

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 50 OF 2013
(High Court HAC 323 of 2012)

BETWEEN : LUM BING and
ZHANG YONG

Appellants

AND : THE STATE

Respondent

Counsel : Ms B Malimali for the First Appellant
Mr A Singh for the Second Appellant
Mr V Perera for the Respondent

Date of Hearing : 9 October 2014

Date of Ruling : 12 December 2014

RULING

[1] The two appellants along with two others were jointly tried in the High Court at Suva for offences under what may be termed the human trafficking provisions of the Crimes Decree 2009 (the Decree).

- [2] The first appellant was before the High Court with one co-accused on two charges of aggravated trafficking in persons under section 113 (1) (a) (i) of the Decree. The second appellant was before the Court on two charges of domestic trafficking in persons under section 115 (3) of the Decree.
- [3] Following a trial before a judge sitting with three assessors the first appellant and his co-accused were found not guilty of the aggravated trafficking in persons charges. They were however convicted on both charges for the lesser offence of trafficking contrary to section 112(5) of the Decree. The maximum penalty for this lesser offence is 12 years imprisonment. The second appellant was found guilty in the unanimous opinion of the assessors and convicted by the learned trial judge. The maximum penalty for the offence is also 12 years imprisonment.
- [4] The first appellant was sentenced on 25 January 2013 to two terms of ten years imprisonment to be served concurrently with a minimum term of nine years imprisonment. The second appellant was sentenced to two terms of 8 years imprisonment to be served concurrently with a minimum term of seven years imprisonment.
- [5] A notice of appeal against conviction and sentence was initially filed by the Appellants on 22 February 2013. However due to non-compliance with Rule 43(1) of the Rules by the legal practitioners then acting for the Appellants, the appeal was deemed abandoned by the Registry. The appeal was revived by the filing of a fresh notice of appeal on 17 May 2013 with payment of the requisite fees in compliance with Rule 43 (1). It would appear that the Respondent has not taken issue with the procedure described above. Neither Counsel has addressed the issue of whether there is a need to apply for an enlargement of time following non-compliance with Rule 43(1) which resulted in the fresh notice of appeal being filed out of time. To the extent that an order for the enlargement of time is required, it is granted.
- [6] In the event that any of the Appellants' grounds of appeal against conviction raise questions of mixed law and fact or questions of fact alone, the Appellants must obtain the leave of the Court pursuant to section 21 (1) (b) of the Act. An appeal against

sentence requires leave under section 21(1) (c) of the Act. The power of the Court to grant leave to appeal may be exercised by a justice of appeal under section 35 (1) of the Act.

- [7] Both Appellants have subsequently filed amended grounds of appeal. The amended grounds of appeal on behalf of the firstnamed Appellant were filed on 5 June 2014. Counsel submitted that the four (4) grounds of appeal against conviction raise questions of law only and therefore leave was not required. In their amended form the grounds relate to errors of law allegedly made by the learned Judge in the course of the summing up. I am prepared to conclude that leave is not required in respect of the appeal against conviction.
- [8] As for the application for leave to appeal against sentence the test for leave is whether there is an arguable error in the sentencing discretion of the trial judge.
- [9] The firstnamed Appellant was sentenced to a term of 10 years with what the trial Judge described as a minimum term of 9 years. It is apparent that the sentence was imposed under the Sentencing and Penalties Decree 2009. Therefore the reference to the minimum term of 9 years is a reference to the non-parole that is required to be determined under section 18 of that Decree. It is arguable that the learned Judge has taken into account as aggravating factors matters that were either not properly capable of constituting aggravating factors or were not properly established by the evidence before the Court. Leave is granted to appeal against sentence.
- [10] The amended grounds of appeal on behalf of the secondnamed Appellant were filed on 15 May 2014. Having read the submissions filed by the parties and after hearing Counsel leave is granted in respect of those grounds of appeal against conviction that raise questions of mixed law and fact or fact alone. The issue raised in each ground is arguable. Leave is not required in respect of those grounds that raise questions of law only. Leave to appeal against sentence is granted as the Appellant has raised an arguable error concerning the exercise of the sentencing discretion by the learned Judge.

[11] Both Appellants are granted leave to appeal against conviction in respect of those grounds where leave is required and leave to appeal against sentence. This appeal is to be listed in the callover in March 2015 with criminal appeal AAU 44 of 2013 (Zhong v. The State) in respect of which leave to appeal against conviction and sentence has already been granted (Ruling 15 July 2014). The application for leave to appeal by the fourth appellant (Laojindamane AAU 47 of 2013) is listed for hearing on 20 January 2015). Counsel are reminded that certification of the appeal record is required before the appeal is placed in the callover list.

Orders:

Leave to appeal against conviction and sentence is granted to both appellants.



W. Calanchini
.....
Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL