Court Copy

IN THE COURT OF APPEAL

SUVA, FIJI ISLANDS

CRIMINAL APPEAL NO. AAU0018/2009
(HCC NO.HAC 005/2007S)

BETWEEN	:	**URAIA TIRAI**
		(APPELLANT)
AND	:	**THE STATE**
		(RESPONDENT)
COUNSEL	:	**A.K.SINGH (FOR THE APPELLANT)**
	:	**P. K. BULAMAINAIVALU (FOR THE RESPONDENT)**
DATES OF HEARINGS AND SUBMISSIONS	:	**3rd, 6th, 7th July 2009**
DATE OF RULING	:	**17th July 2009**

RULING ON APPLICATION FOR BAIL – PENDING APPEAL

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1. Applications for bail pending appeal against conviction or sentence come frequently before this Court so that the legal principles governing them are well settled. Each case however has to be decided on its own facts and this, no doubt, is the reason why the Appellant has made his application for bail pending appeal against his conviction on the 28th of November 2008 in the Magistrates Court in its extended jurisdiction on a charge of being in unlawful possession of illicit drugs contrary to Section 5(a) of the Illicit Drugs Control Act, 2004.

2. On the 24th of July 2008, the Appellant appeared in the Magistrates Court of Suva on a charge of without lawful authority being possessed of 617.6 grams of ***Cannabis Sativa***, an illicit drug.

3. In a Judgment delivered on the 28th of November 2008, the learned Magistrate found the Appellant guilty and sentenced him to two (2) years imprisonment.

   He now applies to this Court for bail pending his appeal to the Full Court which has been fixed for hearing in the mid-September session of the Court.

4. The following facts were admitted by the Appellant at his trial:

   1) He was at his house when the police arrived on 3rd of March 2006 around noon.
   2) Two police entered his house and another three were outside.
   3) There were some carpenters working for him at that time.
   4) The police took the Appellant away from his house on that day.

   The issues which the Court had to determine on the evidence were whether the alleged illicit drugs were found in the appellant's possession and whether he had knowledge of this.

5. **THE LAW**

Section 5(a) of the Illicit Drugs Control Act, 2004 states:

"Any person who without lawful authority –

(a) Acquires supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or.....

commits an offence and is liable on conviction to a fine not exceeding $1,000,000 or imprisonment for life or both".

The word 'possession' is defined in **Section 4** of the **Penal Code** as follows;

"possession" –

(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."

Cannabis Sativa is listed under **Part 8 of Schedule 1** of the Illicit Drugs Control Act 2004 as an illicit drug.

6. Before dealing with this application it is desirable to comment on a statement of the law on confessions which the learned Magistrate makes at page 3 of his judgment. No submissions were made to me on this because the Appellant did not make any confession of guilt to the police when he was interviewed. However, so that there can be no doubt about the law, because of the number of times in practice when the admissibility of confessions comes before our Courts. I set it out briefly now.

7. The learned Magistrate said:"It is trite law that confession is best evidence and it is possible to have conviction based on confession alone i.e. confession if proved to be made and true alone can ground a conviction. The accused has admitted when he was interviewed under caution that encounter with the police at the material time and place.

8. However, he denied that he pushed out the parcel of dried leaves through the window and argued that his fence had broken down and people came through the fence often and it could even belong to the carpenters that were working there at the time or his neighbors that were not in good terms with him".

9. The learned Magistrate rejected this evidence and convicted the Appellant. However, it is his statement of the law on confessions that calls for comment and correction.

The learned Magistrate relied on two cases on the admissibility of confessions. These were R v Sykes (1931) Crim. App R 233 and Alowesi N. Rasaciva v The State Crim. App No. 48 /1997.

10. Neither case was cited to him in argument but of more importance in the first place is that the reference to R v Sykes is wrong. There is no such case mentioned in Volume 31 of the English Criminal Appeal Reports and I am at a loss to understand the source from which the Magistrate obtained this authority.

11. Furthermore in the second case of Rasaciva which was an appeal to the High Court from the Taveuni Magistrate's Court, SCOTT, J said in the second-last paragraph of his judgment delivered on the 29th October 1997 :"It has been said that a confession ....well proved is the best evidence that can be produced (R v Baldry (1852) 2 Den 430, 446; 169 ER 568, 574)".

There is a wealth of difference between that phrase and the statement by the Magistrate that : "It is trite law that confession is best evidence".

12. **Regina v. William Baldry** was an appeal to the English Court of Crown Cases Reserved which came before a court consisting of Lord Campbell, C.J., Pollock, C.B., Parke, B., Erle, J. and Williams, J. and concerned a confession to murder made by the Appellant to a Police Constable.

