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IN THE FIJI COURT OF APPEAL

SUVA, FIJI ISLANDS

APPELLATE JURISDICTION

[Criminal Appeal No. AAU 0029/06]
(HAC 10/05)

Before the Honourable Acting President	:	**Mr. JUSTICE JOHN E. BYRNE**
BETWEEN	:	**PAULIASI DELAIBATIKI**
		APPLICANT
AND	:	**THE STATE**
		RESPONDENT
Counsel	:	**Ms B. Malimali for the Applicant**
	:	**Ms P. Madanavosa for the Respondent**
Date of Hearing and Submission	:	**2nd December 2009**
Date of Ruling	:	**12th February 2010**

RULING ON APPLICATION FOR BAIL PENDING APPEAL AGAINST CONVICTION

INTRODUCTION

[1] Most applications for bail pending appeal to this Court against conviction in the High Court are foredoomed to failure. The instant application is no exception. This is because the law on such applications is well settled both by statute (the Bail Act 2002) and the Common Law. I shall elaborate on that statement in the course of this ruling in the hope that the Court's time will not be wasted in future by applicants who, if they know the law and are honest with themselves, will not take up the time of judges in applications which in a majority of cases have no chance of success.

[2] The applicant was one of three others who were convicted in the High Court at Suva on the 3rd of April 2006 in a trial which began on the 22nd of February 2006. They were charged with one other who was found not guilty that on the 7th of January 2005 at Samabula in the Central Division, each of them murdered Ashok Kumar. After what I regard was a very careful summing-up taking 29 pages, the learned trial Judge accepted the unanimous opinions of the three Assessors and sentenced them to life imprisonment.

THE EVIDENCE

[3] Some of the evidence in this case was not in dispute. It was not in dispute that the deceased, Ashok Kumar, was a shopkeeper at Fulaga Street in Samabula. He lived with his wife and family. On the 7th of January 2005, he went to his shop as usual, and at a quarter to five (4.45.am) in the morning. His wife watched him go to the shop and when he gave her a "thumbs up" signal, she went back inside the house. At 5.30 am, she was awakened by the sound of the horn from the bread delivery van. The delivery boy, Jonacani Salabula had discovered her husband's body lying on the shop floor with the Fiji Times and Sun newspapers, and a yellow torch near him. The deceased's son rushed to the shop. His wife followed immediately afterwards. The deceased was lying on the floor of the shop. A pink scarf was tied around his neck and his legs were tied with another piece of cloth. The deceased's wife, who was formerly a medical

orderly at the St Giles Hospital, told her son to untie the scarf and she turned him onto his side. He had no pulse. She tried CPR (that is mouth-to-mouth respiration and chest compression) but with no success. His body was cold. She said that before the scarf was untied from his neck it was tied "really tight" and it took her son three or four minutes to untie it. She knew her husband was dead.

[4] The shop had been disturbed, and her son Salesh Kumar gave evidence of all the missing items. They included 14 discs (VCD's) and a DVD player. These items were recovered by the Police and identified by Salesh Kumar as having been taken from their shop.

[5] It was not in dispute either that there was a robbery at the shop of the deceased at some time between 4.45am and 5.30am on 7th January 2005. The remaining evidence was in dispute and so far as the present applicant is concerned it is referred to at pages 11 – 12 of the Judge's summing up in these terms:

> *"The 3rd and 4th Accused dispute their confessions to the police, saying that they had both been promised immunity from prosecution by Inspector Luke Qionibaravi and that the police had made up the confessions and induced them to sign them.*
>
> *The police officers, and in particular Inspector Qionibaravi said that no such promise had been made to them, that IP Qionibaravi had no power to offer State immunity to Accused persons, and that the Accused persons had made their statements voluntarily and without inducements. Further, neither the 3rd nor the 4th Accused complained about the alleged inducements to Ilisoni Koroi, a Justice of Peace who spoke to them at the conclusion of their interviews.*
>
> *Which version of these issues you accept is a matter for you. If of course you accept what the 3rd and 4th Accused say, that they were induced to sign false*

