

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 048 OF 2023

BETWEEN: **MOHAMMED MASUM**

Appellant

AND: **THE STATE**

Respondent

Coram: **Mataitoga, AP**

Counsel: **Appellant in Person**
Nasa J for the Respondent

Date of Hearing: **4 October 2024**

Date of Ruling: **2 December 2024**

RULING

1. The appellant was charged with 2 counts of Murder, contrary 237 of the Crimes Act 2009. He pleaded not guilty to the charges. He was tried at the High Court in Lautoka and at the end of the trial he was found guilty as charged on both counts, and was convicted on in a judgment dated 4 May 2023.
2. The appellant was sentenced on 18 May 2023 to life imprisonment. He must serve 20 years before he may be considered for pardon.

3. The appellant was dissatisfied with his conviction in the High Court and on 24 May 2023, prepared his Notice of Appeal against conviction, signed it and submitted it through the appropriate channel in the Fiji Correction Service [FCS]. This was received in the court registry on 5 June 2023. His appeal was timely.

Grounds of Appeal

4. The first set of appeal grounds submitted by the appellant with the Notice of Appeal dated 5 June 2023, were as follows:
 - i) The trial judge erred in law when his Lordship proceeded with the trial, without giving him the right to seek legal advice;
 - ii) The trial judge erred in law when he proceeded with the trial without giving the appellant the opportunity to seek legal advice;
 - iii) The trial judge erred in law, when he proceeded with the trial without giving the appellant the opportunity to prepare his defence;
 - iv) The trial judge erred in law when his Lordship forced the appellant to study the disclosures which was in English and defend himself;

5. On 7 March 2024, the appellant filed in the court registry a “Consolidated Grounds of Appeal Against Conviction.” In this submission the appellant’s submitted 8 grounds of appeal and advised the court that he withdraws previous grounds he had filed. It will be noted that in one of the grounds submitted that is part of consolidated grounds, also covers the question of law set out in the 4 grounds set out in paragraph 5 above. The consolidate grounds are as follows:
 - i) That the trial judge erred in law and fact when he proceeded with the voire dire when the appellant was not ready, resulting in injustice to the appellant;
 - ii) That the trial judge erred in law and fact when he did not consider the appellant’s request to transfer the case to be heard before a Hindi speaking judge, where it would easier for follow the proceeding for Bangladeshi national, whose Hindi in conversational only;

- iii) That the trial judge erred in law and fact when he admitted the cautioned interview of the appellant, which he signed without knowing the contents, which were in Hindi;
- iv) That the trial judge erred in law and fact when, he allowed a prosecution witness to double as translator who himself admitted that he could not read or write Hindi;
- v) That the trial judge erred in law and fact when he admitted that the told the truth in his caution interview statement, yet there were a lot of contradicting answers by the appellant;
- vi) That the appellant erred in law and fact when the direction or lack of it, he gave himself in admitting the voire dire were based on assumption and not conclusive direct evidence;
- vii) That the trial judge erred in law when he failed to adhere to the right of the appellant as an accused person provided for in the Fiji Constitution and Universal Declaration of Human Rights;
- viii) That the trial judge erred in law and fact when he did not scrutinize properly the evidence and police statements of the prosecution witnesses which would have proved doubt in the prosecution case.

6. To assist in my assessment of the ground of appeal against conviction, sub mitted by the appellant, I will consolidate further them under the various generic headings. These are: Admissibility of Appellant Caution Interview Statement; Unfair Trial and Constitutional Rights of Accused

Relevant law

7. In terms of section 21(1) (a) and (b) of the Court of Appeal Act the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction is ‘reasonable prospect of success’ see: Caucau v State [2018] FJCA 171; Navuki v State [2018] FJCA 172 and State v Vakarau [2018] FJCA 173; and Sadrugu v The State [2019] FJCA 87.

8. Where the questions raised by the ground of appeal, involve questions of law only, leave is not required under section 21(1)(a) of the Court of Appeal Act.

