IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO. AAU0029 of 2017

[High Court Case No. HAC200 of 2014]

BETWEEN : **JULIAN HEINRICH**

Appellant

AND : **THE STATE**

Respondent

Coram	:	Hon. Mr Justice Daniel Goundar
Counsel	:	Mr S Valenitabua for the Appellant Mr S Vodokisolomone for the Respondent
Date of Hearing	:	7 November 2017
Date of Ruling	:	23 November 2017

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of manslaughter contrary to section 239 of the Crimes Act 2009 and sentenced to 3 years' imprisonment. He seeks leave to appeal against conviction only and bail pending appeal. The appeal is timely.

[2] The appeal is governed by section 21(1) of the Court of Appeal Act 1949. Under this section, the appellant may appeal as of right on any question of law alone (subsection

(a)). Leave is required on any question of fact alone, or a question of mixed law and fact (subsection (b)). A single judge has power to grant leave and bail pursuant to section 35(1) of the Court of Appeal Act 1949.

[3] The test for leave is whether the appeal is arguable. The test for bail, however, is more stringent than the test for leave. When considering granting of bail to a convicted person, the court must bear in mind that the presumption in favour of grant of bail is displaced. Section 17(3) of the Bail Act 2002 specifically requires the court to consider the following factors:

> (a) The likelihood of success in the appeal;
>
> (b) The likely time before the appeal hearing;
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> (c) The proportion of the original sentence which will have been served by the appellant when the appeal is heard.

[4] The burden is on the appellant to satisfy that his appeal has a very high likelihood of success (*Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014, *Tiritiri v The State* unreported Cr App No. AAU9 of 2011; 17 July 2015). The two remaining factors set out in section 17(3) are less significant when the threshold of a very high likelihood of success has not been satisfied (*Seniloli & Others v The State* unreported Cr App No. AAU0041/04S; 23 August 2004). However, exceptional circumstances may be considered, that is, "circumstances which drive the court to the conclusion that justice can only be done by granting bail" (*Mudaliar v The State* unreported Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P).

[5] Initially, the appellant was jointly charged with the murder of Sione Tufui with two others. Subsequently, the charge against the others was withdrawn and the charge against the appellant was reduced to manslaughter by the Director of Public Prosecutions. The manslaughter charge alleged that the appellant with other persons

unknown on the 21 June 2014 assaulted Sione Tufui which caused his death and at the time of such assault was reckless as to causing serious harm to him. At the time the allegation arose, the appellant was 19 years old and a high school student, schooling in Ba. He was born and raised in Nauru but came to Fiji for schooling when he was a teenager. When the alleged incident occurred, he had accompanied his friend to Suva in the weekend to watch a rugby match. The deceased was a Tongan national. He was 22 years old and a student at the University of South Pacific.

[6] At the trial, it was not in dispute that the deceased was seriously injured in a brawl that took place between two groups of boys outside the Dragons Nightclub on the early hours of 21 June 2014. The witnesses described the two groups as Tongan and Nauruan boys.

[7] The prosecution led evidence that earlier on in the night the boys had a fight inside the club and were removed from the club by the security officers. The commotion started when the deceased allegedly struck the appellant in the neck with an empty beer bottle as he approached the dance floor of the club. The appellant did not confront the deceased because at that moment he did not see who had struck him. He returned to his friends who were inside the club and one of them noticed that the appellant was bleeding from the neck. When the appellant informed his friend about the assault, the friend went and approached a Tongan boy (referring to the deceased) who turned around and assaulted the friend with a bottle. At that point, a fight ensued between the Tongan and Nauruan boys. There was no evidence that the appellant participated in the fight inside the club. The trouble makers were escorted out of the club by a security officer. When the boys came out of the club, they continued with their fight on the pavement outside the club. Except for Finau Leone, three other witnesses who gave evidence of the brawl between the Tongan and Nauruan boys did not identify the appellant as one of the perpetrators.