confessions, then of course you cannot put any weight on then and you must decide the case on the remaining evidence. However, if you accept that the confessions of the 3rd and 4th Accused were given by them freely and voluntarily then you may think that they provide a clear confession that the 3rd and 4th Accused were part of a joint plan to commit a robbery on the deceased's shop, that they both knew that the shop owner (the deceased) would be present at the time, and that they both took part in the robbery at that shop. The only issues for you to decide is whether when a group of men decide to commit robbery in a shop which they know will be occupied, the death or serious injury of the occupier is a probable consequence of the planned robbery, and whether the deceased in this case died as a result of the robbery. Remember that what the 3rd Accused said for instance about the 4th Accused or the 1st Accused or 2nd Accused in his statement, is not evidence upon which you can rely. Each confession is evidence only against the maker of the statement."

[6] On the 10th of July 2008 the applicant filed an application for bail pending appeal. Leave to appeal was granted by Goundar, J.A on the 9th of October 2008 after amended grounds of appeal had been filed on the 3rd of October 2008 by the applicant's then solicitor. I list them hereunder:

1) *That the learned trial Judge erred in fact and in law in failing to account and or explain the failure of the prosecution to check the alibi raised by the Appellant that on the day of the offence he was at his wife's village in Rewa where he spent Christmas and the New Year because if he was there he could not be the same person described by prosecution witness Pauliasi Temo that Accused 2 came accompanied by a big fair Fijian man whom be had never seen before.*

2) *That the learned trial Judge erred in fact and in law in failing to address the issue of the prosecution failure to check the Appellant's alibi is a breach of his Constitutional right to a fair hearing under Section 29(1) of the Constitution especially when the Appellant complied with the requirement of informing and*

warning prosecution about his alibi, unlike Accused 4 who gave his alibi warning only 3 days before the trial but he was acquitted.

3) *That the learned trial Judge erred in fact and in law in failing to address the issue that his caution interview confessing to police could have been compared to his alibi evidence checked by police that he was not at the scene of crime on the day of the offence in order to ascertain the truth of that confession especially when he is saying that he had been promised immunity from prosecution by police who made up the confession and induced him to sign it.*

4) *The learned trial Judge erred in fact and in law in failing to address the fact that the prosecution did not rebut the Appellant's alibi evidence relying on his police confession statement only. His wife's statement that the Appellant was with her provided some doubt to the prosecution evidence that he was present at the scene of crime. No identification parade was done to link the Appellant to the crime of murder-alleged against him.*

5) *The learned trial Judge erred in fact and in law in that if the assessors found the 4th Accused not guilty she should disagree with the assessors finding of guilt on the 3rd Accused and find him not guilty also as both provided alibi evidence.*

6) *That the learned Judge erred in law by accepting the opinion of the assessors that the 3rd Accused was guilty of murder when such an opinion was demonstrably perverse or unsafe or unsatisfactorily because the assessors ought to have entertained a doubt similar to that given to the 4th Accused whom they found not guilty.*

7) *That in all the circumstances there has been a miscarriage of justice because prosecution witness Are Amai who was granted immunity because he was also a co-accused has written to the Appellant in his letter dated 28th February, 2008 and stated inter alia that he identified me (3rd Accused) and the 4th Accused in Court because the Police (DPP) told him that if he does not point at 3rd and 4th Accused they will charge him (Are Amai) with murder.*

8) *That in all the circumstances the sentence imposed on the appellant was manifestly excessive.*

[7] The application was supported by affidavits by the applicant sworn on the 30th of October 2009, Aisake Tuisama, Prison Officer, sworn on the 17th of November 2009 and Aporosa Rageci, Prison Chaplain sworn on the 17th of November 2009 and Are Amai sworn on the 29th October 2009.

[8] Are Amai had been convicted of robbery with violence in the same incident and was therefore an accomplice. He was given State immunity from the charge of murder.

