



sentence of 10 years imprisonment. The maximum penalty for the first offence is life imprisonment.

- [2] The Appellant appealed (by way of handwritten letter dated 5 March 2008 and a Petition of Appeal dated 25 March 2008 together with a typed letter of the same date received on 26 March 2008) against his conviction arguing 11 grounds of appeal against his conviction and three grounds of appeal against the sentence imposed. The Application is, therefore, within the 30 day time-limit and does not require leave to extend the time within which the notice of appeal can be filed.
- [3] By application dated 1 April 2008 (received on the same date) he also seeks bail pending his appeal.

#### **THE HEARING OF THE GROUNDS FOR LEAVE**

- [4] Mr Murti appeared before me on 12 May 2008 at 9.30am. Mr Elliott appeared on behalf of the Office for the Director of Public Prosecutions.
- [5] The hearing then proceeded over two "half days", by way of the Court reading out to Mr Murti each ground of appeal and asking Mr Murti whether he wished to say anything in support of that particular ground and then asking the DPP to respond.

#### **The 11 Grounds in support of an appeal against Conviction**

- [6] **The First Ground against Conviction reads:**  
*"That there is no direct evidence to prove that I was one of the people who committed the crime on both counts, except my confession which was unlawfully obtained from me by Police during investigation (60 hours of police custody and assault)."*
- [7] Mr Murti acknowledged that the Police did arrange for his wife to be present during the interview. He alleged that whilst she was present the Police assaulted him in front of his wife and refused to then take him to hospital.

- [8] **The Second Ground against Conviction reads:**  
*"That the learned trial judge **erred in law and fact** in failing to properly direct himself as to the standard of proof required to safely secure the convictions of the defendant."*
- [9] Mr Murti alleged that a lawyer came and saw an injury to his face but that the lawyer had subsequently passed away. He did agree that the Police who came to arrest him allowed him to have shower and dinner before taking him to the station from where they also called his wife to be present for the interview.
- [10] **The Third Ground against Conviction reads:**  
*"That in fact the only evidence in this case is the confession which was unlawfully obtained by Police during investigation. However it is respectfully submitted that the learned trial judge **erred in law and fact** contravening the requirement of Section 2 of the criminal evidence Act 1898. In this regard, it is submitted that the learned trial judge **erred in law and fact** in failing to immediately summon me as defence witness after the prosecution closed its case as required under the aforementioned provision of then criminal evidence Act. "*
- [11] Mr Murti seemed to suggest that it was the Trial Judge who did not allow him to call a witness from the insurance company. It was pointed out by this Court to Mr Murti that it was up to him to arrange his own case and further that it was clear from the record that the Trial Judge went through the options as to how he could give evidence.
- [12] **The Fourth Ground against Conviction reads:**  
*"That although the learned trial judge was correct in asking me whether I do have any objection when the confession is being tendered as evidence by the Prosecution. However it is submitted that he (learned trial judge) **erred in law and in fact** in failing to ask me at the proper time (that is when the Prosecution starts to lead its evidence) whether do I have any objection when the confession is being tendered as evidence therefore."*
- [13] Mr Murti objected whether the alleged confession should have been admitted into evidence. It was explained to Mr Murti that this was after the Trial Judge had held the "Trial within the Trial" and had been satisfied as per his ruling in the *voir dire*.

- [14] **The Fifth Ground against Conviction reads:**  
*"That the learned trial judge **erred in law and in fact** in failing to properly consider or place (give) credit to my (defence) witness, who witnesses that I was assaulted by Police at the Police Station during interrogation. This witness (defence witness) was not discredited by the Prosecution neither disbelieved by the court."*
- [15] Mr Murti's objection was that in his view the Trial Judge did not give enough weight to the evidence from Mr Murti's wife.
- [16] **The Sixth Ground against Conviction reads:**  
*"That the learned trial judge **erred in law and in fact** in asking the assessors to leave the Court at the commencement of the trial within a trial without my consent. The honourable court is humbly referred to the authority in R.V. Anderson (1929) 21 Cr.App.R.138."*
- [17] **This ground was withdrawn** after it was explained to Mr Murti that it was in his favour that the Assessors were asked to leave the Court so that they were not influenced until the Trial Judge had held the *voir dire* and made a Ruling.
- [18] **The Seventh Ground against Conviction reads:**  
*"That the learned trial court (judge **erred in law and in fact** in breaching my rights to have the case determined within a reasonable time as required under section 29(3) of the Constitution. As far as I am concerned reasonable time has been defined by one of the former Chief Justice Tuivaga's practice directions to mean 12 (twelve) months. This can also be implied from by Section 202(7) of the Criminal Procedure Code (CPC)."*
- [19] Mr Murti alleged that he was ready for trial but he was not informed by the Court and waited over three years for his trial.
- [20] **The Eighth Ground against Conviction reads:**  
*"That the learned trial judge **erred in law and in fact** in forcing me to defend myself."*
- [21] Mr Murti alleged that he was "forced on" without a lawyer.
- [22] **The Ninth Ground against Conviction reads:**  
*"That the learned trial judge **erred in law and in fact** in asking the prosecution to read the PC's [sic] before the trial, during the bail application (which has been*