[8] Finau Leone in his evidence said that he was in the company of the deceased when the Nauruan boys attacked them. He said he saw the appellant repeatedly punched and kicked the deceased while he was lying on the pavement outside the club. He said he remembered the appellant's face because he tried to shield off further attacks by covering the deceased with his own body. Later on the same day, he identified the appellant at the CWM hospital and at the police identification parade.

[9] Evidence was led that by the time the deceased was transported to the hospital by police officers, he was dead. The post mortem report has recorded the estimated time of death as about 3.45am. Multiple blunt force injuries were found on the deceased's body. The deceased died of head injuries.

[10] The appellant was caution interviewed at the Totogo Crime Office on 21 June 2014. The interview commenced at 6.30pm and after numerous breaks and adjournment was concluded on 25 June 2014 at 3.30pm. He was charged on 26 June 2014 and presented before the court on the same day. In the caution interview, the appellant made some incriminating admissions, the admissibility of which he challenged at the trial. The admissions were admitted in evidence after a voir dire hearing.

[11] At the trial, the appellant elected not to give evidence. His defence was that he was not part of the joint enterprise to assault the deceased and that his assault after the deceased had already been assaulted by others was not the cause of death. The assessors gave unanimous opinion of not guilty. The learned trial judge did not agree with that opinion and convicted the appellant of manslaughter of Sione Tufui.

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

1. That the Learned Trial Judge erred in fact and in law in failing to accept the submission by Defence Counsel, after the voir dire in the court below, that the Appellant was unlawfully detained at the Totogo Police Station during the period of five days in which the Appellant was held in police custody at the above mentioned police station.

2. That the Learned Trial Judge erred in fact and in law in holding, after the voir dire in the court below, that the Appellant's Caution Interview was voluntarily and fairly obtained from the Appellant.

3. That the Learned Trial Judge erred in fact and in law in failing to address the relevant principles on prior inconsistent statements made by Finau Leone during the trial and in failing to apply those relevant principles to the prior inconsistent statements made to the police by Finau Leone at the Totogo Police Station.

4. That the Learned Trial Judge erred in fact and in law in failing to properly apply the evidence in the Appellant's Record of Caution Interview which His Lordship had accepted to have been given with the Appellant's free will.

5. That the Learned Trial Judge erred in fact in holding that the Appellant was part of a joint enterprise with others in the assault on Sione Tufui and in Sione Tufui's eventual death.

6. That the Learned Trial Judge erred in fact in not assessing properly extent of the injuries on Sione Tufui's body which, in the circumstance of the Appellant's case, could not have been caused by the Appellant.

7. That the Learned Trial Judge erred in law in disagreeing with the unanimous opinion of the assessors without a coherent and rational analysis of the evidence in the trial, thus negating the assessor's statutory or legal role as judges of fact.

[13] The first two grounds of appeal challenges the trial judge's voir dire ruling admitting the appellant's caution interview in evidence. At the trial, counsel for the appellant presented the following grounds for a voir dire:

(a) That the Accused's record of Caution Interview, as recorded from 21.06.14 to 25/06/14, was unlawfully obtained and is inadmissible as evidence in the trial for the Accused in that the interview was held while the Accused was Unlawfully Detained at the Totogo Police Station.

(b) That the Accused's statements in the Accused's Caution Interview, as recorded from 1.06.14 to 25/06/14, were not given voluntarily and is inadmissible as evidence in the trial for the Accused.

(c) That the Accused's statements in the Accused's Caution Interview, as recorded from 21.06.14 to 25/06/14, were unfairly obtained and is inadmissible as evidence in the trial for the Accused.

[14] Although three grounds for objection were advanced, the appellant's main complaint was that the caution interview should have been excluded from evidence for several breaches of the Constitution. It was not in dispute that the appellant was detained and interviewed by police over a period of five days. The Record of Interview commenced on 21 June 2014 at 6.30pm and concluded on 25 June 2014 at 3.30pm. The interview was suspended on numerous occasions during this period. Counsel for the appellant submits that the period of detention exceeded more than 48 hours and was in breach of Article 13 (1) of the Constitution. Article 13 (1) (f) states:

> Every person who is arrested or detained has the right-
>
> To be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that it is not reasonably possible, as soon possible thereafter.

