IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.AAU0083 OF 2010

BETWEEN: BRIAN SINGH

Appellant

AND: THE STATE

Respondent

Date of Hearing: Wednesday, 8th December 2010

Counsel: Mr K. Shah for the Appellant
Ms S. Puamau for the Respondent

Date of Ruling: Thursday, 16th December 2010

RULING ON LEAVE TO APPEAL

1. Under the statute law of Fiji as explained in its common law or case law if an appellant in a criminal matter wishes to rely upon grounds of appeal that are mixed fact and law that appellant must apply for leave to appeal against conviction to a single Court of Appeal judge for leave to appeal.

2. Likewise if there is to be an appeal against sentence it is subject to a single judge of the Court of Appeal granting leave on the basis that the appeal involves a point of law.

3. Brian Singh applies for leave to appeal against both conviction and sentence. He was convicted after trial before Mr Justice S. Thurairaja and assessors and sentenced to 3 years imprisonment in total with a minimum period before being eligible for parole of 2½ years. Brian Singh was a senior civil servant who had to

attend overseas for meetings and conferences with international bodies and the like. The offences arose out of obtaining expenses from the Treasury for business class travel and then purchasing economy class fares and being reimbursed the difference by the travel agent concerned into his own personal account. His defence at trial was that he was entitled to do this. The opinion of two of the assessors was "not guilty" and that of the third assessor "guilty". The trial judge, in accordance with the law decided to convict on the evidence.

4. Mr Shah on behalf of Brian Singh advances ten grounds of appeal against conviction and five grounds against sentence. I will discuss some but not all of these grounds. In respect of conviction I must not make any decisions on the appeal but if I find that proposed grounds of appeal are properly arguable, (as opposed to barely arguable or not arguable) the application meets the threshold for leave. Once the threshold is reached, my view is that the appellant should be free to advance arguments in the Court of Appeal without attempting to restrict him on the basis that leave is granted only in respect of some but not all grounds of appeal. The Court of Appeal is in my opinion well able to sort out "the wheat from the chaff" when it comes to focusing on what are more or less and non arguable grounds of appeal.

5. As a ground of mixed fact and law Mr Shah's principal argument relates to criticism of the trial judge's address to the assessors and his reasons for convicting Brian Singh despite the majority opinion of the assessors. Mr Shah cites Lord Hailsham of St Marylebone in **R v. Lawrence** [1982] AC 510 at 519 on the needs for a summary of the facts in a summing up which is appropriate on the facts of the particular case. In respect of the requirements of a judgment setting aside the majority opinion of the assessors, Mr Shah says :

> *"It is submitted that when the majority of the assessors were not satisfied with the Prosecution having discharged the burden and standard of proof, and decided that the accused was not guilty they found that the burden of proof had not been met by the Prosecution. The Trial Judge failed to*

adhere to the Assessors verdict and decided to override the same, but failed to provide any reasons. The reasons that needed to be provided according to ***Ram Bali v. Regina*** *(1960) 7 FLR 80 and* ***Shiu Prasad v. Reginam*** *(1972) 18 FLR 70 (CA) was that the weight of the evidence and the Presiding Judge's views on credibility of witnesses must address the overturn of the decision of the majority of the assessors."*

6. I have read carefully both "the address" and the reasons for convicting. I think these matters raise a properly arguable ground or grounds of appeal against conviction. This is a ground of mixed fact and law and therefore is a ground on which leave may be sought in this application.

7. I am fortified in this view by the concession by Ms Puamau who appears on behalf of the State that the State does not submit against the granting of either of the leaves being sought.

8. On sentence I believe that developments in sentencing in the last thirty years or so have increased the availability of matters of law as grounds of appeal. It seems that the learned trial judge did not view Community Service as an alternative to an immediate custodial sentence because it is "degrading and demoralising". This may be explicable in context. However it affords the necessary "foot in the door" for leave to appeal against sentence.

9. From my superficial view of the papers I do not believe that a matter said to be a decisive issue of law is sufficiently arguable. This concerns an argument that the false pretence relates to a promise of future action rather than present or past action. But the present counts are different from those before Mr Justice Winter in an earlier trial. I believe that in any event the view of the Court of Appeal rejecting Mr Justice Winter's opinion on that matter are correct in law and binding authority on the matter. That appeal case is **The State v. Brian Singh** [2007] FJCA 46 AAU 0097, 2005S where the Court consisting of President Gordon Ward, Ellis JA and Penlington JA handed down judgment on 25th June 2007. However since this is merely a preliminary opinion the matter can be further and,

need be, exhaustively raised and discussed and adjudicated upon before the Full Court of Appeal.

