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

0000056

CRIMINAL APPEAL N0.AAU0032 OF 2006
[High Court Cr. Case N0. HAC.15/05]

BETWEEN:

SACHIDA NAND MUDALIAR

APPLICANT

AND:

THE STATE

RESPONDENT

Sahu Khan and Raza for applicant
Gibson and Tabete for respondent

Hearing: 14 June 2006

Ruling: 16 June 2006

RULING

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[1] The applicant was convicted in the High Court of manslaughter and sentenced, on 17 May 2006, to three years imprisonment. He has appealed against conviction and sentence on a number of grounds. An application for bail pending appeal was refused in the High Court and he now applies to this Court.

[2] The Court has had the benefit of detailed and carefully researched submissions by counsel for the applicant and I record my gratitude for the assistance both he and counsel for the respondent have given.

[3] It is not an easy case. The applicant is a qualified medical practitioner and the charge arises from the death of a young woman who had been treated by him. There is no suggestion that, if bail is granted, the applicant will abscond. If he should be successful on appeal, the time spent in custody pending the appeal will have a serious effect on his medical practice.

[4] The position in respect of bail pending appeal is well established. By section 3 of the Bail Act, there is a presumption in favour of granting bail but that is displaced where, as here, the applicant has been convicted and has appealed against his conviction. In determining whether bail pending appeal should be granted, the Act requires the court to consider the likelihood of success in the appeal, the likely time before the appeal will be heard and the proportion of the original sentence which will have been served by the time the appeal is heard. This Court has ruled that whilst the Act requires a court to consider those three matters, it is not prevented from considering any other issues it feels may be relevant.

[5] The burden is on the applicant to establish that it is a proper case for the grant of bail. In order to do so, it is necessary to show that exceptional circumstances exist, namely, circumstances which drive the court to the conclusion that justice can only be done by granting bail.

[6] The principal thrust of the applicant's submissions relates to the likelihood of success in the appeal. There are lengthy grounds of appeal against conviction many of which are of mixed law and fact but counsel relies, for the purpose of this application, only on the grounds raising issues of law. In summary he suggests; (1) the charge was defective for duplicity and/or latent ambiguity and that the trial judge erred in the manner in which he dealt with an application by counsel for the defence in respect of it; (2) that the judge failed to deal properly

with the issue of corroboration of a suggested accomplice; (3) that he misdirected the assessors and himself on the effect of section 234 of the Penal Code in such a way as wrongly to negate the defence; and (4) he erred in his direction on the offence of attempt to procure an abortion under section 172 of the Penal Code.

[7] The Court heard detailed submissions on these grounds but it must be borne in mind that it is not for a single judge at such an application to give any ruling on the matters raised. He must decide whether they show on their face that the appeal has every chance of success and the submissions I have heard have been of great assistance in reaching my conclusion. I also bear in mind that I do not have, at present, the record of the proceedings in the trial court. That will only be available at the hearing of the appeal by the full Court. During the submissions, reference was made to some matters which were not documented in the court papers at this stage and I have accepted counsel's account of what occurred with respect to them.

[8] It is clear that each of the four topics presented by counsel raise arguable and substantial issues. As such there is some chance of success but I am not satisfied that they, either considered singly or in the light of their possible cumulative effect, show every chance of success. In the event of success, an order for a retrial will be the likely result.

[9] I pass to the length of time the applicant will have to wait for his appeal to be heard. The record will need to be prepared and it is clearly too late for the July sitting of the Court. However, there is no reason why it should not be ready for the November sitting.

[10] Counsel for the applicant has referred to the grounds of appeal against sentence as a relevant factor in respect of his submission that the charge is bad for duplicity. I have considered that in relation to the appeal against conviction. However, for the purpose of assessing the proportion of the sentence which will have been served, he asks the Court to accept his submission that the trial judge in effect

passed two sentences; one year for manslaughter on the ground that the death was the result for an abortion and two years on the basis that it was the result of gross negligence. It was the cumulative effect of those which resulted in the sentence of three years imprisonment.

[11] On that basis, he asks the Court to use those sentences separately when assessing the proportion of sentence which will have been served by November. Mr Gibson disputes that is a proper reading for the judge's sentencing remarks but I do not need to decide that. Section 17(3) requires the Court to consider "the proportion of the original sentence" that will have been served. Mr Sahu Khan's submission requires the Court first to accept that they were separate sentences. That cannot be a correct approach. The "original sentence" is one of three years imprisonment and the court may only consider the length of time served as a proportion of that figure.

[12] With a remission of one third, the Court is left with two years from 17 May 2006. By the time of the sitting in November, the applicant will have served approximately six months depending on when in the sitting the case is heard. Counsel suggests that the Court may also take into account the possibility that the applicant may become eligible for some form of extra-mural sentence in order to assess the likely release date, citing *Marotta and Others v The Queen*, [1999] 73ALJR 265. I have no evidence of how such release may be considered and I do not consider I can, or should, take such a possibility into account.

[13] Taking all these issues into account and also bearing in mind the special circumstances of the case I have referred to above and other aspects of the appellant's personal circumstances, I do not consider this is a case where bail should be granted and the application is refused.

[14] I have referred to the fact that additional grounds of fact and law are included in the notice of appeal. Clearly it is in the interests of justice in a case of this nature involving technical and medical evidence that they should also be placed before

the Court. Counsel for the respondent, properly, raises no objection. I give leave to appeal on all the grounds in the notice of appeal which rely on mixed law and fact or on fact alone.

[15] Finally it is imperative that this appeal be heard in the November sitting of the Court. The preparation of the record is to proceed with sufficient expedition to ensure this is achieved.

FIJI COURT OF APPEAL

[GORDON WARD]
President
FIJI COURT OF APPEAL

16TH JUNE, 2006