They undoubtedly raise arguable points but that is a long way from saying that they have every chance of success ...: at 3

4.6 In ***Macartney***, Byrne, JA referred to the 'likelihood of success' requirement and to the authorities. He also alluded to the difficulty faced by the Court of Appeal where an application for bail pending appeal is made – before a single Judge - grounds of appeal cannot be dealt with in depth as they are required to be by the Full Court at the hearing of the appeal.

4.7 In ***Praveen Ram v. The State*** (CrimApp No. AAU0096 of 2008S, HCt CrimAction No. HAC 88 of 2007, 4 November 2008), the Appellant/Applicant was granted bail pending appeal. This was, unusually (see ***Macartney***, at para **[16]**) in an appeal against a conviction for murder. However, the grant of bail was based upon the Court's determination that it was:

> ... an exceptional case, one where there are strong prospects of success [on] appeal and where, if the Court of Appeal orders [a] retrial for manslaughter, a non-custodial sentence might be imposed: at para **[22]**

4.8 Can it be said that the same applies here?

4.9 ***(b) Sentence:*** Taking the grounds in respect of sentence first, and bearing in mind that at this stage it is not appropriate to delve too far, it appears inappropriate to lead Mr Matai into a belief that these grounds classify to the degree required for grant of bail.

4.10 In sentencing Mr Matai, the Court:

- Noted the maximum sentence of 3 years: ***State v. Lole Vulaca, Rusiate Korovusere and Pita Matai (Sentence)*** (CrimCas No. HAC 120 of 2007, 23 April 2008), at 3
- Selected a 'starting point': at 3
- Set the 'starting point' by reference to the nature of the crime to which Mr Matai was convicted as an accessory (murder): at 3
- Took into account the factors going to make up the 'accessory after the fact' offence: at 2, 4
- Took into account the nature of the disciplined force of which Mr Matai was a member: at 2
- Acknowledged the importance of loyalty in the disciplined force ('duty', 'commendable'): at 2
- Acknowledged the importance of duty to law, to which 'loyalty' must give way: at 2
- Recognised the importance of duty as a police officer: at 2
- Acknowledged Mr Matai's direction to the police officers to 'lock up' Mr Malasebe, and their failure to listen: at 3
- Recognised the 'terrible tragedy' lying in the matter for Mr Matai: at 3
- Acknowledged Mr Matai's excellent record, being a well-respected member of the Police Force and a number of other matters going to mitigation – in an extensive and detailed paragraph: at 3
- Determined that a non-custodial sentence was not indicated or possible taking all the circumstances into account: at 3
- Acknowledged Mr Matai's being a first offender and a senior police officer: at 4
- Took into account all the mitigating and aggravating factors: at 4

4.11 Whether the grounds of appeal vis-à-vis sentence are sustainable is a matter for the Full Court to determine at the hearing of the appeal. However, at this stage it is difficult to identify a flaw warranting a determination as to the likelihood of success as required under section 17(3)(a) of the Bail Act.

4.12 *(c)* ***Conviction:*** Grounds a)-g) are of a nature similar in somewise to some of the grounds addressed by His Lordship Justice Byrne in ***Macartney v. State*** (CrimApp No. AAU01013 of 2008, 12 December 2008). There, Byrne, JA said:

> ... All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for bail pending appeal should attempt even to comment on. They are matters for the Full Court which will also have the benefit of the court record which I do not: at para **[30]**

4.13 Byrne, JA remarked similarly in relation to contradictory evidence, a ground raised in the present application:

> It is argued that the trial Judge should have directed the assessors that this contradictory evidence could create doubt and that it was a matter for them.
>
> Again I hold that such a submissions is not properly made on an application for bail. It can and no doubt will be made to the Full Court on the appeal. I note however paragraphs 31 and 39 of the learned trial Judge's summing up which deal with the evidence the assessors has to consider ...: at paras **[32]-[33]**

4.14 This may similarly be said in the present case. Even then, a reference to the Summing Up indicates that in respect of the evidence specifically relating to Mr Matai, for example, reference was made to 'inconsistent evidence about the condition of the deceased at 7am on the 5th of June ...' (at 37), and that there are inconsistent statements and the nature of those statements are referred to: ***State v. Lole Vulaca, Waisale Boletawa, Maika Rauqera, Rusiate Korovusere, Jone Cama, Eronimo Susunikoro, Eremasi Naraga and Pita Matai (Summing Up)*** (CrimCas No. HAC 120 of 2007, 22 April 2008), at 37-38

4.15 Early in the Summing Up, at page 3, the Court emphasised that the evidence must be considered against each accused separately and that an assumption must not be made that 'because you find there is enough evidence to convict one, .that the others must also be guilty'. The case against each 'must be considered separately'.