Ruling on bail

10. Since Brian Singh's application for bail pending appeal was considered together with his applications for leave to appeal against conviction and sentence it is not inappropriate to give a ruling on bail pending appeal as a follow-on ruling.

11. Around the common law world it has been universally held that bail pending appeal should be granted only when the chances of success are exceptionally high. That view is reinforced by the Bail Act 2002 section 17(3) which says :

> *"(3) When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account –*
>
> *(a) the likelihood of success in the appeal ;*
> *(b) the likely time before the appeal hearing ;*
> *(c) the proportion of the original sentence which will have been served by the applicant when the appeal is heard."*

A sentence of three years is not the kind of sentence which will attract the principle of S17(3)(c). That applies to short sentences and in context a sentence of 3 years in which 2 ½ years must be served before eligibility for parole is not a short sentence. Section 17 as well as section 3 lays down that while the policy of bail pending trial is in favour of granting bail, when it comes to bail pending appeal the policy of the law is quite different. Then in almost all cases, the person convicted after trial must remain serving this sentence until if he succeeds and his appeal is allowed without order of retrial, he emerges from custody as an acquitted person. Even then if finality has not been reached the, State may apply that he be remanded on bail or on custody pending an appeal by the State to a higher Court.

12. With regard to authority in Fiji adopting the policy I have stated, Miss Puamau on behalf of the State cites **Ratu Jope Seniloli and Ors v. The State** Criminal Appeal No.41 of 2004. **Amina Koya v. The State** Criminal Appeal No.AAU 0011/96, and **Dauna v. The State** [2010] FJCA 43, AAU 0090 (20 August 2010).

13. It is worth quoting also a summary of Scutt JA in **Matai v. The State** [2008] FJCA 89 AAU 0038.2008 (22 December 2008) which sets out authority in mainstream common law jurisdictions. The summary is within the judgment of the Court in **Chamberlain v. R** No.1 (1983) HCA 13 : (1983) 153 CLR 514 :

In Chamberlain v. R (No.1) [1983] HCA 13; (1983) 153 CLR 514 (2 May 1983) sets out the principles as applied in various common law jurisdictions, including Australia and the United Kingdom:

- *... the cases are uniform that bail will not be granted after conviction and pending appeal unless exceptional circumstances are shown:* ***In re Cooper's Application for Bail*** *(1961) ALR 584, per Fullagar, J. (Australian High Court)*

- *... bail after conviction is granted 'in exceptional case only' :* ***Hayes v. The Queen*** *(1974)48 ALJR 455, at 591, per Mason, J. (Australian High Court)*

- *... the modern practice is to grant bail pending an appeal only where it appears prima facie that the appeal is likely to be successful or where there is a risk that the sentence will have been served by the time the appeal is heard :* ***Watton*** *(1978) 68 Cr AppR 293, at 296-297 (English Court of Appeal)*

- *... the power to grant bail pending appeal will be exercised in 'very exceptional' circumstances only :* ***Re Kulari*** *(1978) VR 276 (Victorial Supreme Court)*

- *... exercise of the power 'in exceptional' circumstances :* ***R v. Ryan*** *(1930) SASR 125;* ***R v. Patmoy*** *(1944) 62 WN (NSW) 1;* ***Reg v. Lawrence*** *(1978) 22 ALR 573;* ***Reg v. Wood*** *(1970) QWN 3 (South*

Australian Supreme Court, NSW Supreme Court, Queensland and Supreme Court)

- *... power will be exercised in 'exceptional or unusual' circumstances only : **R v. Byrne** (1937) QWN 30 (Queensland Supreme Court)*

- *... power to exercised in 'special' circumstances : **R v. Salon** (1952) ALR (CN7), at 1054 : **Reg v. Southgate** (1960) 78 WN (NSW) 44 (NSW Supreme Court)."*

14. I have considered the ten grounds of appeal against conviction put forward on behalf of Brian Singh very carefully. Some of them are properly arguable which is why I have granted leave to appeal. But the high point are those that involve the address to the assessors on the evidence and the decision of Thurairaja J to convict. On these the matter is arguable for and against and I do not assess the chances of success as high. It is certainly far short of "special" or "exceptional" as the authorities require.

