IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 0186 OF 2016
(High Court HAC 146 of 2011)

BETWEEN : **TARUN KUMAR RAWAT**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr A Singh for the Appellant**
Mr S Vodokisolomone for the Respondent

Date of Hearing : **23 April 2018**

Date of Ruling : **7 May 2018**

RULING

[1] The appellant was charged with one count of murder the particulars of which were that on 21 July 2011 at Nadi he murdered Tevita Tabua. Following a trial in the High Court at Suva two of the three assessors returned opinions of guilty while the third returned an

opinion of not guilty. The learned trial Judge concurred with the majority opinions and convicted the appellant on the count of murder. The appellant was sentenced on 2 December 2016 to mandatory life imprisonment with a minimum period of 17 years to be served before a pardon may be consider under section 237 of the Crimes Act 2009.

[2] The appellant filed a timely notice of appeal against conviction and sentence on 23 December 2016. To the extent that the grounds of appeal against conviction involve questions of law alone, leave is not required pursuant to section 21(1)(a) of the Court of Appeal Act 1949 (the Act). However leave is required when the grounds of appeal against conviction involve questions of mixed law and fact under section 21(1) (b) and when the appeal is against sentence under section 21(1)(c). The test for granting leave to appeal against conviction is whether any of the grounds are arguable and the test for granting leave to appeal sentence is whether the appellant has raised an arguable error in the exercise of the sentencing discretion by the trial judge: (**Naisua –v- The State** Cr. App. No. CAV 10 of 2013; 20 November 2013).

[3] It should be noted that it is not sufficient for a notice of appeal to describe a particular ground as involving a question of law alone. Before a right of appeal on a question of law can be asserted, a question of law alone must be shown at the appeal stage to have arisen and has remained undetermined (**R v Hinds** (1962) 46 Cr. App. R. 327). It follows that in the event that a ground of appeal otherwise described as involving a question of law alone is considered to be a ground involving a question of mixed law and fact, then the appellant must demonstrate that the ground raises an arguable point for leave to be granted on that ground.

[4] The grounds of appeal as stated in the notice filed on 23 December 2016 are as follows:

> *"1. The Learned Trial Judge erred in convicting the Appellant for Murder when there was no credible evidence before the Court either direct or indirect proving an intention to kill, as the Prosecution alleged thereby causing a grave miscarriage of justice.*

2. *The Learned Trial Judge erroneously directed the Assessors on the Prosecution case theory as to a fight occurring between the deceased and the Appellant and at the end of the Summing up the Prosecution sort a re-direction that that was not their case as there case was that the Appellant killed in a fit of jealousy, the Learned Trial Judge referred to Question & Answer 240 of the Record of Interview and rejected the Prosecution case theory and refused to put the direction as a result he erred by changing the Prosecution case theory and he failed to direct the Assessors that the Accused had rejected the Prosecution case theory in Question 240 and therefore there was a reasonable doubt, the benefit of which was to be given to the Accused.*

3. *The Learned Trial Judge failed to give Re-directions sort by the Defence and merely said to the Assessors you have heard the Defence Counsel this was erroneous and he failed in his duty as it did not have the authority of the Judge and further it was questions of law and the judge had a duty to give those directions, he thereby caused the trial to miscarry, causing a grave injustice to the Appellant.*

4. *The Prosecution relied on intention as the only element of mens rea and the Learned Trial Judge filed to give the following directions:*

    a) *An Intentional Act is a willed Act, that is to say an Act of which the Accused was aware and meant to do.*

    b) *It is necessary for the Judge to identify the precise intent required to make out the charge in every case.*

    c) *The Assessors must determine beyond reasonable doubt that the Act done was intentional.*

    d) *The Directions the Learned Trial judge gave was not sufficient having regard to Evidence of Accused that he had no intention to kill. (Refer to Charge Statement)*

    As a result the trial miscarried resulting in a grave injustice.

5. *The Learned Trial Judge misdirected the Assessors in paragraph 24 and 25 inclusive of his summing up by erroneously stating the Defence case, when the Defence case was that he had no intention to murder, he defended himself and threw a stone in the dark and importantly he tried to revive the deceased thus saying that there was no intention and he acted in self-defence which the Prosecution had to negate and in the alternative it*

was provocation as a result of his directions the trial miscarried resulting in a grave miscarriage of justice.

6. *The Learned Trial Judge failed to direct the Assessors that the implication of the State not calling to material witness which they gave Notice of that is Police Officer Rohinesh Prasad (Material Witness No.33) and Rejieli Nolan (Material Witness No. 25) as there was evidence that a third person had shifted the body, he was wearing a boot with sand and that the head injuries were consistent with being hit by a boot repeatedly and that this third person did not allow police to investigate on the morning of 22nd July, 2011 by welding a knife as such the Learned Trial Judge failed to give direction in the following term "that failure to call witness cannot supply or make up a deficiency in the Prosecution case and in this context that the Accused bears no onus of proof or any obligation to call evidence, consistent with the presumption of innocence."*

7. *The Learned Trial Judge failed to explain that there were two theories available in the Record of Interview the Plaintiff's theory and Defence theory and that the Record of Interview in totality could not be read to mean that there was a confession to intention to kill but only a confession to assault at its highest or assault in self-defence and further Learned Trial Judge failed to warn the Assessors that it is dangerous to convict on the basis of confessional statement made while in custody which is disputed and its making not reliably collaborated.*