4.16 As to directions in respect of the charge of murder and the law regarding accessory after the fact to murder, the Court commenced in respect of 'murder' at page 3 of the Summing up, setting out the three essential elements at page 4, then going on to address circumstance evidence and the doctrine of joint enterprise, from page 4 through to page 7. At page 7 the second element of the offence 'that it was unlawful' – is commenced through to page 8. At page 8 the third element 'malice aforethought' is addressed, through to page 9.

4.17 At page 9, the Summing Up addressed the elements of the charge of accessory after the fact. Reference is made to circumstantial evidence in respect of the 8th Accused, Mr Matai, and the need for the assessors to be satisfied beyond reasonable doubt that he 'gave active assistance to those whom he knew had commented an offence' before the assessors could find him guilty on that count.

4.18 From page 10 through to page 25 the Summing Up referred to 'The Evidence', outlining that of the witnesses and the caution statements admitted into the trial. At page 26 the Summing Up commences an 'Analysis' referring again to 'joint enterprise' and making reference to the evidence upon which the prosecution relies to prove joint enterprise – this consists of a list of some 14 items, running from page 27 through to page 29. The Summing Up returns specifically to Mr Matai, the 8th Accused, at page 29. At page 3, the Summing Up emphasises that the evidence must be considered against each accused separately and that an assumption must not be made that 'because you find there is enough evidence to convict one, that the others must also be guilty'. The case against each 'must be considered separately'.

4.19 As has been said elsewhere, a Summing Up is not required to canvass all the evidence as given in the trial and that a trial judge cannot be expected nor is required to do this:

> Summing up after a long trial is always a difficult task for a trial Judge. The Judge cannot be expected to remind the assessors of all the evidence which has been given and, as I said earlier, in my view the summing up in this case which covered 90 paragraphs was generally fair. Whether or not the Full Court will hold that [the Judge's] failure to direct specifically on the matters emphasised in the Appellant's submissions to me constitutes sufficient doubt as to justify the appeal being upheld remains to be seen. I am in no doubt that such failure if it be true is not an exceptional circumstance to justify my releasing the Appellant on bail and I refuse to do so on that ground: ***Macartney v. The State*** (CrimApp No. AAU0103 of 2008, 12 December 2008), at para **[35]** per Byrne, JA

4.20 It is important to make the distinction between the present application and that made in ***Macartney***. The grounds of appeal in ***Macartney*** were advanced as the basis for 'special' or 'exceptional' circumstances warranting bail. In the present case, the 'special' or 'exceptional' circumstance advanced for Mr Matai is that of 'time' – length of sentence and length of time awaiting the hearing of the appeal. The grounds are relevant to the question of likelihood of success per section 17(3). Nonetheless, what has been said in ***Macartney*** in regard to the grounds there does, as noted, have some applicability here.

4.21 In addition to the comprehensive Written Submissions, Counsel for Mr Matai made oral submissions. The oral submissions concentrated substantially upon two particular aspects:

> **That** the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting on the law on circumstantial evidence.
>
> **That** the Learned Trial Judge erred in law and in fact in not adequately directing to disregard all the media reports including TV coverage that existed before the trial and during the trial of the Appellants.

4.22 As to the direction on circumstantial evidence, Counsel for the State conceded that if the Summing Up 'failed to isolate' the matters going to circumstantial evidence in relation to Mr Matai then there was an 'inadequate direction'. Specific reference is, however, made to the elements vis-à-vis Mr Matai and the charge of accessory after the fact, and to circumstantial evidence in relation to Mr Matai. For example:

> In this case the defence disputes all of these elements [of the offence of murder]. The defence says that Pita Matai did not assist anyone to escape punishment, nor did he know that an offence had been committed. So you must consider the evidence in relation to

each element of [the] offence carefully. What I have said about circumstantial evidence applies also to the prosecution case against the 8th Accused [Mr Matai]. However, for the purpose of this offence, you must be satisfied beyond reasonable doubt that the 8th Accused gave active assistance to those whom he knew had committed an offence before you can find him guilty on Count 2: ***State v. Lole Vulaca, & Ors (Summing Up)***, at 9

The 8th Accused's position is that he saw the deceased arrive at the station and gave instructions that he be locked in the cell. He went home after arranging for [Mr Malasebe's] interview to be recorded the next day. When he saw the deceased the next day, he thought he had breathing problems and ordered that he be sent to hospital because he was still alive: at 25

Analysis

As I have said before, this is not a case of direct evidence. No one is able to give evidence about what occurred in the Crime Office at Valelevu Police Station from midnight to about 6.45am to Tevita Malasebe. You must look at all the circumstantial evidence and ask yourselves what inferences you can draw from the evidence: at 26

....

In relation to the 8th Accused [Mr Matai], the prosecution says that the 8th Accused knew that [Mr] Malasebe had been at the police station all night, and must have seen the injuries on Malasebe which other witnesses have described as black marks on the legs and bruises all over the abdomen. Knowing what had occurred, he instructed the removal of Malasebe from the Crime Office thus assisting in preventing the offenders from being discovered. He also told IP Ramasibana, his superior that [Mr] Malasebe had contracted breathing difficulties and had been taken to hospital, which the prosecution says, was untrue.

The defence position is, as I have described it, that the Accused were not at the scene, were not part of any joint enterprise and that all the evidence relied upon by the prosecution was done openly and not with any intent to hide evidence: at 29

It is for you to decide whether you can draw inferences from the evidence and whether you are satisfied of the guilt of each Accused separately beyond reasonable doubt ...: at 30

4.23 At the end of the Summing Up, the Court returned again to circumstantial evidence, again emphasizing that the case in respect of each accused should be considered separately:

Conclusion

Remember that in considering circumstantial evidence you must be satisfied beyond reasonable doubt that the only reasonable inference available to you is the guilt of the Accused before you can find them guilty. If you find that there are other reasonable inferences you can draw which are consistent with the Accused's innocence or if you have a reasonable doubt about it, then you should find each not guilty.

Remember also to consider the case against each Accused separately.

Your possible opinions on each count are either Guilty or Not Guilty: at 39

4.24 As to the media aspect, Counsel for Mr Matai said that the assessors are 'common people from the community'; therefore the direction should have referred not only to the media in the context of 'read' – which is print media or newspapers – but to what was 'seen' and/or 'heard'. Most particularly, said Counsel, reference should have been made to television coverage.

4.25 Reference to media coverage was made in the Summing Up immediately after reference to the standard of proof:

> On the issue of proof, I must direct you as a matter of law that the onus or burden of proof lies upon the prosecution to prove the case against each accused person. The burden remains throughout the trial upon the prosecution and never shifts. There is no obligation upon the accused to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proved guilty.
>
> The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt.
>
> If you have a reasonable doubt about the guilt of the accused then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the accused that you can express an opinion that he is guilty.
>
> **Your opinions must be based only on the evidence you have heard in this courtroom and upon nothing else. Whatever you have read about this case in the media or elsewhere, you must totally disregard. Your duty is to apply the law to the evidence you have heard.**
>
> There are 8 Accused persons in this case. The first 7 are charged with murder. The 8th Accused is charged with being an accessory after the fact to murder. As a matter of law, you must consider the evidence against each accused person separately. You must not assume that because you find there is enough evidence to convict one, that the others must also be guilty. Consider the case against each accused separately: ***State v. Lole Vulaca & Ors (Summing Up)*** (CrimCas No. HAC 120 of 2007, 22 April 2008), at 2-3 (Emphasis added)

4.26 One may agree it would be preferable in Summing Up to refer to all forms of media coverage with specificity – print (newspapers), sound (radio and television) and sight (television and print (photographs), as well as the Internet and other electronic media.[1] Nonetheless, reference was made in the Summing Up to 'media' which in common parlance includes television. Most particularly, the terms of the warning and the context in which the warning was given renders it difficult to accept that this ground reaches the threshold required by section 17(3) and the authorities: ***Ratu Jope Seniloi, Ratu Rakuit AV Akalalabure, Ratu Viliame Volavola, Peceli Rinakama and Viliame Savu v. The State*** (CrimApp No. AAU0041/04S, High Ct CrApp No. 002S/003, 23 August 2004); ***Mutch v. State*** (CrimApp No. AAU0060/99); ***Sharda Nand v. DPP*** (FCA Application No. 3 of 1979)

5. MATTERS IN ISSUE – ADDITIONAL GROUNDS

The additional grounds are:

[1] Jurors accessing the Internet in the course of trials has arisen as a problem in Australia, with retrial being ordered.

j) **That** the Learned Trial Judge erred in law and in fact in not taking into account that the Appellants did not and were not able to make free choice in exercise of their legal right to give evidence in [the] trial proper because their Counsel assured them that the Appellants need not do so and that the Appellants must not give evidence in trial proper. The decision and/or advice to the Appellants by their Counsel, and Appellants' acceptance of such decision of their Counsel and advice deprived the Appellants of having their evidence heard and considered in trial proper.

k) **That** the Appellants' Trial Counsel's advice that the Appellants should remain silent was not a correct and proper advice in view of the fact that the Appellants ought to have given evidence challenging the evidence given by the Prosecution witnesses.

l) **That** the Appellants Trial Counsel in advising the Appellants to remain silent and which advice were accepted by the Appellants amounted to the incompetence of the Appellants' Trial Counsel.

m) **That** the Learned Trial Judge erred in law and in fact in not directing the assessors that if they are not satisfied beyond reasonable doubt on the charge of Murder (that the Appellants had no intent) then they could also consider the charge of Manslaughter. By failing to direct the assessors on the charge of Manslaughter there was a substantial miscarriage of justice.

n) **That** the Appellants reserves the right to add and argue further Additional Grounds of Appeal upon receipt of the Court Record of the proceedings.