already dealt) and has nothing to do with this case – was influenced and that the trial judge was motivated of just to convict without fair considering from both parties – that the confession was taken from a person name Faiyaz Ali who a suspect also and later on became state witness without proper immunity by the court. (Reference given for both fact) PCP Cap 21 Ed 1978 Section 276 (a) and Chap 12 (30 The Prevention and Detention and investigation of crime – Page 1261 (12-36) 2003. Edition Archibold [sic].”

- [23] Mr Murti alleged that because Judge Goundar ruled on the bail application (where he had to consider Mr Murti’s prior record) that this made him biased when he was also the Trial judge.
- [24] **The Tenth Ground against Conviction reads:**  
*“That the learned trial judge did **erred [sic] in law and in fact** by saying that I planned the robbery (see sentence ruling) Paragraph 9 – which is against the charge (The indictment section 122, Chap 1 39<sup>th</sup> ed achibold [sic].”*
- [25] Mr Murti submitted that it was not proven that he planned the robbery. It was noted and this was a matter to be considered in his appeal against the Sentence imposed.
- [26] **The Eleventh Ground against Conviction reads:**  
*“That the learned trial judge **erred in law and in fact** in breaching and violating my rights to a fair trial in light of the above mentioned grounds.”*
- [27] Mr Murti submitted that he was not given a fair trial in view of the above grounds.
- [28] **The Twelfth Ground against Conviction (was raised orally on 12 May 2008) reads:**  
*“That Learned Judge was in the DPP’s Office before he became a judge.”*
- [29] Mr Murti submitted that the Trial Judge: “he did not give a favour, not even once to the defence”.
- [30] **The Thirteenth Ground against Conviction reads:**  
*“That Learned Judge erred in law in failing to give and [sic] adequate direction regarding the alternative verdict of robbery with violence or cause unlawful use of motor vehicle.””*
- [31] Mr Murti submitted that the Trial Judge failed to give a proper direction because the prosecution evidence was only half of the confession.

- [32] **The Fourteenth Ground against Conviction reads:**  
*“That Learned Trial Judge erred in law in failing to proceed with caution where the witness materials evidence where there was no proper identification parade held to identify the Appellant.”*
- [33] Mr Murti submitted that there should have been a caution to the jury that there was no Identification parade. Even though it was explained to him that this was not a case where an Identification parade was relevant (as he was not convicted on any identification evidence by the victim), Mr Murti still wished to maintain this ground.
- [34] **The Fifteenth Ground against Conviction reads:**  
*“That the Learned Judge erred in law when he failed to give proper and sufficient direction on the issues of lies.”*
- [35] Mr Murti submitted that he remembered telling the Learned Trial Judge to note part of the evidence regarding the alleged lies of the Police.
- [36] **The Sixteenth Ground against Conviction reads:**  
*“That the Learned Judge erred in law when he directed that each Appellant assisted or aided and abets another to commit the offence without any evidence before him or the assessors heard any evidence.”*
- [37] Mr Murti submitted that there was no evidence of proof that he took part in the Robbery.

#### **THE SUBMISSIONS BY THE DPP IN REPLY**

- [38] Mr Elliott began by noting that the issue of whether or not the Appellant used to work for the Complainant, was dealt with at paragraph 9, page 3 of the sentencing remarks by His Lordship, Justice Goundar.
- [39] In relation to his response to the actual Grounds raised by the Appellant, Mr Elliott’s submissions have been summarised below.
- [40] **Grounds 1 and 3** – Mr Elliott submitted that the Appellant was convicted because of the role he played and that when the Appellant said that there was no direct evidence of his involvement, “he forgets that he has been convicted because of the

role he played – yes, he was not inside, but he was in the car, he was part of the joint criminal enterprise.”

[41] As for the reliability of the Appellant’s confession, Mr Elliott noted that it was subject to a *voir dire* and that His Lordship was satisfied to the requisite standard, beyond a reasonable doubt. Also, His Lordship’s sentencing remarks concerning the Appellant “having inside information about the setting of the complainant’s house and existing security measures”, ( see paragraph 5), where it is clear that:


- (a) The Appellant had knowledge;
- (b) The Appellant’s sudden termination of his employment which goes in hand with his later confession;
- (c) Three assessors convicted him.