[15] The appellant was arrested at around 3 am on 21 June 2014 (Saturday). Forty eight hours lapsed at around 3 am on 23 June 2014 (Monday). Detention and interrogation continued for a further three days before the appellant was charged with murder and presented in court on 26 June 2014 (Friday). The justification for this prolonged detention is not clear without the benefit of the full court records. Prima facie, after the lapse of 48 hours without charge, the detention became unlawful.

[16] The appellant's second ground for objection was that his caution statements were obtained involuntarily and without according him a right to legal aid lawyer under Article 13 (1) (c) of the Constitution. Article 13 (1) (c) states:

> Every person who is arrested or detained has the right-

> To communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if her or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission.

[17] According to the Record of Interview, the interviewing officer advised the appellant of his right to counsel as follows:

> Q. 5 You have the right to consult any lawyer of your choice, any family member or a friend to be present during this interview. Do you wish to consult any of the above to present?
>
> Ans: No, I don't have any relatives here.
>
> ...
>
> Q 8 You also have the right to consult the Legal Aid Commission in which you do not have to pay for anything and if you need, arrangement can be done for you through phone or consult them personally. Do you understand that?
>
> Ans: Yes
>
> Q. 10 Do you understand your right being put to you?
>
> Ans: Yes

[18] Counsel for the appellant submits that the appellant gave evidence in the voir dire to the effect that the interviewing officer told him that 'even if a lawyer from the LAC came to sit with him during his interview it would be useless'. Counsel submits that the incriminating caution statements were unfairly obtained and should have been excluded from the evidence on the ground of unfairness. There is some force in counsel's submission. The appellant was a 19-year old high school student when he was accused of a serious crime. He did not have any close relatives in Fiji. His parents at that time resided in Nauru. His guardian and carer in Fiji resided in Lautoka. While the police advised him of his constitutional right to consult a lawyer, there is nothing in the Record of Interview to suggest that the appellant competently waived his right to counsel. He was asked whether he understood his right to legal aid counsel but he

was not asked whether he wanted to exercise that right. The appellant's evidence that the police talked him out of consulting legal aid counsel was plausible. Further, the police could have justified an extension of the detention period beyond 48 hours by seeking an order from the court, but they failed to do so.

[19] The crux of the appellant's objections to the admissibility was that his caution interview was unlawfully and unfairly obtained in breach of his constitutional rights. When there is a challenge to the admissibility of evidence for a breach of a Constitutional right, the trial judge must first determine whether there was a breach of a Constitutional right, and if there was, whether it is fair to admit the evidence (*R v Goodwin* (1993) 2 NZLR 153). The burden to prove lack of breach or unfairness rests on the prosecution and the burden of proof is beyond a reasonable doubt (*State v Roko* [2001] FJHC 94; Hac0013d.2000s; 27 November 2001).

[20] In the present case, the learned trial judge did not determine whether the appellant's detention was unlawful and whether the evidence obtained as a result of an unlawful detention and in breach of the Constitutional rights of a detained person should be excluded on the ground of unfairness. Instead, the learned trial judge ruled the appellant's caution interview admissible on the ground that the appellant gave his interview voluntarily. Voluntariness or involuntariness was not an issue. There was no suggestion that the caution statements were extracted using force, threat, inducement or promise. The grounds for objection were founded on the alleged breaches of the Constitution by police. The learned trial judge arguably erred in admitting the caution interview in evidence by not considering the real grounds for objection to the admissibility of evidence.

[21] The third ground of appeal alleges that the learned trial judge failed to direct his mind to a material inconsistency in Finau Leone's police statement and his evidence. In his evidence, Mr Leone identified the appellant as one of the boys who repeatedly

punched and kicked the deceased while he was lying unconscious on the ground. However, in his police statement Mr Leone said:

> I cannot recall all their clothing and the faces as everything happened fast and we were just trying to protect ourselves and continuously pushed back by their attacks made at us but of them all I recognised one of them by the face as he was a regular person in all times we were attacked by the Nauru nationals in the Dragon Night Club as he is a big man with strong build, is about 6 feet tall and has long hair just below his shoulder...