5.1 As to the additional grounds, whether these can be taken into account in Mr Matai's application for bail at this stage is in issue. Leave has not yet been granted to allow them and there is a question whether a single judge can do so. The Court of Appeal Act does not provide that power to a single Judge, reserving it to the Court of Appeal: ***Volau v. State*** [2006] FJCA 54; AAU0079/2008; High Court Action No. HAA 59 of 2008 (13 October 2008); ***Daunabuna v. State*** [2008] FJCA 55; AAU0120.2007; HCt Action No. HAA 114 of 2007 (14 October 2008)

5.2 In both ***Volau v. State*** and ***Daunabuna v. State*** having recognised this limitation in the powers of a single Court of Appeal Judge, I dealt with the problem by extending time to the Appellants for the filing of their respective appeals, allowing the new grounds to be filed by this means, and referred the matter as a question of law to the Full Court of the Court of Appeal in the following terms:

3. In accordance with section 37 of the Court of Appeal Act, the Court refers to the Full Court a question of law, namely whether a single Judge of Appeal has the power under section 35(1)(b), consistent with section 26(1) and taking into account the aforesaid Rules relating to amendment of Grounds, to extend the time of appeal so as to enable an Appellant/Applicant to incorporate into his appeal new Grounds.

5.3 The same path can be followed in the present case. However, there is an additional hurdle. Upon the State's objecting to the new grounds, the following orders were made:

1. The Appellants to file and serve Affidavits in support of the proposed new grounds of appeal on or before 23 January 2009.

2. The Respondent/State to file and serve Affidavits in response on or before 20 March 2009/.

3. The Appellants to file and serve any Affidavits in Reply on or before 27 March 2009.

4. The Appellants to file and serve Written Submissions on or before 3 April 2009.

5. The Respondent/State to file and serve Written Submissions in Reponses on or before 17 April 2009.

6. The Appellants to file and serve any Written Submissions in Reply on or before 24 April 2009.

7. Set the matter for hearing on leave in respect of the proposed new grounds at 9.30am on 27 April 2009.

5.4 This means that the grounds cannot be considered until a determination is made on or after 27 April 2009. By that time, according to his Counsel Mr Matai will have served a substantial portion of his two-year sentence, taking into account remissions. The appeal itself being heard at around that time or subsequently would mean that, if it were successful, Mr Matai's appeal 'would be rendered nugatory'. In response, Counsel for the State said that the appeal against conviction, if the conviction were overturned, would not be 'nugatory'. Nonetheless, it remains that the serving of the sentence is a factor to be considered, as the authorities confirm.

5.5 The issue of grounds going to competence of Counsel has been addressed by the Court of Appeal in ***Rejendra Samy v. The State*** (CrimApp No. AAU 119 of 2007; HCt CrCas No HAC 029 of 2006, 12 December 2008). There, the grounds relating to Counsel were:

> (c) **That** the Appellant pleaded guilty to all the charges after being told by his Counsel that if he pleaded guilty he would not go to the Prison as he was the first offender and that he would get a suspended sentence.
>
> (d) **That** the Appellant pleaded guilty to the charge after being advised/pressurized by his Counsel and whom the Appellant now says that the said Counsel was incompetent and as a result the Appellant suffered a miscarriage of Justice: ***Rejendra Samy v. The State***, at 2

5.6 I simply observe that in dismissing the application for leave to appeal, His Lordship Justice Pathik referred, in respect of these grounds, to ***The Queen v. Alich Charles Green*** (CA No. 364/94, Qld Court of Appeal) and ***R. v. Birks*** (1990) 19 NSWLR 677. First as to ***The Queen v. Green***, the Court of Appeal cited two passages, the first of which said that the 'mere fact that valid criticisms can be made of counsel's conduct of the trial does not mean that the case has been a miscarriage of justice' or that a conviction should be set aside on appeal: at 4 The second passage related to whether or not a failure or refusal to follow instructions is a 'sufficiently exceptional circumstance' to entitle a convicted person to a retrial. This was not in issue before the Court in ***The Queen v. Green***, however, the Court formed a tentative view that it would be necessary for an Appellant 'to prove disobedience of a specific instruction on a matter of substantial importance, ie which was directly material to the proper conduct of the defence and might have affected the outcome of the trial': at 4, 6

5.7 As to ***R. v. Birks***, the Pathik, JA referred to a passage from Chief Justice Gleeson's judgment, namely:

> As a general rule an accused person is bound by the way the trial is conducted by Counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by Counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence: at 685

5.8 The Queensland Court in ***The Queen v. Green*** commented that this passage from ***R. v. Birks*** should be read as indicating 'no more than that such conduct by counsel will not automatically entitle an accused person to a retrial in every case'. It did not mean, said the Queensland Court, that such conduct 'will never have that result':

> Whether or not a new trial should be ordered will depend on the circumstances of each case; a new trial will generally not be appropriate unless incompetent or improper conduct by counsel deprived the person convicted of a significant possibility of acquittal, such as for example when the accused is deprived of the opportunity to present his defence: ***Sankar v. Trinidad and Tabago*** [1995] 1 WLR 194

5.9 In the present case, no determination has yet been made as to these proposed grounds of appeal. Nor could it be made at this stage. Reference to ***Rajendra Samy v. The State***, ***Green*** and ***R. v. Birks*** is not intended to indicate any position taken by this Court on that question. The material required to be filed and served under the Orders not having yet come before the Court, and there having been only scant submissions - made in support of the making of the Orders, this Court cannot be taken to have reached any position in relation to those grounds and has not done so.

