IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU0083 of 2012
(High Court Case No. HAC 40 of 2011)

BETWEEN	:	**SURESH CHANDRA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	Goundar JA
Counsel	:	Mr. H. Nagin for the Appellant Mr. V. Perera for the Respondent
Date of Hearing	:	26 May 2014
Date of Ruling	:	6 June 2014

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of murder and sentenced to life imprisonment with a non-parole period of 18 years. There are two applications before this Court. The first is an application for leave to appeal against conviction and sentence pursuant to section 21(1) of the Court of Appeal Act. The second is an application for bail pending appeal.

[2] The appeal is advanced on the following grounds:

1. That the Learned Trial Judge erred in law and in fact in directing the Assessors to use their common sense without directing them that they have to first find the facts they rely upon as proved and then to draw the necessary inference using their 'common sense'. The direction could well be misinterpreted by the assessors that they had the option to speculate.

2. That the Learned Trial Judge erred in law and in fact in not directing/adequately directing himself and the Assessors as to evidence before the court the three elements the Prosecution must prove beyond reasonable doubt on the charge of Murder.

   (a) What was the reliable and credible evidence presented by the State in proving that the Accused was engaged in a conduct?

   (b) What was reliable and credible evidence presented by the State in the Accused's conduct that caused the death of Farzana Begum?

   (c) What is the reliable and credible evidence presented by the State in proving the Accused's intention to cause death of Farzana Begum? or;

   (d) What was the reliable and credible evidence presented by the State in proving that the Appellant's recklessness caused the death of Farzana Begum by the Appellant's conduct?

3. That the Learned Trial Judge erred in law and in fact in not properly directing himself and the Assessors adequately the laws on circumstantial evidence and further not directing himself and the Assessors the particulars of circumstantial evidence that would lead to one conclusion that the Appellant committed the offence and further the Learned Trial Judge ought to have directed the assessors that to find the Appellant guilty they must be satisfied that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the facts proved.

4. That the Learned Trial Judge erred in law and in fact in not directing/and/or adequately directing the Assessors and himself on the previous inconsistent statements made by PW4 David Sunil Singh. The Learned Trial Judge ought to have directed the Assessors and himself that when a witness is shown to have made previous statements inconsistent with the evidence given by the witness at the trial, he ought to have directed the Assessors that the evidence given at the trial should be regarded as unreliable. The failure to do so caused substantial miscarriage of justice.

5. That the Learned Trial Judge erred in law and in fact in not directing and/or adequately directing the Assessors and himself on the serious contradiction between PW4 and PW5 whereby PW4 who was the main Prosecution witness evidence was completely discredited during the cross-examination by the Appellant's Counsel. Failure to do so caused substantial miscarriage of justice.

6. That the Learned Trial Judge erred in law by failing to make an independent assessment of the evidence, before affirming a verdict of guilty was unsafe,

unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.

7. That the Learned Trial Judge's failure to evaluate the evidence prior to returning a verdict of guilty as charged and the failure of the Learned Trial Judge to independently assess the evidence before confirming the said verdict, have given rise to a grave and substantial miscarriage of justice.

8. That the Appellant reserved the right to appeal such further and other Grounds as the Appellant may be advised upon the receipt of the Court record.

Appeal Against Sentence

9. That the Appellant appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

10. That the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration."

[3] In my judgment, the grounds of appeal advanced by the appellant involve consideration of law and fact, and therefore, leave to appeal is required. The test for leave is whether the ground is arguable before the Full Court.

Ground 1

[4] The appellant submits that the trial judge misdirected by telling the assessors to use their common sense. The appellant contends that the direction to use common sense invites the assessors to speculate. Perusal of the summing up shows the trial judge did not direct the assessors to use their common sense. Even if such a direction was given, the direction would have been appropriate because the assessors are entitled to use their common sense when they determine the facts from the evidence led at trial. This ground is not arguable and is misconceived.

Ground 2

[5] The contention under this ground is that the trial judge failed to link the evidence to the elements of murder in his summing up. At paragraph 7, the trial judge correctly directed that the prosecution carried the burden to prove the charge beyond a reasonable doubt. At paragraph 9, the trial judge correctly directed on the elements of murder. At paragraph 10,

the trial judge explains the elements of murder and links those elements to the evidence as relied on by the State. This ground is not arguable.