15. In my ruling dated 9th September 2010 in **Zafir Tarik Ali and Others v. The State** Criminal Appeal No.AAU0041 of 2010 I discussed the granting of bail in the case of **Praveen Ram v. The State** [2008] FJCA 68. This case is relied on by Mr Shah. It is a murder case where **Praveen Ram** was convicted of his father's murder. Randall Powell JA allowed **Praveen Ram** bail pending appeal on the ground that the facts in context arguably required the trial judge to have left the issue of provocation to the assessors. The appeal of **Praveen Ram** is yet to be completed. I am of the view from reading his ruling that Randall Powell JA may have erred in applying the chances of success principles. However there is another case to be considered where bail pending appeal was granted in exceptional circumstances. This involves Rupeni Naisoro and Senivalati Ramuwai who were convicted after trial of the murder of Navneet Kumar on 29th April 2005 at Tailevu. The conviction took place on 20th April 2007. Both men were sentenced to life imprisonment and no minimum term was fixed. Then

another person with no connection to either Naisoro or Ramuwai, one Timoci Ravuraboto confessed to the Waimaro Methodist Church Reconciliation Prayer Team that he, acting alone, had murdered the deceased Navneet Kumar on 29th April 2005. Before the investigation into Ravuraboto's confession had culminated in criminal proceedings and a Court hearing for him, Acting President John Byrne granted bail. He granted bail to Rupeni Naisoro on 6th October 2009 and to Senivalati Ramuwai on 29th October 2009. In neither application did the State oppose bail pending appeal. This may account for the fact that Acting President John Byrne did not make a ruling with reasons. However the point is that the chances of success in the bail applications of **Rupeni Naisoro** and **Senivalati Ramuwai** were exceptional to the point of near certainty. Contrast that with the present application and the difference in chances of success is immense.

16. In my opinion I am constrained by the legal framework and the authorities to refuse bail pending appeal.

17. Does the situation in respect of Brian Singh's continuing diabetes and continuing heart problems about which I have heard oral evidence from four witnesses including Brian Singh himself make any difference in his favour on the decision in respect of bail pending appeal?

18. The context is that Brian Singh has had diabetes for twenty years and had a coronary artery by pass operation in Queensland Australia in 2008. Prior to his conviction his life style was that of a respected senior civil servant.

19. With his medical history and being 58 years of age it is not surprising that under the stress and possibilities of further deterioration in his health, he believes that being in prison at Nasinu is likely to shorten his remaining life span.

20. He has been unwell on some occasions and in consequence has been taken for medical treatment on three or so occasions from Nasinu. The court has heard

from Dr Susana Nakalevu a medical officer at Nausori Health Centre. She informed the Court that she saw Brian Singh on 30th October 2000 at about 10.00 p.m. He attended accompanied by a prison officer complaining of chest pains against the background of a known heart condition. After tests which showed no abnormality in blood pressure, ECG or blood sugar level, Dr Nakalevu after finding a quite high temperature of 38 degrees centigrade concluded that Brian Singh had a viral infection in his upper respiratory tract consistent with sinusitis. She prescribed pain killers and anti biotics as well as a low dose sedative. There was evidence of a similar visit to Makoi Health Centre on 18th November 2010 where Brian Singh was seen by medical assistant with 30 years experience James Danfort. The diagnosis was of gastritis and he was prescribed an antacid, paracetamol, and multivitamins.

21. I also heard evidence from Mr Apimeleki Taukei, Chief Officer of Nasinu Prison. Although the medical services inside Nasinu are adequate rather than well provided I am satisfied that if Brian Singh has to attend Suva Private Hospital for monitoring of his conditions he will be allowed to do so. The normal range of medicines on prescription will be provided and more expensive drugs such as pills for reducing cholesterol which are expensive can be obtained at his expense.

22. The approach to medical conditions within sentencing policies in Fiji are the same as in mainstream common law jurisdictions such as England, Scotland and Australia. Shortly stated ill health is not a reason for a non custodial sentence if the Court is of the view that only a custodial sentence is appropriate in all the circumstances. The only exception is where an incurable illness is in its last phase and the prisoner has only a few months to live. In 2009 with a prognosis of six months at most Al Megrahi, the Lockerbie bomber, was returned to Libya on a compassionate basis within this policy, which decision was made by the Scottish Executive and by the Minister for Justice in Scotland. Some time ago, in

a similar situation, Great Train robber Ronald Biggs was allowed within policy by the Home Secretary to leave prison.

23. I am quite sure that health does not fall to be dealt with differently in the consideration of bail applications pending appeal than in sentencing.

24. I decide that despite being sympathetic to Brian Singh's predicament re health matters, they do not impinge on my decision which is to refuse bail pending appeal.

ORDERS

25. The orders of the Court are :

(1) Leave to appeal against conviction and upon sentence granted.
(2) Application for bail pending appeal refused.

William R. Marshall
Resident Justice of Appeal