5.10 Consistent with the approach taken in ***Ratu Jope Seniloli & Ors v. The State*** (CrimApp No. AAU0041/04S, 23 August 2004), however, it appeared to me appropriate to outline those grounds here and to draw attention to the authorities referred to.

6. EXCEPTIONAL CIRCUMSTANCES – SENTENCE & TIME FACTOR

Ultimately, the question is whether the time factor and the prospect of the serving of the sentence brings Mr Matai's application within the 'exceptional circumstances' requirement for bail to be granted. Time and proportion of sentence served before appeal cannot, however, dictate the outcome. In the cases where bail has been allowed in consequence of 'time' and 'proportion of sentence' being in issue, the seriousness of the offence has not generally been remarked upon. Cases where comment has been made in that respect include ***Macartney v. State*** (CrimApp No. AAU0103 of 2008, 12 December 2008) where the conviction was for murder, and ***Mudaliar v. The State*** [2006] FJCA 50; AAU0032U.2006S (28 July 2006) where the conviction was for manslaughter.

6.1 The principal matters to be taken into account in an application for bail pending appeal are as stated in section 17 of the Bail Act, namely the likelihood of success in the appeal, likely time before the appeal hearing, and proportion of sentence that will have been served when the appeal is heard. It seems to me that seriousness of the offence is a matter to be considered in an application for bail pending appeal also.

6.2 Counsel for Mr Matai explained to the Court that with his sentence of two (2) years, Mr Matai was entitled to six months remission applicable upon his admission to prison, bringing the sentence to 18 months. Counsel said that Mr Matai has already served nine months. This means that if the appeal were to be heard in April or May 2009 (the next scheduled Court of Appeal sittings), he will have served his term of imprisonment. This calculation is premised upon his gaining further remissions for good behaviour and so on and, in any event, the estimate brings Mr Matai well within the principles as to time espoused by the Court of Appeal of Belize in ***Luke Mariano v. The Queen*** (CrimApp No. 9 of 1980, 16 July 1980) and ***Willword Bonner v. The Queen*** (CrimApp No. 7 of 1979, 1 June 1979).

6.3 In the present application, it is not simply a case of a proportion or substantial proportion of the sentence having been served before the appeal can be heard, but the prospect of the whole sentence (taking into account remissions) being served. However, I am not persuaded that the fact alone of a sentence being completed before an appeal can be heard constitutes 'exceptional circumstances'. After all, if there were no chance of the appeal's success, then 'time' would have to be irrelevant or at least overruled by that factor. If the chance of an appeal's success were 'slim' or 'low' or the grounds simply 'arguable', then again it does not appear to me that 'time' could override this so as to warrant the grant of bail under the 'exceptional or special circumstances' rule.

6.4 It seems to me that the statement made by the English Court of Appeal in ***Watton*** (1978) 68 CrAppR 293, at 296-97 cannot be right; at least, it is not consistent with the law in Fiji. That the requirement that 'it appears prima facti that the appeal is likely to be successful' is stated in ***Watton*** as an *alternative* to 'where there is a risk that the sentence will have been served by the time the appeal is heard' runs directly counter to ***Ratu Jope Seniloli & Ors v. The State*** (CrimApp No. AAU0041/04S, 23 August 2004).

6.5 As earlier noted, there the Court of Appeal said as to:

- the likelihood of success in the appeal;
- the likely time before the appeal hearing;
- the proportion of the original sentence which will have been served by the applicant when the appeal is heard: s. 17(3)

that the likelihood of success must be addressed first, and the two remaining matters are directly relevant 'only if the court accepts there is a real likelihood of success': at 5 Otherwise, those latter matters 'are otiose': at 5

6.6 The question also arises of what is considered to be the 'original sentence' for the purpose of section 17(3)(c). In ***Mudaliar v. The State*** [2006] FJCA 50; AAU0032U.2006S (28 July 2006) the Court of Appeal said:

> Counsel for the appellant and respondent took us fully through the evidence and the law that will be the substance of the appeal. It would be wrong for us to prejudge the appeal or give an opinion on any of the points raised. It must suffice for us to say that there are arguable points of substance to be determined on appeal, but on the evidence the appellant faces a strong prosecution case.
>
> The other two considerations under s. 17 of the Bail Act are in this case resolved by recording that the President has already directed that the appeal be heard in November and counsel agree there seems to be nothing that will prevent that. As result the appellant

will have served 8 months of his three years sentence. Success on appeal would result in a new trial and no doubt bail would be granted pending trial. While we are aware of the possibility of early release **we think the sense of proportion appropriate in such a case as this is to compare the sentence served with the total sentence.**

Directing ourselves collectively to the three considerations required by s. 17 and bearing in mind the accepted view that some extraordinary circumstance should be shown for bail to be granted a convicted applicant, we consider that the applicant has not satisfied us that he should be granted bail. **The seriousness of the offence and the strength of the prosecution case outweigh the likelihood of success on appeal and time that would be served is not such that would tip the balance in favour of the applicant.** Bail is accordingly refused: at paras **[9]-[11]** (Emphasis added)

6.7 Hence, albeit Counsel for Mr Matai has cogently submitted that the applicant should be based upon the prospect of Mr Matai's having served, almost served or served a substantial portion of his sentence *with remissions*, ***Mudaliar v. State*** says otherwise. What this Court must do is measure 'proportionality' by reference to the sentence itself – of two years, not to the sentence minus remissions and prospective remissions. Hence, if the appeal were able to be listed for hearing in the April session of the Court of Appeal, Mr Matai would have served some 12 months of the two year sentence. This is more than that in prospect in the ***Mudaliar case*** and the conviction there was for manslaughter. Here, however, the seriousness of the conviction is not insubstantial – accessory after the fact to murder, in respect of which the Court said, as earlier noted:

Perhaps we will never know who inflicted the terrible injuries on [Mr] Malasebe in the Crime Office, because of your act of assisting your men to cover the incident up. There is a blanket of silence over what occurred in the Crime Office that night. Your conduct contributed to that silence.

In these circumstances, I cannot order a non-custodial sentence for you: ***State v. Lole Vulaca, Rusiate Korovusere and Pita Matai (Sentence)*** (CrimCas No. HAC 120 of 2007, 23 April 2008), at 3

6.8 Mr Matai's standing within the Police Force and his exemplary record were factors taken into account in mitigation. At the same time, they might be seen as factors crucial to the 'blanket of silence' remarked upon by the Court. The seriousness of the offence needs to be taken into account in the determination as to bail.

6.9 Even where there is some possibility of success,[2] courts should in my view be temperate in exercising the power to grant bail pending appeal. In ***Chamberlain v. R (No 1)*** [1983] HCA 13; (1983) 153 CLR 514 (2 May 1983) the Australian High Court observed as to the consequences of grant of bail where ultimately an appeal is unsuccessful:

The present application is to release Mrs Chamberlain on bail in order that she may resume family life and continue to breastfeed Kahlia [her newly born child] pending the disposition of her application for special leave to appeal. I may say at once that I do not

[2] And this is not sufficient to come within section 17(3)(a) in any event – the authorities requiring 'a very high likelihood of success' and 'every chance of success': ***Ratu Jope Seniloli & Ors v. The State*** (CrimApp No. AAU0041/04S, 23 August 2004), at 4, citing ***Sharda Nand v. DPP*** (FCA Application 3 of 1979), per Marsack, JA and ***Mutch's case***.

think that there is any likelihood of her failing to answer to her bail if bail were granted. The poignancy of her return to custody and the traumatic disruption of family life that that involves need no elaboration. It needs no psychiatric evidence to establish the tragic nature of those events. The circumstances give force to the observation of Edmund Davis, LJ ... in ... ***Gruffydd*** (1972) 56 CrAppR 585, at 589:

> [O]nce bail is granted pending an appeal, judges who later hear it are presented with an additionally heavy problem. Bail inevitably raises hopes, and to wreck them by ordering a return to custody is a painful duty for any judge. Nevertheless, there are times when such a duty is unavoidable: at 517

6.8 Of course, a Court also needs to take care not to refuse bail through being overly cautious in allowing the prospect of a person's having to return to prison if the appeal is unsuccessful rule out the grant of bail where bail should, in accordance with 'exceptional' or 'special' circumstances, be granted. A concern about the prospect or possibility of a person's being released on bail pending appeal, then having to return to complete the sentence where the appeal fails, should not result in refusal of bail if there are real prospects of success. This would contradict section 17(3)(a).

6.9 Is there, nonetheless, a 'totality' of circumstances here (per ***Ratu Jope Seniloli & Ors v. The State*** (CrimApp No. AAU0041/04S, 23 August 2004), at 5), which could amount to 'exceptional circumstances'?

6.10 A factor that needs to be borne in mind along with those previously referred to was highlighted in ***Chamberlain v. R (No 1)*** [1983] HCA 13; (1983) 153 CLR 514 (2 May 1983) and bears consideration here.