[42] So in terms of Grounds 1 and 3, there were nine witnesses for the Prosecution on the *voir dire* and for the Appellant, the Appellant gave unsworn evidence, as well as his wife. The Appellant agreed that the Police allowed him to shower and have dinner prior to taking him to the station and that when he asked for his wife to be present during the questioning this was agreed to – to then say that the Police then assaulted him in front of his wife just does not follow.

[43] The Appellant is an intelligent man as he demonstrated when appearing before Justice Goundar and before this Court. If the Court examines the top of page 8, paragraph 34, of the *voir dire* ruling where His Lordship dealt with the issue of delay – the Appellant was arrested late at night, he was allowed to shower and have dinner prior to departure, it was a long trip, he was given time to sleep prior to interview. The Court’s attention was drawn to paragraph 25 and following. Further, Justice Goundar was an experienced lawyer – he was satisfied beyond a reasonable doubt that there was no breach of the voluntariness rule.

- [44] If one checks the charge sheet all was in order. The Appellant understood the caution, it was a demonstrably reliable confession. If the Court looks at the following Questions and Answers: Q27, Q29, Q39 (in fact the last is interesting where he talks about the dog which ties in with paragraph 6 of His Lordship's sentencing judgment when he talks of the dogs being locked up). The Appellant's confession fits in with what happened. The Court was also referred to Questions and Answers: 53, 56 and 65. Indeed, Mr Elliott noted, it was the Appellant who took them through the abandoned vehicle. So, one must ask precisely what was his challenge?
- [45] **Ground 2** - Mr Elliott drew the Court's attention to paragraph 39 of the *voir dire* ruling - "I am satisfied beyond reasonable doubt".
- [46] **Grounds 3** – Mr Elliott submitted one further point in relation to Ground 3 and the alleged failure by his Lordship to immediately call the Appellant. He noted that His Lordship had told the Appellant on 27 February 2008 that he had three options in relation to giving evidence, it was not then for the trial judge to summon him. Indeed, Mr Elliott submitted that he would go so far to put to the Court that it was an astounding proposition for the Appellant to now try and say that he did not know of his rights at the trial.
- [47] **Ground 4** – Mr Elliott submitted that a *voir dire* was held, a ruling was given, the Appellant put his material before the assessors and he was convicted.
- [48] **Ground 5** – Mr Elliott submitted the Appellant's wife was his witness. His Lordship was disbelieving of her in the *voir dire* as were the three assessors in the trial proper. Mr Elliott took the Court to paragraph 39 of the *voir dire* ruling where His Lordship on three occasions mentioned the words "I am satisfied beyond reasonable doubt". Not only that, His Lordship did make positive findings – the challenges which the Appellant was now making was not with anything of substance.



- [49] **Ground 6** – Mr Elliott noted that this had now been withdrawn.
- [50] **Ground 7** – Mr Elliott noted the thrust of the Ground seemed to be that 3 ½ years between the offence and trial was too long. According to Mr Murti he was in custody for 14 days in November 2004 then on bail until 5 December 2007 and then spent approximately 80-90 days on remand until the trial in February 2008. So it was the submissions of the DPP that in relation to Ground 7 he really has to articulate why the delay was biased. He needs to show how this disadvantaged him.
- [51] Mr Elliott checked the DPP file between the adjournments and noted that the signing sheet produced by the Appellant (on 12 May 2007) from signing at his local police station were in 2005 and <sup>only</sup> 2006 but did not go through till December 2007.  And apart from his co-accused breaching bail, there was clearly a delay in the trial because Mr Murti also wasn't reporting to Court.
- [52] **Ground 8** – Mr Elliott submitted that as to whether he should have been given the right to Counsel, he noted that he had a lawyer in the lower court and he has to show how he had been disadvantaged.
- [53] **Ground 9** – Mr Elliott submitted that the issue of the Trial Judge seeing the Appellant's previous convictions on the question of bail, obviously, it was not ideal but that material had to be considered by the Trial judge where the Appellant was seeking bail. Judges are expected to put such matters out of their mind as irrelevant material when it came to the trial. But also, the Trial Judge did not convict him, it was the Assessors and the Trial Judge simply endorsed their verdicts.
- [54] **Ground 10** – Mr Elliott noted that this was a sentencing ground.

