

IN THE COURT OF APPEAL, FIJI ISLANDS

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: AAU0035 OF 2007

BETWEEN:

DIP CHAND

Appellant

AND:

THE STATE

Respondent

Counsel: Ms. B. Malimali & Ms. T. Leweni for the Appellant
Mr. A. Elliot for the State

Date of Hearing: Friday 22nd August, 2008

Date of Ruling: Friday 19th September, 2008

RULING

- [1] Dip Chand (the appellant) was convicted in the Lautoka High Court on three counts of murder. On each count he was sentenced to life imprisonment with an overall recommendation that he serve 19 years in prison. The evidence in the trial depended on his confession to the police and circumstantial evidence which included DNA evidence.
- [2] The initial grounds of appeal were filed by the appellant in person.

- [3] On 2 May 2007, the appellant appeared before Ward P. for hearing of leave to appeal. Ward P. observed that the grounds of appeal were inadequate and because the appellant did not speak, read or understand English adequately to deal with his appeal, his Lordship recommended that the appellant be represented by Legal Aid.
- [4] On 28 July 2008, Legal Aid appeared as counsel for the appellant. Leave was granted to file amended grounds of appeal. Amended grounds were filed and they are:
1. That the learned trial Judge erred in fact and in law when his Lordship did not direct himself on the consequences and effect of the medical report of the appellant, in his judgment on the trial within trial dated 10th May 2006.
 2. That the learned trial Judge erred in law when his Lordship did not direct the assessors on the law relating to the absence of a body/bodies and the questions that they must ask themselves when presented with a case such as this.
 3. That the learned trial Judge erred in law and in fact when his Lordship did not direct the assessors on what weight they should give to the Appellant's confession in light of the allegations of violence, threats and intimidation by the police during, before and after the interview of the appellant.
 4. That the learned trial Judge erred in law and in fact when his Lordship's directions to the assessors during the summing up did not effectively canvas the defence case thereby encumbering the appellant's right to a fair trial pursuant to s.29(1) of the Constitution.
 5. That the learned trial Judge erred in law and in fact when he failed in his summing up to direct the assessors on each of the counts pertaining to the deceased.
- [5] On 22 August 2008, the application for leave to appeal was heard.
- [6] The State opposes leave. Counsel for State submitted the grounds are so tenuous that they should be dismissed. The State applied for a dismissal of appeal under Section 35(2) of the Court of Appeal Act saying the appeal is unmeritorious.

[7] I deal with the State's application first.

Section 35(2) provides:

If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal.

[8] The right of appeal for a person convicted on a trial held before the High Court is governed by Section 21 (1) of the Court of Appeal Act. Leave is not required if the grounds involve a question of law alone. However, leave is required if the grounds involve mixed questions of law and fact, or fact alone.

[9] A further limitation on the right of appeal to the Court of Appeal is placed by section 35(2).

[10] It is settled law that any right of appeal to the Court of Appeal is statutory. The Constitution mandates the Parliament to prescribe the right of appeal to the Court of Appeal (see, s. 121(1)). However, the statute prescribing such right must satisfy the constitutional right of appeal. The Constitution, in particular, Section 28(l) gives every person charged with an offence, if found guilty, a right of appeal to a higher court.

[11] The leave to appeal procedure provided by the Court of Appeal Act is not a unique procedure. Most commonwealth jurisdictions have similar procedures.

[12] A leave procedure prescribed by a statute will survive a constitutional challenge if it ensures that the higher court will be able to make an informed reassessment of the issues raised (*S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC); 1996 (1) SACR 105 (CC)). The case of *Rens* considered the constitutionality of the leave to appeal procedure, in respect of high court trials, provided for in section 316

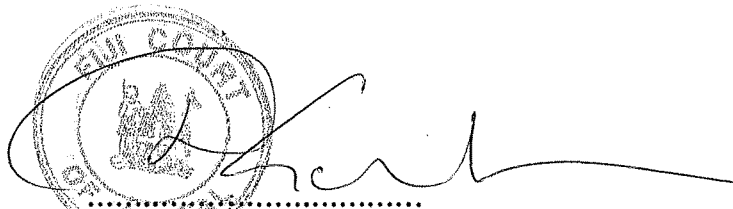
read with section 315(4) of the Supreme Court Act 59 of 1959 (South Africa). The procedure survived a constitutional challenge in the Constitutional Court.

- [13] The effect of a criminal conviction on the liberty and dignity of the individual makes it imperative that adequate procedural checks and balances limit wrong convictions to the barest minimum. The right of appeal is accordingly, of considerable importance in the achievement of a fair criminal justice system.
- [14] In that regard, the power to dismiss an appeal under Section 35 (2) should be used sparingly, particularly, if the appellant is indigent and illiterate and was convicted for serious crime. No matter how dreadful a crime is, the Constitution guarantees every charged person a right of appeal against conviction to a higher court.
- [15] The right of appeal as prescribed by Parliament must be a meaningful right. A meaningful right of appeal is achieved by a procedure that avoids clogging appeal rolls with frivolous and unmeritorious appeals. This is particularly so in our jurisdiction, where majority of appeals are filed by prisoners without any legal assistance. I am not suggesting that all appeals filed by the prisoners are frivolous, but experience has shown that some appeals are frivolous and unmeritorious, thus, clogging appeal rolls and denying resources to appeals that are meritorious.
- [16] The leave procedure allows the Court to filter meritorious appeals from unmeritorious appeals so that meritorious appeals are allocated resources to achieve a full and meaningful hearing by a higher court. Leave procedure, in my view, is not intended to limit the constitutional right of appeal. To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal.

[17] After considering the grounds of appeal and the submissions of the parties, I find the grounds are not frivolous and unmeritorious to warrant a dismissal of the appeal under section 35(2) of the Court of Appeal Act.. I find the grounds of appeal are arguable.

[18] I make the following orders:

- (i) The State's application to dismiss the appeal under section 35(2) of the Court of Appeal is refused.
- (ii) Leave is granted to the appellant to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act.
- (iii) The case is to be listed for call over next year.



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Daniel Goundar
JUDGE OF APPEAL

At Suva
Friday 19th September, 2008

Solicitors

Legal Aid Commission, Govt. Buildings, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the State