

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

CRIMINAL APPEAL NO. AAU 0041/10

(High Court Criminal Action No. HAC 14/10S)

BETWEEN: ZAFIR TARIK ALI, TAIMUR ALI, TAHIR ALI and
CHANDLESH GANESH

Appellants

AND: THE STATE

Respondent

Coram: Hon. Justice Kankani T Chitrasiri, Justice of Appeal
Hon. Justice Daniel Goundar, Justice of Appeal
Hon. Madam Justice Anjala Wati, Justice of Appeal

Counsel: Mr. I Khan for the Appellants
Ms.N. Ratakele for the Respondent

Date of Hearing: Wednesday, 17 November, 2010

Date of Judgment: Tuesday 23rd November 2010

JUDGMENT OF THE COURT

Introduction

1. This is an application for bail pending the hearing of appeal filed challenging the judgment of the learned High Court Judge, His Lordship Justice P.Fernando convicting the appellants of murder contrary to *S.199 and 200 of the penal Code, Ch.17.*
2. The Appellant's were convicted on 7th July 2010 and was sentenced to life imprisonment and of which an imperative term of 11 years to be served in the prison.
3. Consequently, Appellant's filed an appeal to the Court of Appeal challenging both the conviction and the sentence imposed by the learned High Court Judge. Thereafter they also made an application for bail pending the hearing of the foresaid appeal filed by

them. The said application for bail was taken up by a single judge of this Court and was refused. Consequently, this application for bail was made to this bench comprising of three justices.

4. This application being an application for bail pending an appeal, it is now necessary to refer to the relevant law found in the statute as well as in the common law.

The Law

5. Sec.3(3) of the Bail Act 2002 stipulates;

3(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.

However Sec.3 (4) (b) states;

*3(4). The presumption in favour of the granting of bail is displaced where-
(b) the person has been convicted and has appealed against the conviction.*

6. Accordingly, it is clear that any application for bail pending appeal consequent to a conviction should be considered on the circumstances of each case. Furthermore, **Sec.17 (3) of the Bail Act** envisages the basis on which bail should be granted on a person who is awaiting the hearing of his /her appeal. It reads thus;

17(3) When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account-

(a) the likelihood of success in the appeal;

(b) the likely time before the appeal hearing;

(c) the proportion of the original sentence which will have been served by the applicant when the appeal is heard.

7. Moreover, **Sec.33 (2) of the Court of Appeal Act (Chapter 12)** empowers this court to grant bail to an appellant awaiting for his appeal which is to be taken up in the Court of Appeal. It states;

33(2)The Court of Appeal may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

8. The aforesaid power of the Court of Appeal, empowers a single Judge of appeal to admit an appellant to bail upon due consideration of an application for bail pending appeal. This power emanates from **Sec.35 (1) (d) of the Court of Appeal (Amendment) Act of 1998** and it reads thus;

35(1) A judge of the Court may exercise the following powers of the Court,

(d) to admit an appellant to bail;

9. In this instance, His Lordship Justice Marshall, Justice of Appeal had made an considered order refusing to enlarge the appellants on bail pursuant to an application made in terms of the aforesaid **Section 35(1) (d) of the Court of Appeal Act.**

10. Having aggrieved by the aforesaid ruling of Hon. Justice W.Marshall JA, appellants made this application in terms of **Sec.35(3) of the Court of Appeal Act** praying for an order in favour of the appellants.

Section 35(3) reads as follows;

35(3)If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant's favour, the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.

11. Having stated the relevant statutory provisions in respect of the applications for bail pending appeal, I will now refer to a few decisions in Fiji and in the common law jurisdictions wherein the principles governing the issue at hand had been discussed.

12. In the very early case of *Advert Fitz v Gerald* [(1924) 17 Criminal Appeal reports], it was held that Courts would not grant bail to a prospective appellant unless there are exceptional and unusual reasons.
13. In the famous case of *Ratu Jope Seniloli & Others v. The State* [Criminal Appeal No. AAU0041 (104)] Gordon Ward JA stated that;

“the general restriction on granting bail pending appeal as established by cases in Fiji and many other common law jurisdiction is that it may be granted where there are exceptional circumstances.”

This decision in Fiji have been cited by both Counsel appeared for the respective parties in this application.

14. Aforesaid “Exceptional circumstances” is defined in *Rechts v. Watlon* (1978- Criminal Appeal Reports 293), as “those circumstances which will drive the court to the conclusion that justice can only be done by granting bail.”

Presence of “exceptional circumstances” when granting bail, pending trial had been highlighted in many decisions including that of *Apisai Tora v. Rechts* (1978) 24 FLR 28, *Simon Mc Cartney v. State* (Criminal Appeal No. AAU103/08) and *Mutch v. State* (2000) AAU0006/99.

15. Therefore, it has become trite law that applications for bail for the accused who had been convicted and are awaiting the appeal, be decided in favour of the appellants only on establishing “exceptional circumstances”. The term “exceptional circumstances” had not been properly defined either in the statute or in the case law. Obviously, it is a matter that would depend on the circumstances of each case.