6.11 After canvassing the principles, the Australian High Court said that in applications for special leave to the High Court there was an additional factor, namely that generally in such cases an intermediate court will already have found against the appellant in an appeal. That pertained in ***Chamberlain v. R.*** for an appeal to the Full Federal Court had been dismissed, with Mrs Chamberlain now seeking leave to appeal to the High Court. However, the Court went on to emphasise:

> ... there is another factor of more general and more fundamental significance which militates against the granting of bail. Mrs Chamberlain challenges the verdict upon which her conviction and sentence are founded: if the verdict were to be set aside, the formal conviction and the sentence would be quashed; if the verdict stands, so must the conviction and sentence. To suspend or defer the sentence before an appeal is heard in such a case is to invest the verdict of the jury with a provisional quality, as though it should take effect only after the channels of appeal have been exhausted. But the jury is the tribunal constituted to determine whether an accused should be convicted or acquitted, and its verdict takes effect immediately. In a serious case, where the prisoner's custodial sentence depends upon a jury's verdict (as it does when there is a conviction for murder and there is no discretion as to sentence) an application for bail before the verdict is set aside is in substance an application to suspend the effect of the verdict. To grant bail in such a case is to whittle away the finality of the jury's finding and to treat the verdict merely as a step in the process of appeal. The central feature in the administration of criminal justice is the jury, and it is a mistake to regard to effect of its verdict as contingent upon confirmation by an appellate court: at 520, per Brennan, J.

6.12 In Fiji, the finality is of the finding by a judge, not a jury. The judge sits with assessors and must have regard to their opinions, however is entitled to bring in a verdict not consistent with the assessors' opinions. In ***The State v. Taru Inoke Takiveikata (No 5)*** (CrCas HAC005.04S, 1 November 2004) His Lordship Justice Gates set out the principles governing criminal trials by judge and assessors, observing that it is the judge who must given judgment, having received the opinions of the assessors, 'but in doing so shall not be bound to conform to the opinions of the assessors': s. 299(2) ***Criminal Procedure Code*** (Cap 21)

6.13 The principle in ***Chamberlain v. R. (No 1)*** applies equally in Fiji with its system of judge and assessors as in Australia with its jury system. The central feature in the administration of justice in Fiji is the judge sitting with assessors. The finality of that finding should not be 'whittled away' so as to 'treat the verdict merely as a step in the process of appeal'.

6.14 In the present case, for Mr Matai (unlike Mrs Chamberlain and Mr Matai's co-Appellants) the sentence was not one where there was no discretion. This does not, however, undermine the importance of the principle that a judge's determination is final and should not be treated as 'provisional' simply because it may be or is subject to appeal.

7. CONCLUSION

I am not satisfied that section 17(3) is met in the present case. Principally, the problem lies with the requirement that the grounds disclose 'every chance of success' or 'a very high likelihood of success'. Arguable points are not enough. As to time and sentence, I am mindful that if Mr Matai's appeal is not heard in the April session of the Court of Appeal sittings, then the proportion of his sentence of two years will be running, and there is a likelihood that with remissions his sentence may be almost served, or even served.

7.1 The Court is mindful also of the seriousness of the offence of which Mr Matai has been convicted, and that it is not the sentence minus remissions that is to be taken into account in an application for bail pending appeal, but the total sentence imposed by the Court – here, two years. Consistent with ***Mudaliar v. The State*** [2006] FJCA 50; AAU0032U.2006S (28 July 2006), the sentence, rather than sentence with remissions and prospective remissions, is what has exercised the Court's determination here.

7.2 Three further matters are borne in mind. One is that although none of the accused persons in the trial gave evidence, caution statements of all but one (the 7th accused) were in evidence. A perusal of the Summing Up indicates that a factor underlying the opinions of the assessors appears to have been that of credibility of the accused determined in the assessors' opinions to be guilty. In respect of Mr Matai,[3] the following was said in the Summing Up:

> **The 8th Accused**
> There is inconsistent evidence about the condition of the deceased at 7am on the 5th of June. DC Kalidole, DC Samulea and the 8th Accused [Mr Matai] in his interview all said that the deceased was alive and was taken to hospital. The evidence of the extra-mural prisoner and the WPC's was that he looked dead. Elia Batibasaga said that hewn he saw the deceased at the hospital he was 'cold and clammy'. His notes stay that [Mr Malasebe's] body was still. Dr Prashant said that the expulsion of faeces normally occurred in the first two hours **after** death. Zarif Ali said that there [were] faeces and

[3] For the 1st and 4th Accused (Mr Vulaca and Mr Korovusere) there was evidence that they had delivered Mr Malasebe to the hospital and that they allegedly said he had been 'picked up' in the street, and this was why they were delivering him.

urine on the floor. The seized blanket smelt badly of faces. Which version of the evidence you accept is a matter for you.

