

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court of Fiji]**

**CRIMINAL APPEAL NO: AAU077/2015**  
**[High Court Case No: HAC 241/2013]**

**BETWEEN** : **YANG XIEN JIONG** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : Hon. Mr. Justice Daniel Goundar

**Counsel** : Mr. J. Savou for Appellant  
Mr. M. Korovou for Respondent

**Date of Hearing** : 14 March 2016

**Date of Ruling** : 22 March 2016

**RULING**

[1] This is an application for leave and bail pending appeal. The appellant was convicted after trial on a charge of murder and sentenced to life imprisonment with a non parole period of 18 years. The appeal is timely.

[2] The grounds of appeal are:

**Ground 1** – The Learned trial Judge erred in law and fact by failing to give reasons on why he failed to accept during the *voire dire* as well as the trial proper that the Appellant’s confession had been obtained unfairly as a result of the following:

- i) *The appellant was kept in custody for seven days under oppressive circumstances during the caution interview without any application by the State to extend the 48 hour allowable period;*

- ii) *The appellant's interview was recorded in English which was a language that the Appellant could not read however the oppressive circumstances of his custody led him to sign something he did not understand.*

**Ground 2** – The learned trial Judge's directions on the elements of murder at paragraphs 11, 31 and 32 of his summing up, lacked fairness and objectivity when he used examples that fitted the prosecution's case.

**Ground 3** – The learned trial Judge caused the trial to miscarry when he unfairly commented at paragraph 18 of the summing up that I had admitted the offence in the following manner:

*Paragraph 18 – "Mr Fong was later rushed to Hospital, and he died at approximately 1.40am on 8<sup>th</sup> April 2012. A police investigation was carried out. The two friends who were with the accused at the time were later arrested. They were tried and later imprisoned. The accused at the time were later arrested on 30 May 2013, while awaiting a flight to China at Nadi Airport. He was cautioned interviewed by police. In the interview, he admitted the offence. Later, he was taken to court, and charged for the murder of Mr. Robert Fong. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution."*

**Ground 4** – The learned trial Judge caused the trial to miscarry when he commented at paragraph 29 of the summing up that the appellant was aiding and abetting the commission of murder despite the Appellant being the only person mentioned in the Information.

- [3] At trial, the prosecution case was based on a disputed confession which was ruled admissible in a *voir dire* by the trial judge. There was also some circumstantial evidence that placed the appellant at the crime scene, but apart from the confession there was no direct evidence to link the appellant to the killing of the victim.
- [4] The test for leave is far less stringent than the test for bail. Leave will be granted if the appellant can show that his appeal is arguable (**Naisua v The State** unreported Cr Case No. CAV0011/13).

[5] The granting of bail is a matter of discretion for the court. Since the appellant is a convicted person, the presumption in favour of grant of bail is displaced under the Bail Act 2002. Under section 17(3) of the Bail Act, the court is obliged to take the following factors 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 appellant when the appeal is heard.

[6] The appellant is serving life imprisonment. The question of him having served his sentence before his appeal is heard does not arise. In assessing the likelihood of success, I bear in mind that the onus is on the appellant to show that the issues raised, on the face of it, has every chance of success, or that the grounds have a very high likelihood of success (Zhong v The State unreported Cr App No. AAU44 of 2013; 15 July 2014, Viliame Tiritiri v The State unreported Cr App No. AAU9 of 2011; 17 July 2015, Seniloli & Others v The State Cr App No. AAU0041/04S; 23 August 2004). In my judgment the appeal is arguable but I am not satisfied that the appeal has a very high likelihood of success.

### Result

Leave granted.

Bail refused.



### Solicitors:

Office of the Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecutions for the State

.....  
Hon. Mr. Justice Daniel Goundar  
**JUSTICE OF APPEAL**