Analysis

16. Looking at both oral and written submissions made by the learned Counsel for the appellants, it is seen that the appellants are basically relying upon the aspect of probable success in the appeal which basis is referred to in Sec. 17(3) (a) in the Bail Act 2002.
17. It is my opinion that even though, the success in the appeal is mentioned as a separate criterion, it also may fall into the category of "exceptional circumstances". Hence, we have carefully considered these aspects, namely the "success of the appeal" and the "presence of exceptional circumstances" in order to arrive at the right conclusion, with having special reference to the grounds of appeal urged by the appellants.
18. The grounds of appeal filed by the appellants, focus towards the way in which the learned High Court Judge had directed the assessors in his summing up. Those grounds of appeal have been framed in order to discuss the law that arises from the summing up to the assessors. Those grounds are directed towards the manner that the learned High Court Judge:
 - informed the assessors of using their common sense without directing them that they have to first find the facts they relied upon as proof.
 - explained them the issue of joint or common enterprise analyzing the evidence against each and every accused separately.
 - evaluated the medical evidence recorded in this instance to the assessors.
 - directed the assessors as to the way in which the circumstantial evidence in this case be considered giving reference to each other accused separately.
 - directed them adequately as to the burden of proof in a criminal case.

19. Learned Counsel for the appellant made lengthy submissions on the aforesaid grounds of appeal referring to the evidence that had been led in the high Court. To my mind, the appellants have come up with very important issues of law that may lead to a probable chance of winning the appeal in the end.
20. At this stage, it must be noted that His Lordship Justice W. Marshall JA, in his ruling made on 9th September 2010 has made reference to the case of *Simon McCartney v. State [Criminal Appeal 103/08]* and analyzed the manner in which the judicial pronouncements should be made in situations such as the one at hand. In that ruling His Lordship has quoted the following from the said judgment *Simon V. McCartney*;

“...the other factor weighing against the granting the Appellant bail is that in the research I have conducted since argument concluded I have not found one case where a person convicted of murder was granted bail pending an appeal to the Court of Appeal, nor for that matter was any such case cited to me be either the Appellant or the Respondent. In my view this is a matter which has some significance on this application.”
21. However, in the case of *Praveen Ram v. The State [2008- FCA 68 dated 4th November 2008]* cited by the appellants, the accused had been granted bail pending an appeal. Court in that instance had considered the fact that the deceased father of the appellant had been an alcoholic and was in a poor health condition. Also, the issue there was whether provocation should have been left to the assessors giving the choice of manslaughter as an alternative to murder. Hence, the circumstances in that case had been peculiar to that and had discussed an issue of a strong defence taken up by the accused appellant as well.
22. We were very much mindful of the above authorities found in the common law jurisdiction. In fact, all the three justices who adorned this Bench were very much keen to ascertain from both counsel of the directions given to the assessors as to the manner in which the learned Trial Judge explained to the assessors the way that the law should

be applied giving reference to the relevant evidence recorded against each of the accused.

23. However, it must be noted that the deceased in this instance may not have succumbed to his injuries, if not for the appellants taking the deceased into their custody and control. The evidence reveals that the accused was directed by the 3rd Appellant to sit in the tray of the vehicle in which the accused was traveling. Even though we do not have the benefit of perusing the court record, those matters do come to light by the summing up of the learned High Court Judge.
24. In the summing up it also reveals that the principal witness, Mohammed Zakariya Ali who is the nephew of 1st and 2nd appellants had stated that the four appellants while travelling in the vehicle searching for the robbers who had entered the 1st appellant's house had persuaded the accused to get into the vehicle that they were travelling. However, nothing is mentioned in the summing up, as to the events that happened thereafter until the body of the deceased was found in the following morning.
25. When the totality of the evidence is considered it will be revealed that the death of the deceased may not have occurred if not for the acts of the appellants. Therefore, it is seen that the appellants have engaged in an unlawful activity though it may not constitute the offence of murder. In such a situation Appellate Court may not allow the appellants to go scot free. Hence, the circumstances in this instance may lead to convict the appellants to an offence lesser than the murder. The aforesaid issue would be considered carefully in the appeal and therefore it seems to me that there is a possibility of imposing liability for a lesser offence even though the appellants may have a chance of obtaining a discharge from the offence of murder.
26. In the circumstances, it is my opinion that a full and complete success in the appeal cannot be ensured in their appeal.

Daniel Goundar JA

27. I Agree

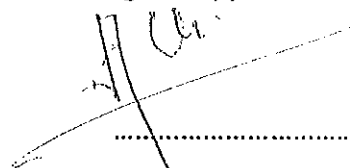
Anjala Wati JA

28. I Agree

The Order of the Court

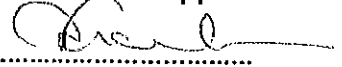
Kankani T.Chitrasiri JA

29. For the aforesaid reasons, the application for bail awaiting the appeal is refused.



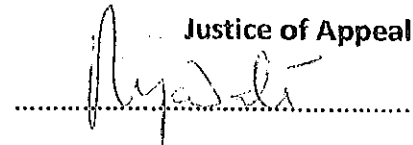
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Hon. Justice Kankani T. Chitrasiri

Justice of Appeal



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Hon. Justice Daniel Goundar

Justice of Appeal



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Hon. Madam Justice Anjala Wati

Justice of Appeal



Solicitors:

Mr. I. Khan for the Appellants

Ms. N. Ratakele representing the DPP for the Respondent