However, if you accept that [Mr] Malasebe was removed from the Crime Office on the 8th Accused's orders when he was dead, then you must ask yourselves whether in giving this order the 8th Accused was knowingly assisting those who had committed an offence on [Mr] Malasebe to help them to escape detection. IP Ramasibana's evidence was that the 8th Accused told him the deceased had 'breathing difficulties'. Was this a deliberate lie? Was it told to protect those who assaulted and killed Malasebe?

In this interview he said he did not see any injuries on [Mr] Malasebe. Defence counsel say that [Mr Matai] did not know any crime had been committed so he was not assisting anyone.

In asking yourselves whether the 8th Accused did knowingly assist the perpetrators of an assault on the deceased, you must ask yourselves what the 8th Accused knew on the morning of the 5th, whether he had seen the injuries on [Mr] Malasebe described by ASP Parker, by the extra-mural prisoners, by the doctors and nurses at the hospital and by the deceased's mother.

If he had known that an unlawful act had occurred in the Crime Office, then should he have preserved the crime scene for investigations? If the deceased was dead, should he have ordered his removal? And in not preserving the scene, was the 8th Accused knowingly assisting his men to evade detection? Are you satisfied of that beyond reasonable doubt?

These are questions for you to consider: at 37-39

7.2 The second is that earlier referred to, and seen as significant in Byrne, J.'s determination in ***Macartney v. State*** (CrimApp No. AAU0103 of 2008, 12 December 2008):

> ... one of the biggest problems ... in attempting to persuade this Court that he should be granted bail pending his appeal was the unanimous opinion of the assessors with which the trial Judge agreed: at 5-6

7.3 The third is that 'status' and, in this context, safety, is raised in the Affidavit in Support of the application. It is said (by Mr Vulaca for himself and on his co-Appellants' behalf), that as (former) police officers, in custody 'almost everyday' accused persons are faced against whom the Appellants 'are yet to give evidence and if we are kept in prison we will not be able to give witness against those accused in fear of retaliation by them'. This is a factor to be considered for Mr Matai consistent with what was said in ***Ratu Jope Seniloli & Ors*** (CrimApp No. AAU0041/04S, 23 August 2004) as to 'standing back' to consider the issues under section 17(3) 'with any other matters' applicable to a particular applicant' that might 'amount in their totality to exceptional circumstances': at 5

7.4 The status of Appellants was itself raised in ***Ratu Jope Seniloli & Ors*** as a factor. There, it was loss of positions as Vice President and Deputy Speaker for two Appellants, and similar loss of status or community standing of the others. The Court said it was:

> ... well aware of the status and position [all] these men hold and have held, of their contributions to and obligations under Fijian custom and tradition and of their

contributions over many years to public life in this country. The significance of those was no doubt also considered by the trial court. However, they do not amount to exceptional circumstances such as will override the fact that they have been convicted and sentenced and neither does it discharge the burden of satisfying this Court that the interests of justice require bail to be granted pending appeal: at 5-6

7.5 The State has a duty to ensure that persons who are held in lawful custody are not subjected to unlawful threat or attack, and that steps are taken to guard against this. In Mr Matai's case, this factor does not outweigh the need to meet section 17(3)(a) of the Bail Act.

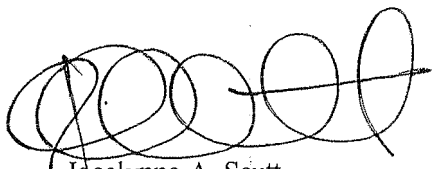
7.6 I am not satisfied that the appeal 'has ***every chance of success***': ***Sharda Nand v. DPP*** (FCA Application 3 of 1979), per Marsack, J. (Emphasis added) I am not satisfied that the appeal has 'a ***very high likelihood of success***': ***Ratu Jope Seniloli & Ors*** (CrimApp No. AAU0041/04S, 23 August 2004), per President Ward, AJ, at 4 (Emphasis added)

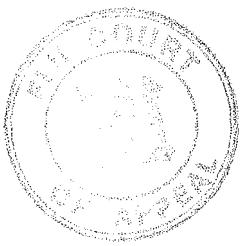
7.7 The Court is mindful that the festive season is upon us and that this has been seen in some cases as warranting the grant of bail pending appeal: cases cited in ***Willword Bonner v. The Queen*** (CrimApp No. 7 of 1979, 1 June 1979) and ***Luke Mariano v. The Queen*** (CrimApp No. 9 of 1980, 16 July 1980) Generally, family members wish to be with one another at this time. However, just as the Court is mindful of Mr Matai's position in this regard, the Court is mindful too that Mr Malasebe will never enjoy another festive season and his family is forever deprived of his being together with them at this and any other time.

7.8 Sentiment should not, in any event, sway this Court or dictate the outcome of an application for bail. That the application comes just before the break for the festive season cannot override the principles set down in the authorities applicable in Fiji.

ORDERS

1. The application for bail is refused.
2. No order as to costs.





Jocelynne A. Scutt
Judge of Appeal
Suva
22 December 2008