[22] It is not in dispute that the person that Mr Leone described as 'strong, big man, 6 feet tall and long hair' was not the appellant. The appellant at the time and even now is of small stature and was not a regular patron of the nightclub. The inconsistency was material as it went to reliability of the identification of the appellant by the witness. The learned trial judge failed to consider the inconsistency in the summing up or the judgment.

[23] Another weakness in the identification was that Mr Leone initially pointed out to two innocent Nauruan boys at the police identification parade and it was only after an elimination process that the witness identified the appellant. This point was overlooked in the summing up and the judgment.

[24] In the summing up, the learned trial judge gave a direction on identification in accordance with the *Turnbull* guidelines, but he did not point out any weaknesses in the identification evidence of Mr Leone. Mr Leone was a crucial witness for the prosecution. The prosecution relied upon his evidence to impute criminal liability for manslaughter under the doctrine of joint enterprise. It is arguable that the failure of the learned trial judge to consider the weaknesses in the identification evidence either in the summing up or in the judgment resulted in a miscarriage of justice.

[25] The fourth ground of appeal alleges that the learned trial judge misconstrued the caution statements of the appellant in order to convict him. The caution statements were considered in paragraph 9 of the judgment as follows:

> I also accept the accused's police caution interview statements, which were tendered in evidence, as Prosecution Exhibit No. 3. In my view, after considering all the evidence, I had made the finding that the accused gave his caution interview statements to the police voluntarily and they were the truth. I accept that the commotion between the Nauruan and Tongan boys started when Sione Tufui, the deceased, attacked the accused and a friend in the Nightclub with a broken beer bottle. The accused and his friend were subsequently injured, and this started the fight between the Nauruan and Tongan boys first inside the Nightclub and then outside the same. I accept the accused's statement, in his caution interview statements that, he later joined the other Nauruan boys repeatedly punched Sione Tufui while he was unconscious on the ground. Please, refer to questions and answers 74, 75,77,84,85,86,92,93 and 102 of Prosecution Exhibit No.3. As to the nature of the accused's assault on the deceased while he was unconscious on the ground, I also accept Finau Leone's (PW4) evidence on the same. PW4 said, he saw the accused repeatedly punching and kicking Sione Tufui on the ground.

[26] Counsel for the appellant submits that when the record of interview is read as a whole, the appellant's case was that he acted alone and not part of a joint enterprise when he punched and kicked the deceased while he was lying unconscious and motionless on the pavement outside the club. Counsel further submits that by the time the appellant got involved, the deceased was already seriously injured or probably dead. There is substance in counsel's submission. There was no evidence of the exact timing of death. In his caution interview, the appellant said he only punched the deceased after the group attack rendered him unconscious (Q85 & Q92). But the manner in which the learned trial judge assessed and used the caution statements arguably gave an impression that the appellant admitted to being part of the group attack on the deceased and caused his death.

[27] The fifth ground of appeal alleges that the learned trial judge made a complete wrong assessment of the evidence to hold the appellant was part of a joint enterprise to cause

the death of Sione Tufui. In paragraph 15 of the summing up, the learned trial judge told the assessors that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

[28] The prosecution case against the appellant was that the victim was killed in the execution of a common intention by the appellant and others to violently assault the deceased by repeatedly punching and kicking him. The defence's case was that the appellant was never part of the joint enterprise and that he did not participate in the joint assault on the deceased. Counsel for the appellant submits that if the trial judge had made a proper assessment of the identification evidence of Mr Leone and the appellant's caution statements, he would have come to a conclusion that the appellant was not responsible for the death of Sione Tufui under the doctrine of joint enterprise. I find there is substance in this argument.