13. In ruling that the confession had been properly admitted the Court approved and followed an earlier case of **Regina v. Warringham** in which Parke, B. held that in order to render a confession by a prisoner admissible the prosecution must show affirmatively, to the satisfaction of the Judge, that it has not been made under the influence of an improper inducement and that if this appeared doubtful on the evidence the confession ought to be rejected. There is no doubt that the phrase "well proved" means: "made voluntarily". This has been the law for nearly two centuries if not longer and it is surprising that the learned Magistrate should have misstated it.

14. I pass now to the present application.

The Appellant has filed nine (9) grounds of appeal. The first two of them allege that the learned Magistrate erred in law when he held that there was a reasonable inference that the Appellant knew that he had cannabis in his possession and physical control over it.

15. The next ground is that the Learned Magistrate erred in law when he held that the Appellant was the owner of the property.

16. Ground 4 alleges that the Learned Magistrate erred when he failed to hold that the appellant had no knowledge that the plastic bag contained illicit drugs.

17. Ground 5 claims that the Learned Magistrate erred when he failed to hold that there was inconsistent evidence by the prosecution witnesses, when one said that the Appellant threw the bag from the right window and the other from the back window.

18. Ground 6 claims that the Learned Magistrate erred when he held that the Appellant had confessed the offence when in fact there was no confession.

19. Ground 7 is virtually a repetition of Ground 1.

Ground 8 states that the Learned Magistrate erred in law regarding the mandatory requirements of Section 155(1) of the Criminal Procedure Code Cap 21.

20. Ground 9 claims that the Learned Magistrate erred in the principle of sentencing in that the sentence imposed was excessive.

21. Even at this stage I can hold that there is no substance in Ground 6 because it is clear from the record of the Magistrate's Court and from the judgment that the Learned Magistrate did not hold that the Appellant had made any confession.

22. As to Ground 8 that the Learned Magistrate erred regarding the mandatory requirements of Section 155(1) of the Criminal Procedure Code Cap 21, my own view is that he did not.

23. Sub-Section 1 states that every judgment shall.....be written by the Presiding Officer of the Court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the Presiding Officer in open court at the time of pronouncing it.

24. The **"bare bones"** of Sub-Section 1 were fleshed out by Grant, Ag.C.J. in the penultimate paragraph on page 4 of his judgment in Chandar Pal v. Reginam [1974] 20 FLR 1 when dealing with Section 154 (1) of the Criminal Procedure Code the equivalent of which is our present Section 155. His Lordship said this:

> "As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts or rejects, and should proceed to make his findings of fact, apply the appropriate law to those facts, and give his reasoned decision; bearing in mind throughout the provision of Section 154(1) of the Criminal Procedure Code".

25. For my part I fail to see how the Learned Magistrate in this case did not follow the dictum of Grant Ag.C.J. but the other members of the Court who I expect to constitute with me the Bench hearing this Appeal may have a different view. I therefore say nothing more at this stage.

26. It is important for the Court to recognize on an application of this nature that it would be wrong to canvass in any other than a superficial way the merits or de-merits of the grounds of appeal. That is the task for the Full Court on the hearing of the appeal. It seems to me, with respect, that Counsel for the Appellant overlooks this in many of his submissions on the present application.

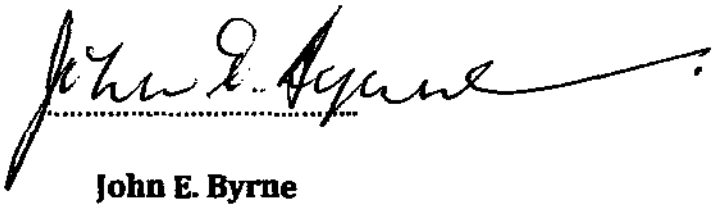
27. It is of course relevant to make submissions on the likelihood of success on the appeal but in my opinion most of the grounds are such that all I can say is, as I said in paragraph 37 in my ruling in Simon John Macartney v. The State CRIM. APP. No. AAU103 of 2008 of 12th December 2008. that: **"I am not prepared to go so far as to say that the appeal has a high likelihood of success but I likewise do not consider that it lacks even the faintest prospect of success".**

28. Many cases have been cited to me by both parties including my own ruling in Macartney and that of Scutt, J.A. in her ruling in Matai v State (2008) FICA 89. Her Ladyship in a ruling of 29 pages on application for bail pending appeal against conviction mentions with approval much of what I said in Macartney and refers to numerous other cases both here and overseas.

29. The golden thread running through all these decisions is that before bail will be granted on an appeal against conviction or sentence there must be a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for a single judge on an application for bail pending appeal to delve into the actual merits of the appeal. This is sometimes said to require "exceptional circumstances", see for example, Edward Fitzgerald in (1924) 17 Criminal Appeal Reports and R v Watlon (1978) Criminal Appeal Reports 293.

30. I find no exceptional circumstances in this case which would warrant me granting the application. I am re-inforced in this view by the fact that it has been fixed for hearing in the September session of this Court now only two months away.

The application is therefore refused.



John E. Byrne

JUDGE

17th July 2009