Ground 3

[6] Ground 3 alleges that the trial judge's directions on circumstantial evidence were inadequate.

[7] The trial judge's directions on circumstantial evidence are contained at paragraphs 13-15 of the summing up:

> "[13] The thrust of the prosecution's case is based on what we call circumstantial evidence. They ask you to infer from the circumstances that Suresh strangled Farzana. They say that the various circumstances relating to the case and the accused when taken together will lead to the sure conclusion that it was the accused who committed the crime.
>
> [14] Circumstantial evidence can be powerful evidence; indeed it can be as powerful as, or even more powerful than direct evidence, but it is important that you examine it with care as with all evidence, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient reliability and strength to cast doubt upon or destroy the prosecution cases.
>
> [15] Finally you should be able to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing or making up theories without good evidence to support them and neither the Prosecution, nor the Defence, nor you should do that."

[8] In ***Boila v State*** *Cr App No. CAV 0005 of 2006*, the Supreme Court held that 'no special directions are required of a trial judge in directing on the use of circumstantial evidence'. The only required direction is that the assessors must be satisfied of the guilt beyond a reasonable doubt when acting on circumstantial evidence. In my judgment the trial judge's directions on circumstantial evidence are adequate and correct in law. This ground is not arguable.

Grounds 4 -5

[9] Grounds 4 and 5 relate to previous inconsistent statements made by the witnesses, David Singh and Kamlesh Sami called by the State. Kamlesh Sami said he saw the appellant slapping the victim and that he did tell the Police about the slap but it was not recorded in his statement. David Singh's inconsistency related to an omission. He failed to tell the police that he saw the appellant holding the victim by the neck and covering her mouth. The trial judge directed the assessors to consider the inconsistencies in deciding whether David was a credible witness. Whether the trial judge should have also directed the assessors to approach David's evidence with caution is arguable.

Grounds 6 and 7

[10] Grounds 6 and 7 allege that the trial judge should have carried out an independent analysis of the evidence after the majority assessors expressed opinions of guilty. The law did not require the trial judge to carry out an independent analysis of evidence in order to accept the assessors' guilty opinions *(**Kaiyum v State** Cr App No. AAU0071 of 2012)*. This ground is not arguable.

Sentence appeal

[11] After sentencing the appellant to life imprisonment, the learned trial judge imposed a non-parole period of 18 years. The power to impose a non-parole period is given to the courts by the Sentencing and Penalties Decree. The appellant's contention that in cases of life imprisonment, non-parole periods serve no purpose is not arguable. The offenders who are sentenced to life imprisonment are eventually released on licence. The decision to release the offenders on licence is made by the Executive. The courts play no role in the Executive's decision to release an offender on licence. But the courts have discretion under the Sentencing and Penalties Decree to prevent an early release on licence by imposing a non-parole period. What this means is that the offender will have to serve the non-parole period before any release by the Executive is considered. That is the purpose of imposing a non-parole period. The sentence appeal is not arguable.

Bail

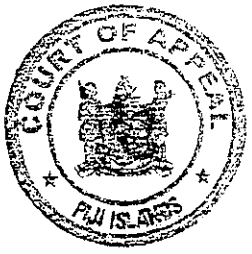
[12] The appellant seeks bail pending appeal. Since the appellant is a convicted prisoner, the presumption in favour of grant of bail has been displaced. His non-parole period means that he has a substantial prison time to serve. As far as his appeal against conviction is concerned, the test for bail is more stringent than the test for leave. The test for bail pending appeal is whether the appeal has every chance of success *(**Mutch v State** Cr App No. AAU0060 of 1999)*. Although the appellant has demonstrated arguable grounds, I am not satisfied that his grounds of appeal have every chance of success. The Court of Appeal has power to dismiss an appeal even when an error has been shown but the error has not resulted in a miscarriage of justice. For these reasons, the application for bail must fail.

Result

[13] Leave to appeal against conviction is granted on grounds 4 and 5 only. Leave refused on the remaining grounds.

[14] Leave to appeal against sentence is refused.

[15] The application for bail pending appeal is refused.



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Hon. Justice D. Goundar
JUSTICE OF APPEAL