IN THE FIJI COURT OF APPEAL

Notice

CRIMINAL APPEAL NO. 11 of 1989

Between:

IFEREIMI KUBUKAWA
SERU MOCE
APISAI KOROI
AISAKE TUISAUMA
SAULA SUCU AND
PITA KEWA — Appellants

- and -

THE STATE — Respondent

Mr. Q. Bale for the Appellants
Mr. I. Mataitoga for the Respondent

DECISION
(Bail Application in Chambers
Before a Single Judge)

This is an application for bail pending the hearing of an appeal to the Court of Appeal.

In so far as this bail application is concerned each of the 6 applicants was charged in the High Court sitting at Suva with 2 counts of the offence of Causing Grievous Bodily Harm contrary to Section 227 of the Penal Code. On 28 September 1989 they were found not guilty of the offence charged but guilty on 2 counts each of the lesser offence of Assault Occasioning Actual Bodily Harm contrary to Section 245 of the Penal Code. Each was sentence on the 29 September to 9 months' imprisonment on each count but the sentences were ordered to run concurrently. Thus effectively each applicant is to serve 9 months imprisonment less any remission to which he is entitled.

On 6 October 1989 the applicants filed Notice of Appeal in the Fiji Court of Appeal against their convictions and sentences. Ten grounds are advanced against convictions and the 11th ground is against severity of the sentence.

The grounds on which bail is sought are as follows:-

"1. THAT we have every prospect of succeeding in our appeal having regard to the grounds of appeal contained in our Notice of Appeal filed herein on the 5th day of October, 1989.

2. THAT it is likely that there would be considerable delay in preparing the trial record and consequently it is highly probable for some considerable time hereafter and in any event well after we have served our sentence with remission and such delay would cause grave injustice to us."

With regard to the submission that the applicants have every prospect of succeeding in their appeal Mr. Bale relies on Grounds 2 and 3 of the Notice of Appeal. Ground 2 alleges misdirection on the part of the trial judge in failing to properly direct himself and the assessors on the proper guidelines to be taken into account before the applicants could be found guilty of any lesser offence not charged in the indictment. In brief Mr. Bale argued that it must be shown that the lesser offence is an essential ingredient of the major offence.

Ground 3 alleges that having failed to properly direct himself and the assessors on the issue of alternative verdicts, the trial judge failed to reject as legally improper the assessors' opinion that the appellants were guilty of the offence of Assault Occasioning Actual Bodily Harm. The basic argument in this ground is that whereas assault is an essential ingredient of the offence of Assault Occasioning Actual Bodily Harm, assault is not necessarily an ingredient of the offence of Causing Grievous Harm. He pointed out, and Mr. Mataitoga, the Acting Director of Public Prosecutions agreed, that in the indictment as laid assault was not particularised as an ingredient of the charge of Causing Grievous Harm.

Mr. Mataitoga, however, referred to the definition of "Grievous Harm" as contained in section 4 of the Penal Code, which includes "any serious injury to any external or internal organ member or sense".

Mr. Mataitoga also contended that the terms of Section 169 of the Criminal Procedure Code are sufficiently wide to support the course adopted by the trial court. Section 169 reads as follows:-

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

Mr. Bale relied heavily on the decision of the English Court of Appeal in Austin (1973) 56 Cr. App. R. 163.

Mr. Mataitoga submitted that whilst the statutory provisions involved in the Austin Case (i.e. section 18 and section 20 of the Offences Against the Person Act 1861) were broadly similar to section 227 and section 245 of our Penal Code, the wordings were sufficiently dissimilar to be distinguishable. He submitted that the English Court of Appeal decision in R v. Snewing [1972] Crim. Law R. 278 is more relevant to our statutory provisions and should be followed. In this case Snewing was indicted for inflicting Grievous Bodily Harm. The jury asked if they could find him guilty of Occasioning Actual Bodily Harm and the judge directed that the only alternative open to them was common assault. They convicted him as indicated. On appeal it was held that the direction was wrong and a conviction for Assault Occasioning Actual Bodily Harm was substituted.

Mr. Mataitoga submits that the point raised by Mr. Bale namely that assault was not particularised in the grievous harm charge is only arguable but it does not establish a prima facie

that the appeal will succeed. Mr. Bale on the other hand contends that the failure to aver to assault in the indictment has caused an unjustice to the defence case.

As regards the 2nd ground namely that the applicants will have served their sentences by the time their appeal comes for hearing, Mr Mataitoga has rightly conceded that this is likely to be the case.

The first sitting of the Court of Appeal in 1990 is not likely to take place until February or March. Bearing in mind the length of the trial which lasted for several weeks, the preparation of the appeal record will take considerable time. There is therefore no prospect of the appeal being heard this year. Having regard to the fact that a prisoner is entitled to 1/3 remission under normal circumstances, the prospect of the applicants having completed their sentences before the appeal is determined is almost certain.

Whilst Mr. Bale has clearly not satisfied me that his clients have, prima facie, every prospect of success, he appears nevertheless to have an arguable case. I must however point out that it is not within my province to actually decide the legal issues raised by Mr. Bale.

Whilst the existence of an arguable case itself will not be sufficient justification for granting bail, it has strengthened the submission that that bail should be considered because the applicants will have served or will have very substantially served their sentences by the time their appeal comes up for hearing.

Section 33(2) of the Court of Appeal Act Cap 12 empowers the Court of Appeal if it sees fit to admit an appellant to bail pending determination of his appeal. This power although discretionary is for obvious reasons cautiously exercised. As is pointed out in Watton (1979) 68 Cr. App. R. 293:-

> "The only ground for the granting of bail on an appeal to the Court of Appeal ..... is the existence of special circumstances, i.e. where it appears, prima facie, that the appeal is likely to be successful, or where there is a risk that the sentence will be served by the time the appeal is heard."

Although I regard the present application to be a borderline one I have nevertheless decided to grant bail to avoid any risk of unjustice. However I must point out that my decision to grant bail in this case should not be taken to mean that every future applicant for bail pending appeal will necessarily be granted bail merely because there is a risk that his sentence will be served before the determination of his appeal. There can be many reasons either individually or in combination for refusing bail in such circumstances, e.g. that the appeal is patently misconceived in law or, it is manifestly devoid of any merit or it would be against public safety to allow bail.

Each applicant will be admitted to bail pending determination of his appeal in a personal bond of $500 with one surety each in the like amount. In terms of Rule 55(5) of the Court of Appeal Rules each appellant is ordered to be personally present at each and every hearing of his appeal and at the final determination ~~of~~ thereof.

(Sir Moti Tikaram)
Resident Justice of Appeal

Suva
20 October 1989.