8. *The Learned Trial Judge refused to redirect the assessor or omitted to direct them that the cross-examination of the Pathologist confirmed that there was no sexual act performed on the deceased and further there was no injury in the back passage or sign of any digital penetration and further that head injury could be caused by boot kicks thus causing a reasonable doubt to the confession and Prosecution case theory.*

9. *The Learned Trial Judge refused to give a good character direction even though it was raised in cross-examination of the Officer in charge, opening and closing of Defence and evidence from the Accused, the Learned Trial Judge was required to direct the assessors that they should consider good character as a factor affecting the likelihood of the Accused committing the crime charged thus causing the trial to miscarry.*

10. *The Learned Trial Judge failed to assist the Assessors in regard to the sworn testimony of the Accused and failed to direct them to give the Accused such credit as they think fit for having taken the course of making*

a Defence by way of giving Evidence on Oath and that his testimony was to be weighed as the case of any other witness.

11. *The Learned Trial Judge erroneously restricted the closing submissions to 15 minutes in a Murder Trial when he knew that two Assessors were very young and inexperienced and that this was a fundamental error and it deprive the accused of a fair trial pursuant to the Constitution of Fiji Section 15(1).*

12. *The Learned Trial Judge erroneously admitted the Record of Interview without proper reasoning when there was evidence before him that the Record of Interview was compelled by acts of violence to make a confession and further that his Record of Interview at mid-night was unlawful as no lawyers were available to assist him and that during the Voire Dire the police gave no justification why the interview over 4 days had to commence at mid-night.*

13. *The deceased died at in the early hours off 22nd July, 2011 and after the Accused had left the scene a third person had moved the body and he was welding a knife at a police officer when they tried to investigate and since the head injuries were inconsistent with a stone thrown there was a reasonable doubt on the guilt of the Accused an further the Prosecution failed to produce the stone which at PTC they said they possessed.*

14. *The Learned Trial Judge direction on circumstantial evidence was erroneous and confusing when he should have directed the Assessors as follows:-*

    a) *In cases in which a circumstantial evidence direction is required, guilt should not only be a rational inference, but should be the only rational inference that could be drawn from the circumstances.*

    b) *Where an intermediate conclusion of fact is a necessary link in a chain of reasoning, that fact should be identified for the jury, which should be directed that it cannot view such an intermediate fact as basis for guilt unless satisfied of its existence beyond reasonable doubt.*

    c) *A jury should be reminded that if there is any rational hypothesis consistently with innocence it is their duty to acquit.*

This cause the trial to miscarry.

15. *The Learned Trial Judge erred in imposing such a heavy minimum term and erred as a result of applying wrong principles and taking into account irrelevant factors and not giving the Appellant credit for his good subjective features and prospects of rehabilitation."*

[5] At the hearing Counsel for the Appellant submitted that the grounds are essentially concerned with one issue which can be stated as the failure on the part of the prosecution to establish beyond reasonable doubt that the appellant intended to cause or was reckless as to causing the death of Tabua by his conduct – see section 237 (c) of the Crimes Act 2009. Counsel submitted that the only evidence before the Court adduced by the respondent to establish intention was the caution interview and the post mortem report.

[6] In his judgment the trial Judge referred to the "*caution*" interview wherein the appellant admitted that he was with the deceased at the time and place of death and that they had argued. The appellant admitted exchanging punches during the course of a physical fight. It would appear that the appellant also admitted to hitting the deceased with a stone. It was submitted by Counsel at the hearing that the stone was thrown at the deceased in the dark. The stone hit the deceased on his head. It would appear that as a result of this the deceased fell to the ground unconscious. The appellant apparently went to the deceased to try to revive him and when he could not feel a pulse he fled the scene. The judge also referred to the post mortem report which to a large extent was consistent with the appellant's admissions.

[7] In my judgment it is arguable whether that evidence was sufficient to establish beyond reasonable doubt the necessary intention required under section 237 of the Crimes Act. Leave is granted to the extent that the grounds of appeal involve questions of mixed law and fact.

[8] As for the sentence appeal the issue raised is the period of 17 years fixed by the learned judge before a pardon may be considered. This aspect of the sentence for murder under section 237 of the Crimes Act is not an early release provision. The appellant has not

identified any arguable error in the exercise of the discretion when that term was fixed by the Judge. The application for leave to appeal sentence is refused.

[9] The appellant has also applied for bail pending appeal. The application is supported by an affidavit sworn on 17 May 2017 by Tarun Kumar Rawat (the appellant). The principles that are considered in an application for bail pending appeal were fully discussed in the decision of **Zhong –v- The State** [2014] FJCA 108; AAU 44 of 2013; 15 July 2014. In this case neither the material in the affidavit sworn by the appellant in support of his application nor the grounds of appeal upon which the appeal is based and or for which leave has been granted for the appeal to proceed before the Full Court satisfy the threshold of exceptional circumstances. Furthermore, Counsel for the appellant submitted that the verdict should have been one of manslaughter for which a custodial sentence may be imposed in any event.

Orders:

1. *Leave to appeal conviction is granted.*
2. *Leave to appeal sentence is refused.*
3. *Application for bail pending appeal is refused.*

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