IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 9 OF 2011
(High Court HAC 18 of 2008)

BETWEEN : **VILIAME ROGOSE TIRITIRI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr M Yunus for the Appellant**
Mr L Fotofili for the Respondent

Date of Hearing : **22 April 2015**

Date of Ruling : **17 July 2015**

RULING

[1] The Appellant and one other were tried in the High Court at Lautoka before a judge sitting with three assessors. The Appellant was convicted on the one count of murder

by the learned trial Judge who agreed with the unanimous guilty opinions of the assessors. The co-accused was acquitted. The Appellant was sentenced to the mandatory sentence of life imprisonment with a [non-parole] term of 12 years with effect from 27 October 2010. (See: **Aziz –v- The State** AAU 112 of 2011; 13 July 2015).

[2] The Appellant subsequently filed a timely notice of appeal against conviction and sentence on 26 November 2010. In written submissions filed on his behalf the Appellant relied on 8 grounds of appeal against conviction and 2 grounds of appeal against sentence. The application for leave to appeal came on for hearing before a justice of appeal on 30 January 2012. In his judgment delivered on 30 January 2012, the justice of appeal noted that the Appellant admitted being at the scene and did not rely on any alibi. The judge stated that the directions given by the trial judge on identification were meticulous and were a correct summation of the "*Turnbull*" principles. Furthermore, the justice of appeal concluded that there was sufficient evidence before the High Court to conclude that the Appellant was one of two men whose actions killed the security guard. The evidence established that the Appellant picked up a block of concrete and smashed it on the security guard's face. The justice of appeal also concluded that on the evidence that was before the High Court it was impossible to say that the guilty verdict was unreasonable in the sense that it was *"obviously and palpably wrong*" as required by section 23 of the Court of Appeal Act Cap 12 (the Act). The justice of appeal was satisfied that none of the grounds of appeal satisfied the threshold for granting leave to appeal. As a result the judge dismissed the applications for leave to appeal against conviction and sentence. He then proceeded to dismiss the appeals pursuant to section 35(2) of the Act on the basis that the appeals were frivolous and vexatious.

[3] Following that decision the Appellant filed an application in the Supreme Court seeking an enlargement of time to file a petition for special leave to appeal against the decision of the justice of appeal.

[4] For reasons that do not relate to the merits of the appeal against conviction and sentence, the Supreme Court granted the Appellant an enlargement of time, granted the petition for special leave to appeal, allowed the appeal, set aside the orders of the

justice of appeal and ordered that the Appellant's application for leave to appeal was to be headed as a renewed application before the Court of Appeal. The decision of the Supreme Court was premised on the application of section 35(3) of the Act which the Supreme Court considered was the proper approach in this case. As this is a renewed application for leave, it must be heard by the Full Court and is listed for callover on 24 July 2015 to be fixed for hearing in the September session. The Appellant is renewing his application for leave to appeal against conviction only.

[5] There is also before the Court an application for bail pending appeal pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant bail pending appeal may be exercised by a justice of appeal pursuant to section 35(1) of the Act.

[6] In **<u>Zhong –v- The State</u>** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of bail pending appeal. It is appropriate to repeat those observations in this ruling:

> *"[25] Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to bail pending appeal. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
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> *[26] The starting point in considering an application for bail pending appeal is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
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> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first*

instance these are set out in section 17 (3) of the Bail Act which states:

"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:

> *(a) the likelihood of success in the appeal;*
> *(b) the likely time before the appeal hearing;*
> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*

*[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.

*[30] This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others –v- The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"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 (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*
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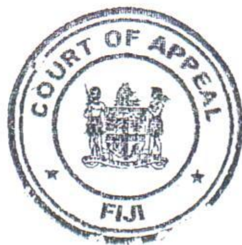
> *[31] It follows that the long standing requirement that bail pending appeal will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[7] At the outset it must be recalled that at this stage of the proceedings the Appellant has not yet been granted leave to appeal against conviction. What that means is that the Appellant has not yet established to the satisfaction of the Court of Appeal that any of his grounds raise an arguable point. Even when leave has been granted to an appellant the existence of arguable grounds of appeal falls well short of the test of *"a very high likelihood of access"*

[8] It must also be recalled that when the leave application was heard by the justice of appeal his first conclusion was that none of the grounds of appeal raised by the Appellant in his notice met the threshold of raising an arguable point. This aspect of the decision was not discussed by the Supreme Court. The Supreme Court concluded that it was wrong in the circumstances for the justice of appeal to proceed to dismiss the appeal under section 35(2) of the Act rather than allowing the Appellant an opportunity to renew his application before the Full Court.

[9] Although the Appellant has presented comprehensive written submission in support of the renewed application for leave to appeal to the Court of Appeal, the grounds of appeal neither individually nor taken together satisfy the test of the appeal having a very high likelihood of success. The Appellant's submissions filed in support of his application for bail pending appeal take the matter no further.

[14] As a result I have concluded that the Appellant has not demonstrated any exceptional circumstances that would justify bail pending appeal being granted. The matters concerning family responsibilities are common to many appellants and do not constitute special circumstances. The application is dismissed.



Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL