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

CRIMINAL APPEAL NO. AAU0032 OF 2006S
(High Court Criminal Action No. 15 of 2005S)

BETWEEN:

SACHIDA NAND MUDALIAR

Appellant

AND:

THE STATE

Respondent

Coram: Gallen, JA
Ellis, JA
Scott, JA

Hearing: Tuesday, 18 July 2006, Suva

Counsel: M Raza and S D Sahu Khan for the Appellant
R Gibson and H Tabete for the Respondent

Date of Judgment: Friday, 28 July 2006, Suva

JUDGMENT OF THE COURT

Introduction

[1] The appellant stands convicted of manslaughter. He is appealing against his conviction and sentence and has applied for bail pending disposal of the appeal. This was refused by the President and the appellant has requested that the application be heard by a full bench of this Court.

[2] The charge of manslaughter was framed in these words:

> ***"Sachida Nand Mudaliar s/o Anamaliai Mudaliar is charged with the following offence:***
>
> ***Statement of Office***
>
> ***Manslaughter: Contrary to sections 198 and 201 of the Penal Code, Cap. 17.***
>
> ***Particulars of Office***
>
> ***Sachida Nand Mudaliar s/o Anamaliai Mudaliar between the 21st day of March 2003, and the 22nd day of March 2003, at Suva in the Central Division, unlawfully caused the death of Poonam Pritika Kumar d/o Arun Kumar."***

The prosecution alleged that the appellant committed two unlawful acts, namely an abortion and a grossly negligent procedure on the deceased.

[3] A brief summary of the facts is that the deceased became pregnant to her boyfriend Abhikesh Kumar. She wished to end the pregnancy and consulted a doctor who estimated that she was 20 weeks into pregnancy and referred her to the appellant a gynaecologist. He says she consulted him on 19 March 2003 and again on 21 March 2003. He claims she had already aborted the fetus and he then proceed to clean out her uterus. The prosecution claimed he performed an abortion and in so doing severely damaged the cervix and uterus causing massive blood loss and air embolisms.

After the procedure the appellant asked Abhikesh to take her to his lodgings but Abhikesh said this was impossible. As a result she was left alone in the surgery over night. She was found dead in the morning.

[4] The evidence adduced by the prosecution included that of Abhikesh Kumar, the doctor first consulted by the deceased the pathologist and expert doctors. The appellant chose to give a very full unsworn statement from the dock. Following the Judge's summing up the assessors retired and in due course

gave their opinion that the appellant was guilty of manslaughter. The Judge agreed and convicted the appellant. He then sentenced the appellant to three years imprisonment by imposing a term of two years for the element of gross negligence plus one year for this element of abortion.

[5] The appellant was on bail until trial, sentenced on 17 March 2006 and his appeal will be heard in the November sittings of this Court.

[6] Following conviction there is no longer a presumption in favour of bail: Bail Act 2002 s.3(4)(b). In this case the Court must consider in particular the likelihood of success in the appeal, the likely time before the appeal hearing, and the proportion of the original sentence which will have been served by the applicant when the appeal is heard; s.17(3) of the Act. In this case no issue is taken that the applicant would not answer bail if granted, or that there is any danger of re-offending on bail. We have considered the application afresh by way of rehearing.

[7] The appellant's grounds of appeal addressed the three requirements of s.17 we have recorded. As to the likelihood of success he submitted:

"(i) The charge was defective and/or bad in law. It was bad for duplicity. It was both actual and latent by reason of ambiguity.

(ii) The Learned Trial Judge erred when he refused the application by the Defence Counsel for the State to elect the basis upon which the prosecution was to proceed against the applicant.

(iii) The Learned Trial Judge misdirected himself and/or failed to adequately and/or properly direct himself and/or the assessors on the issue of corroboration.

(iv) The Learned Trial Judge erred when he withdrew from himself and the assessors and/or misdirected himself on the issues in section 234 of the Penal Code. The submissions on this ground include and cover part of the ground that the Learned Triad Judge failed or did not adequately and/or properly and/or misdirected himself and/or the assessors in consideration of the defence case.

(v) The Learned Trial Judge erred in not directing himself and/or the assessors and/or misdirected himself and/or the assessors on the elements of the offence of abortion.

(vi) The 18-day delay in summing up after the close of the final addresses together with the other issues raised in this application rendered the verdict unsafe, unsatisfactory and/or dangerous.

(vii) That the sentence was harsh and excessive and in any event unlawful."

[8] The first two submissions can be dealt with together. They arise from the fact that the charge in fact contained two primary allegations based on the separate allegations of performing an abortion, and of gross negligence in the procedure. The significance of this is plain from the Judge's approach to sentence we have quoted. As to the third submissions it is correct that the witness Abhikesh could be considered an accomplice, and he had been granted State immunity. The Judge was therefore bound to warn the assessors to be careful in considering his evidence. The appellant criticised the Judge's warning. As to the fourth submission counsel emphasised that the defence was that the appellant had not performed an abortion but a clean up operation and so was entitled to the statutory protection accorded those who

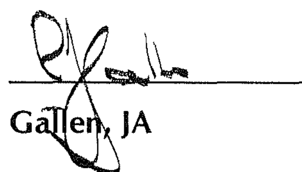
perform a surgical operation for with reasonable skill and care for the benefit of the patient. Counsel submitted that the Judge had not considered this defence and expressly took away any consideration of it from its assessors and himself. The fifth submission recasts the fourth. The sixth submission is based on the fact that there was a delay of 18 days between the end of the evidence and addresses to summing up. We were told the reasons for the delay. The seventh submission is that in the absence of findings by the assessors on the separate unlawful acts relied upon by the prosecution it was wrong to pass what is stated to be a cumulative sentence. It was submitted that where the assessors' opinion on each allegation was not given separately it was wrong to impose a cumulative sentence.

[9] 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 these are arguable points of substance to be determined on appeal, but on the evidence the appellant faces a strong prosecution case.

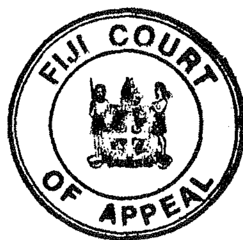
[10] The other two considerations under s.17 of the bail Act are in this case resolved by recording that the President has already directed that the appeal be heard in November and counsel agree there seems to be nothing that will prevent that. As a result the appellant will have served 8 months of his 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 his is to compare the sentence served with the total sentence.

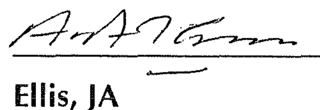
[11] Directing ourselves collectively to the three considerations required by s.17 and bearing in mind the accepted view that some extraordinary circumstance should be shown for bail to be granted a convicted applicant, we consider

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.

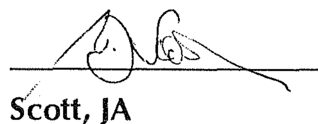


Gallen, JA





Ellis, JA



Scott, JA

Solicitors:

Messrs Mehboob Raza and Associates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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