[29] The sixth ground of appeal challenges the power of the trial judge to disagree with the opinions of the assessors. The power to agree or disagree with the assessors' opinions is derived from section 237 of the Criminal Procedure Act 2009. Section 237 states:

> (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.
>
> (2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.
>
> (3) Notwithstanding the provisions of section 142(1) and subject to sub-section (2), where the judge's summing up of the evidence under the provisions of subsection(1)is on record, it shall not be necessary for any

judgment(other than the decision of the court which shall be written down) to be given, or for any such judgment (if given) —

(a) to be written down; or

(b) to follow any of the procedure laid down in section 141; or

(c) to contain or include any of the matters prescribed by section 142.

(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be —

(a) written down; and

(b) pronounced in open court.

(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes.

[30] Counsel for the appellant submits that the power to disagree with the assessors is only available in the cases of majority opinion and not unanimous opinion. Counsel relies on subsection (4) that states 'when the judge does not agree with the majority opinion of the assessors, the judge shall give reason...' to support his submission that the trial judge has power to only disagree with the assessors' majority opinion and not the unanimous opinion. This submission cannot be sustained because subsection (1) clearly states that 'the judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors'. In Fiji, it is settled that the verdict, that is, the decision to convict or acquit in the case is always that of the judge

(*Joseph v The King* [1948] AC 21, *Ram Dulare & Or v R* [1955] 5 FLR 1). The assessors only give an opinion which the trial judge may or may not accept.

[31] However, when the judge disagrees with the unanimous or majority opinion, the judge is obliged by law to give written reasons in an open court. The reasons must be cogent and in sufficient detail to withstand critical examination on appeal in the light of the whole of the evidence led at the trial (*Ram Bali v R* [1960] 7 FLR 80). The obligation to give cogent reasons does not mean that the judge is required to review the evidence in the detail, but findings of credibility of important witnesses and inferences properly drawn from the evidence should be clearly but concisely stated (*Roko & Ors v State* Cr App 5 and 12 0f 2002; 29 April 2004).

[32] In the present case, the learned trial judge convicted the appellant in an extempore judgment after the assessors expressed a unanimous opinion of not guilty. He gave written reasons three days later in the sentencing remarks. The procedure that the learned trial judge adopted is arguably in non-compliance with subsection (4). It is also arguable that the reasons that the trial judge later gave for departing from the assessors' opinions are not cogent enough to comply with subsection (4).

[33] After careful consideration of all these matters, I am satisfied that this appeal has a high likelihood of success. The appellant was sentenced to 3 years' imprisonment on 6 March 2017. Currently, the Court is hearing criminal appeals that were filed in 2013. The appellant's appeal is unlikely to be heard before 2020, by which time the appellant will have served his sentence. In the High Court, the appellant was granted bail pending trial. While on bail, he complied with all the conditions of bail. He is not a flight risk. For these reasons, it is in the interests of justice to release the appellant on bail pending appeal.

[34] The applications for leave and bail are allowed. The appellant's mother, Mrs Eminum Collette Heinrich has offered to be a surety. She now resides at 27 Calcutta Street, Waiyavi, Lautoka and will remain in Fiji until the appellant's appeal is heard. The appellant has offered to report to a police station while on bail pending appeal. Bail is granted on the following conditions:

(i) Mrs Eminum Heinrich is to enter into an agreement for bail undertaking and deposit a security of $1000.00 cash at the Court of Appeal Registry.

(ii) The appellant is to reside with Mrs Eminum Heinrich at 27 Calcutta Street, Waiyavi, Lautoka and not to change that address without approval from a justice of appeal.

(iii) The appellant's passport is to remain with the court and he must not obtain any travelling documents while the appeal is pending.

(iv) The appellant must report to Lautoka Police Station on the last Saturday of every month.

(v) The appellant must appear for all hearings in the Court, unless his appearance is excused by the Hon. President or any justice of appeal.

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

Solicitors:
Public Defender's Office, Nauru for the Appellant
Office of the Director of Public Prosecutions, Fiji for the Respondent