- [55] **Ground 11** – Mr Elliott submitted that this ground added nothing of substance to the Appeal.
- [56] **Ground 12** – Mr Elliott submitted that this ground added nothing of substance to the Appeal. It was an “offhand” ground raised from the Bar Table that day. He did not want to respond and choose not to dignify it by a response.
- [57] **Ground 13** – Mr Elliott submitted that on this ground the Court was referred to “Disclosure 1<sup>st</sup> phase Q3 – Q10”. Q26 – Q57 demonstrated that he had knowledge.
- [58] **Ground 14** – Mr Elliott submitted that this ground added nothing of substance to the Appeal. It was not relevant and how on earth could there be an identification parade when the victim had nothing to identify?
- [59] **Ground 15** – Mr Elliott submitted that he did not understand this ground: it was either “guilty” or “not guilty”.
- [60] **Ground 16** – Mr Elliott submitted that it was a typical case. The Appellant said that he did not drive car and the assessors did not believe him.

### The Three Grounds in support of an appeal against Sentence

- [61] **The First Ground against Sentence reads:**  
*“That the sentence is manifestly harsh and excessive.”*
- [62] **The Second Ground against Sentence reads:**  
*“That the sentence is wrong in principle”*
- [63] **The Third Ground against Sentence reads:**  
*“That the sentence is wrong and unlawful.”*
- [64] Mr Murti added the following to these grounds:  
(a) on what evidence did the Prosecution convict him;

- (b) Faiyaz Ali admitted his involvement and nothing has happened to him while Mr Murti has been given 10 years imprisonment;
- (c) The real person "is out there not charged";
- (d) Weight was not given to the parts played;
- (e) Could he have a suspended sentence so he can get back to running his business and supporting his family?

[65] In summary, Mr Elliott for the DPP submitted that the sentencing judgment is clear, the role which the Trial Judge found that he played and that he has a long list of previous convictions. That the conditions of prisons in Fiji compared with the United Kingdom had been taken into account by the Trial Judge hence a sentence of 10 years instead of 13-16 years.

#### **THE SUBMISSIONS ON BAIL PENDING THE APPEAL**

[66] Mr Murti indicated that he was also seeking bail pending the hearing of his appeal to the Court of Appeal. He submitted the following reasons for seeking bail:

- 1. "There is insufficient evidence";**
- 2. "Need to pay a lawyer for defence on this case";**
- 3. "Also need a proper space or environment during the proceedings of the case; and**
- 4. "Also my young family needs me – especially my children."**

[67] Mr Murti added to this in Court:

- (a) That he had been running a business and a very good business prior to being imprisoned;
- (b) That he had gained a good reputation;
- (c) That if he was granted bail he could then assist his family who cannot carry on the business without him and that this is the one chance he has got to change;
- (d) That the Court should consider that a person was trying to change and if not it would jeopardize his life;
- (e) His family needed him.

[68] The parties were then advised that the Court would reserve its decision and judgment would be delivered on notice.

### REFUSAL OF LEAVE ON CONVICTION

[69] **Leave is refused on all Grounds** (which all appear to be mixed grounds of fact and law). The Court entirely agrees with the submissions made by Mr Elliott for the DPP (as set out above) and sees no point in setting them out again here.

[70] If, however, it was considered that any of **the 16 Grounds** involved purely a question of law, the Court is of the view that the grounds are also vexatious or frivolous and thus dismissed pursuant to **Section 35(2) Court of Appeal Act, Cap.12, 1978, as amended by the Court of Appeal (Amendment) Act 1998.**

[71] The Court needs to note, however, that it spent two half days on this application for leave to appeal during which it was at pains to try and explain to the Appellant just because he was found not to have gone into the victim's premises and, instead, drove the car, does not mean that he was not as liable. Indeed, he was part of the joint criminal enterprise.


[72] Further, the Court also attempted to explain on a number of occasions to the Appellant that there was no need for an identification parade as this was not the basis upon which he had been convicted. Instead, Mr Ali had confessed to the Police what had happened with that confession reinforced by Mr Murti's own confession to the Police (after a shower, dinner and a sleep at which his wife was present) and which the Trial Judge in the *voir dire* as well as the assessors in the trial proper had accepted as voluntarily given and thus convicted him beyond a reasonable doubt.

[77] The Court wishes to acknowledge the assistance given by Mr Elliott of the DPP who displayed the utmost fairness in his presentation.

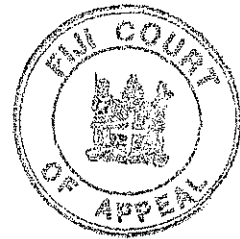
## ORDERS

[78] This Court makes the following Orders:

1. Leave to appeal is refused against Conviction on all Grounds.
2. In the alternative, if any Ground against Conviction was considered to involve purely a question of law, the Court is of the view that the grounds are also vexatious or frivolous and thus dismissed.
3. The notice of appeal in relation to sentencing is dismissed as being frivolous.
4. In view of the above, there is no need to consider the application for Bail.



The Hon. Thomas V. Hickie  
Judge of Appeal



Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions for Respondent