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

CRIMINAL APPEAL NO. AAU0042 OF 2006S
(High Court Criminal Action No.HAC028 /2005S)

BETWEEN: JOSAIA TUKANA

Appellant

AND: THE STATE

Respondent

Coram: Byrne, JA
Pathik, JA
Powell, JA

Hearing: Thursday, 3 April 2008, Suva

Counsel: Appellant in Person
A Prasad for the Respondent

Date of Judgment: Tuesday, 8 April 2008, Suva

JUDGMENT OF THE COURT

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[1] Josaia Tukana, the appellant was tried and convicted in the High Court at Suva on one count of murder, contrary to section 199 of the Penal Code, Cap 17. On 3 July 2006 he was sentenced to life imprisonment, as mandated under section 200 of the Penal Code Cap 17.

[2] By Petitioner's Appeal dated 14 July 2006 he appealed against the life imprisonment sentence imposed by the High Court. On 14 August 2006 leave to appeal was

granted against sentence on the narrow ground that the sentencing judge should have considered her powers under section 33 of the Penal Code, Cap 17, which provides:

> *"Where an offence in any written law prescribes a maximum term of ten years or more, including life imprisonment, any court passing sentence for such an offence may fix the minimum period which the court considers the convicted person must serve."*

[3] The trial judge did not fix a minimum term.

[4] The Court of Appeal held that the trial judge should have considered the issue of minimum sentence and whether there existed evidence to support the fixing of one, and, in a judgment of 22 October 2007, amended the sentence by fixing a period of 15 years in imprisonment to be served by the appellant effective from the date his current sentence commenced.

[5] In these further proceedings the appellant seeks leave to appeal to the Supreme Court. In support of this leave application the appellant, who appears in person, relies on matters set out in a letter of 14 November 2007 from the appellant to the Chief Registrar of the Supreme Court of Fiji and a further letter dated 10 March 2008 received by the Fiji Court of Appeal on 1st April 2008.

[6] In the letter of 14 November 2007 the appellant contends that a minimum term of 15 years is harsh and excessive in light of the circumstances and that a proper term would be something less than 10 years with remission. The circumstances that the appellant relies on are that he was being insulted by his wife immediately before he attacked her, that he had taken her to the hospital and that the doctors at the hospital were negligent in operating on his wife and were thus responsible for her death.

[7] Section 65 of the Court of Appeal Rules provides that an application for leave to appeal to the Supreme Court must be made by way of Notice of Motion filed within 28 days after the final judgment against which leave to appeal is sought and that the Notice of Motion must state precisely the question to be certified under section 122(2)(a) of the Constitution. It must state clearly the relevant facts and be supported by an affidavit verifying the facts.

[8] Section 122(2) of the Constitution provides that an appeal may not be brought from a final judgment of the Court of Appeal unless (a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance or (b) the Supreme Court gives special leave to appeal.

[9] The appellant's letter of 10 March 2008 in addition refers to inconsistent versions of evidence said to be given by a particular witness to the attack on the appellant's wife.

[10] All of the matters raised in the two letters were considered by the trial judge and by the Court of Appeal and none of them warrant the grant of leave to appeal to the Supreme Court.

[11] Leaving aside the fact that this application does not comply with the Court of Appeal Rules in that neither a Notice of Motion nor affidavit has been filed and that no precise question has been stated, there is no issue of significant public importance involved.

[12] It is not any error of the Court that can give rise to a question of public importance: ***Suresh Charan & Anor v The Housing Authority*** [1999] ABU0015. The test is as held in ***Rich v Christchurch Girl's High School Board of Governors*** (No2) [1947] 1

NZLR 21 at 25 where it was said that there has to be a matter of public or general interest over and above the interest of the litigant involved.

[13] Although the appellant appears convinced that his wife may not have died if the operating doctors had better equipment or if different medical procedures had been followed, these were matters considered by the trial judge and the Court of Appeal. In particular the issue of causation (medical negligence or assault by the appellant) was considered at some length. It does not involve a novel legal issue and has been considered by Courts in many jurisdictions over a long period of time. See ***R v Smith*** [1959] 2 ALL ER 193 and ***Vereimi Ikanaiwai v. Reginam*** [1986] 32 FLR 156.

[14] Although not articulated by the appellant in his letters or in Court, it appears that an administrative consequence of the decision of the Court of Appeal to fix a minimum term of 15 years has been to deprive the appellant of the chance of release from prison after serving 10 years.

[15] The appellant was legally represented at the Court of Appeal hearing on 28 August 2007 and this risk of an effective longer sentence was adverted to by counsel for the State at that hearing. The outcome of that appeal may thus appear unfortunate to the appellant, but again it does not raise a matter of significant public importance. Whether or not what occurred in relation to this on that occasion could be formulated into a question or matter within section 7(2) of the Supreme Court Act (pursuant to which section an application for special leave can be made directly to the Supreme Court) we are not able to express an opinion.

[16] Leave to appeal is refused.

Byrne, JA

Pathik, JA

Powell, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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