[9] Despite the immunity given to him, the trial judge declared him hostile to the State because as the Judge said, he gave evidence which was clearly inconsistent with his plain statement and police statements in that he initially failed to name the 3rd and 4th accused as being present during the robbery.

[10] As to this the Judge said at page 14 of her summing up:

"When a witness turns hostile as this witness did, his evidence can be of very little weight because he is proven to have given inconsistent versions of the events before the trial. As I have said before, his previous statements are not evidence, only his in-court statements are evidence. You need to consider his explanations for his previous inconsistency, in this case that the police forced him to give that version implicating the 3rd and 4th Accused to decide whether you can accept any part of his evidence."

[11] It is the same Are Amai who swore an affidavit on 29th of October 2009 and who in paragraph 4 deposes:

"In truth the Applicant was not there at the shop at Fulaga Street on 7th January 2005."

In paragraph 36 of his affidavit he states:

"My fear and self-preservation caused me to blame Pauliasi Delaibatiki for this offence and I would like to set things right."

[12] The affidavits of Aporosa Rageci states that he had been a Prison Chaplain for over 25 years and was first approached by the applicant sometime in 2008 about letters which Are Amai had written to him.

[13] He arranged a meeting between the applicant and Are Amai at which Prison Officer Pita Rokoratu was present in the office of the Chief Officer Administration on the 17th of February 2009 at which Are Amai said that he had pointed out the applicant as being involved in the murder because he had been pressured by DPP Officer Kevueli Tunidau.

[14] Aisake Tuisama in his affidavit of the 17th of November 2009 said he believed that Are Amai had been threatened by Kevueli Tunidau which was why he implicated the applicant.

COMMENT

[15] Whether or not any of these affidavits are truthful is not a matter for me to decide because, as I said at the beginning of this ruling, the law on applications for bail pending appeal is clear. In only exceptional circumstances will bail be granted pending an appeal. In my ruling in Criminal Appeal No. AAU 0103 of 2008 Simon John Macartney v. The State delivered on the 12th of December 2008 I set out at some length the law on this subject. I quoted numerous authorities all of which are to be effect that bail will not be granted to a prospective appellant pending appeal unless there are exceptional and unusual reasons. I find no such reasons in this case. As matters stand the applicant has been properly convicted. The assessors unanimously found him guilty as charged and the trial judge also agreed with the findings of the 3 assessors and convicted the applicant.

THE BAIL ACT 2002

[16] Section 3 (4) of the Bail Act provides that the presumption in favour of granting of bail is displaced where.....(b) the person has been convicted and has appealed against the conviction. Section 17(3) of the Act sets out those matters to be taken into account by a Court when considering an application for bail. This section reads:

"When a court is considering the granting of bail to 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 in heard.

THE LIKELY TIME BEFORE THE APPEAL HEARING

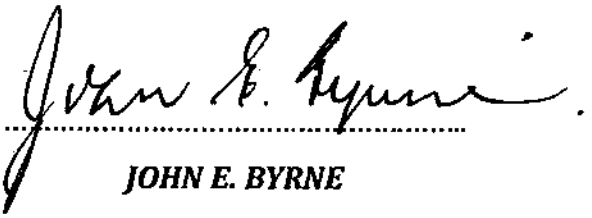
[18] The only relevant document before the Court and which has been served on the respondent is the amended grounds of appeal. The court records have not been served on the respondent. Therefore there is no indication when the substantive matter will be heard.

[19] As to the proportion of the sentence that would have been served by the applicant when the appeal is heard, I note that in *Amina Begum Koya vs. The State Criminal Appeal No. AAU 0011/96* Tikaram, P said at page 5 of his judgment that if an accused is likely to spend the whole or a substantial part of his or her term in prison before his or her appeal is heard this may constitute a good ground for granting bail.

[20] In this case the applicant was sentenced to life imprisonment so that he would not have served the whole or even a substantial part of his term of imprisonment even if the appeal were to be heard this year.

[21] For these reasons the application is refused.

Dated at Suva this 12th day of February 2010.



JOHN E. BYRNE

ACTING PRESIDENT, FIJI COURT OF APPEAL