Assessment of the Grounds of Appeal

Admissibility of the Appellant's Caution Interview Statement

9. Under this heading grounds i), ii) iii) and v) in paragraph 5 above are considered together. The contention on the part of the appellant, is that he is a Bangladeshi and the caution interview was conducted in Hindi and the record was in Hindi. He claimed that he did not fully understand the process and that he was not ready and he informed the trial judge.
10. The trial judge considered the claim made by the appellant and stated the following:
State v Masum [2020] FJHC 686; para 4 & 5

“4. When this case was transferred to this Court, his renewed bail application and pre-trial issues were taken up for hearing. At those hearings the accused was seen conversing fluently with the Court interpreter in Hindi. The court interpreter confirmed that the accused talks and understands Hindi very well. The accused finally admitted that he could understand proceedings conducted in Hindi although he could not read or write that language. Having been satisfied that the accused could understand the proceedings conducted in Hindi, I decided to hold the voir dire hearing and the trial proper by providing the assistance of a Hindi interpreter. If I decided otherwise, his constitutional right to a speedy trial would have been violated. That would have been a bad reflection on the system and not in the interest of justice. At the voir dire hearing, the accused proved himself to be a good Hindi communicator when he cross-examined the opposing witnesses in Hindi.

5. The accused was unrepresented at the final pre-trial hearing. He requested that he be granted bail to retain a private counsel so that he could prepare for his defence. He said he was going to retain Mr. Iqbal Khan, one of the expensive counsels in this court. When questioned if he had

money to do so, he said he must first come out on bail to bring down money from Bangladesh. In Fiji, the remandees are not detained in incommunicado. Therefore, he had access to legal representation whilst being on remand. He had already retained a private counsel and then withdrew. He had waived his right to retain a counsel from the Legal Aid Commission. The right to legal practitioner is not absolute in Fiji. It may be restricted in the interest of justice.”

11. It is apparent from these quotations that adequate consideration was given by the trial judge, to the appellant to accommodate his request with regard to the language difficulty. The appellant may have overplayed his lack of literacy in Hindi.
12. These grounds have no merit and are dismissed.

Unfair trial – section 14 of the Constitution - Rights of Accused/Appellant

13. Ground vii) is about the appellant’s claim that his pre-trial rights as an accused person were denied by the trial judge.
14. An accused person in Fiji has certain rights under section 14 of the Fiji Constitution. These include the right to be tried in the language that would ensure he understands the due process; the right to seek legal advice; the right to reasonable access to disclosures and evidence of the prosecution and be given adequate time to study the same: section 14(2)[c] and [e] of the Fiji Constitution.
15. The appellants claim in his iv) and vii) grounds of appeal that his rights protected under section 14(2)[c] and [e] were not observed by the trial judge. The judgement does not shed much light on these pre-trial requirements of procedural fairness, an accused person is entitled to get from the court.
16. The copy record of trial will be available to the full court and they would be in a position to determine whether the rights of the appellant [accused] were indeed violated.

17. These grounds involve questions of law only; leave is not required. The appellant may appeal to the full court on these grounds and hopefully better articulate in its accompanying submission the exact nature in which his rights as an accused person was denied in the pre-trial stage.

Lack of Scrutiny of Evidence by Trial Judge

18. Ground viii) in paragraph 5 is confusing and unclear in what exactly it is alleging.
19. The allegation made in this ground of appeal is that the trial judge did not properly scrutinize the evidence and the police statements, which if he had done that there would be doubt in the prosecution case against him. No reference to the evidence, the appellant is referring to were given and the police statements were not itemized.
20. The appellant submission in support of this ground is a series of ‘what if’ commentary of aspects of the evidence at the trial. Examples of these in the submission:

(a) if Nazrul really did burn the appellant’s hands, then how was he able to dig the grave of Nazrul?

(b) If the appellant had blisters on his hands on the day of arrest, then how and why wasn’t any of these made in the entries of the police or station diaries?

(c) if the appellant’s hands were injured and he wasn’t able to lift the drum from ground onto the van? How was the appellant able to carry or drag the same drum 35 meter across a creek to a field to dump the deceased?

21. There are 15 such questions raise in support of this ground of appeal. Not one may have been raised at the trial proper. These are not evidence at the trial for the judge to scrutinize in evaluating the totality of the evidence in this case. They are questions that is raised as an afterthought after the judgment and sentence against him was entered.

22. The submission for this ground of appeal, is like a ‘kite-flying adventure’ hoping that it may snag something in the appellant’s favour. It is misconceived and has no reasonable prospect of success on appeal. Leave to appeal is refused.

ORDERS:

1. Leave to appeal is refused for grounds i) ii) iii) iv), v), vi) and viii) set out in paragraph 5 in this ruling;
2. Leave is granted for ground vii) which involves a question of law.



The Hon Isikeli U Maitoga
Acting President

