

IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.AAU0041 OF 2010

BETWEEN:

1. ZAFIR TARIK ALI
2. TAIMUL ALI
3. TAHIR ALI
4. CHANDLESH GANESH

Appellants

AND: THE STATE

Respondent

Date of Hearing: Monday, 16th August 2010

Counsel: Mr. M. Raza for the Appellants
Ms. J. Cokanasiga for the Respondent

Date of Ruling: Thursday, 9th September 2010

RULING

Application for Bail Pending Appeal by Zafir Tarik Ali, Taiman Ali, Zahir Ali and Chandlesh Ganesh

1. I heard an application for bail pending appeal on behalf of ZAFIR TARIK ALI, TAIMUR ALI, TAHIR ALI and CHANDLESH GANESH on 24th August 2010. At the end of the bail hearing I said I would take the matter under advisement and consider the able submissions written and oral from Mr Mehboob Raza for the four applicants and from Ms Jojana Cokanasiga on behalf of the State.

2. The applicants were convicted of murder after a trial before Mr Justice Priyantha Fernando and assessors on 7th July 2010. They were sentenced to life imprisonment and ordered to serve 11 years before being eligible to be released on parole.
3. The facts concerned the early morning of Monday 3rd January of 2010. At about 2.00 a.m. there was a burglary at the home of Zafir Ali and Taimur Ali. The house is situated in the countryside at Bau Road Nausori.
4. Five family members got into a double cabin truck with a large uncovered area at the back for transporting goods. This is known as "the back tray". Their object was to look for anyone who might be suspected in respect of the burglary.
5. James Shankar Nair was well known to the applicants as his family lived close by. At Nausori cemetery the five in the truck found James Nair around 3.00 a.m.. He agreed to accept a lift and jumped into the back tray. Later the five decided to take James Nair as a suspect to Nausori police station. Shortly afterwards James Nair parted company with the back tray of the vehicle and was later found dead at the side of the road.
6. I am told that the medical evidence was less than satisfactory. It seems that James Nair died as a result of single fracture of the skull.
7. Mr Raza says that there was an inadequate direction on circumstantial evidence and upon the fact that joint enterprise was required to be proved against each applicant individually. Mr Raza says there was a paucity of evidence on the events preceding James Nair dying at the side of the road and in the circumstances the learned judge's direction and review of the evidence on this was inadequate. There were other matters of criticism in respect of the summing up. Mr Raza says that on a number of grounds there is a strong likelihood of the appeal being allowed.

8. Miss Cokanasiga cites Mr Justice of Appeal Ward in Ratu Jope Seniloli and Others v. The State Criminal Appeal No.AAU0041 of 2004S "The general restriction on granting bail pending appeal as established by cases in Fiji and many other common law jurisdictions is that it may only be granted where there are exceptional circumstances." Mr Raza for the applicants agrees that this is the leading authority.
9. In Fiji, the Bail Act 2002 as it did in other common law countries when it was introduced in such countries put into statutory form the principles and rules that common law judges have applied for a very long time.
10. Section 3 of the Bail Act states :
- "1) Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted ;
 - 4) The presumption in favour of granting bail is displaced where –
 - a) the person seeking bail has previously breached a bail undertaking or bail condition ; or
 - b) the person has been convicted and has appealed against the conviction."
11. Section 17(3) of the Bail Act states :
- "When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take 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 applicant(s) when the appeal is heard."

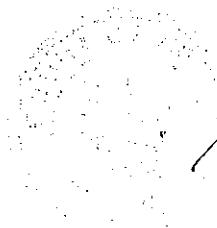
12. Miss Cokanasiga cited the Court of Appeal in Simon McCartney v. The State Criminal Appeal No.AAU 0103 of 2008 where the learned Justice writing the judgment of the Court said :

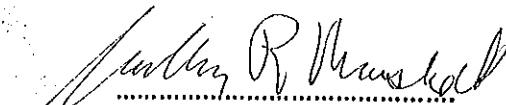
"...the other factor weighing against the granting the Appellant bail is that in the research I have conducted since argument concluded I have not found one case where a person convicted of murder was granted bail pending an appeal to the Court of Appeal, nor for that matter was any such case cited to me be either the Appellant or the Respondent. In my view this is a matter which has some significance on this application."

13. In response to this Mr Raza for the Applicants produced the case of Praveen Ram v. The State [2008] FJCA 68 dated 4th November 2008 where Justice Randall Powell admitted the appellant to bail who had been convicted of murder in respect of his father who was an alcoholic and in poor health. The issue was whether provocation should have been left to the assessors with the choice then, depending on their findings of fact, of manslaughter as an alternative to murder.
14. My view is that the correct principles were applied in Praveen Ram but the question for my judgment is where these principles lead on the present application.
15. It is very clear that I must not decide the appeal or attempt to do so. I am influenced by the legal policy of the Bail Act 2002 which is rightly much more restrictive after conviction that it is pending trial. I also take into account as I have to the matters set out in section 17(3) of the Bail Act.
16. This is a case where the mandatory sentence in life imprisonment and so far less than 2 months have been served. In my judgment if bail is not granted and the appeal is heard in 2010 the proportion that will have been served by the applicants when the appeal is heard will be very small.

17. I turn now to the chances of success. Doing the best I can without having seen the record of the proceedings in the High Court I am impressed by the strength of the points taken by Mr Raza. However while the chances of success may be better than an even chance, I do not believe they reach that high point where chances of success would make this an exceptional case where bail should be granted pending appeal.
18. I appreciate that it is said on behalf of the applicants that there is a very high chance of success. But the experience of the law is that, while many appeals so described do succeed, many also fail for one reason or another.
19. I think it appropriate that every effort be made to have the applicants appeal heard as soon as possible. I hope it can be listed in the Court of Appeal session following the one that is now being heard. I believe that is in November 2010.
20. I have found the arguments finely balanced in this application but for the reasons stated above I do not think that it is appropriate to grant bail pending appeal.
21. I order
 - (i) the application for bail pending appeal be dismissed.
 - (ii) direction that substantive appeal be heard at an early date.

DATED at Suva this 9th day of September 2010.




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William R. Marshall
Resident Justice of Appeal