IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0011/96S IN CHAMBERS
(Lautoka High Court Criminal Case No. 0017 of 1996L)

BETWEEN:

AMINA BEGUM KOYA Appellant/Applicant

-AND-

THE STATE Respondent

*Mr. H. Nagin* for the Appellant/Applicant
*Mr. K. Wilkinson* for the Respondent

*Date and Place of Hearing*: Friday 28th June, 1996, Suva
*Delivery of Decision*: Monday 1st July, 1996

# DECISION

(Bail application pending appeal)

The Applicant Amina Begum Koya was on Tuesday 25th of June 1996 convicted of the offence of arson by the Lautoka High Court (Lyons J.) after a trial lasting about 2 weeks. She was allowed to go home on bail and was sentenced to 3 years imprisonment the next day, i.e. Wednesday 26th June 1996. On Thursday 27th June, 1996 Mr Haroon Ali Shah,

Counsel for the Applicant, filed an application in the Lautoka High Court under the provisions of Section 315 of the Criminal procedure Code seeking bail pending appeal for his client. Later the same day he filed a similar application in the Fiji Court of Appeal Registry in Suva on the basis that he was having difficulty in serving the Respondent's representative in Lautoka. Mr Shah also applied to a single Judge of Appeal for leave to appeal against conviction and sentence having already filed grounds of appeal in the Fiji Court of Appeal. I fixed the two applications for hearing before me in my chambers at 10.30 am on Friday 28th June, 1996. In the meantime request was sent to the Lautoka Registry to send, if possible by fax, the Sentence and the Summing-up. It seems that the Applicant's Counsel was later able to serve the Respondent in Lautoka and the bail application was heard, at least in part, by the trial judge who for the very sound reasons given by him in his written ruling declined to adjudicate on the application. He sent the bail application to Suva by courier mail in the hope that it would be dealt with as soon as possible by a judge of the Court of Appeal in Suva. By the time the file arrived from Lautoka on Friday morning I had already commenced hearing the 2 applications set down before me. The Lautoka file contained, inter alia, the Sentence but not the Summing-up. Neither Counsel before me were in possession of the Summing-up either. I understand the Summing-up has been electronically recorded but not transcribed.

In our assessor system when the trial judge agrees with the opinions of the assessors (as was the case here) it is not incubment on him to write a judgment giving reasons. The Summing-up and his decision which must be written down then constitutes an integral part of the judgment of the Court.

Section 33(2) of the Court of Appeal Act provides that the Court of Appeal "may, if it sees fit, on the application of an appellant admit an appellant to bail pending determination of the appeal." Section 35 of the same Act empowers a single Judge of the Court of Appeal to exercise the Court's jurisdiction to grant bail pending appeal.

Before proceeding to hear the motion for bail I dealt with the application for leave to appeal against conviction and sentence. In brief by virtue of the provisions of Section 21 of the Court of Appeal Act (as repealed and replaced by Section 2 of the Court of Appeal (Amendment) Decree 1990)) an accused who has been convicted on trial held before a High Court can only appeal as of right on any ground of appeal which involves a question of law alone. In the present case the grounds of appeal filed purported to be based on questions of mixed fact and law and hence the leave of this Court (or a certificate from the trial Court) was necessary before the appeal could be heard. Similarly an accused cannot appeal against sentence without the leave of the Court of Appeal.

Mr K. Wilkinson who represented the State on behalf of the Director of Public Prosecutions had no objection to leave being granted. Having examined the grounds filed I had no hesitation in granting leave to appeal in respect of both conviction and sentence. In short the appeal was properly before this Court before I commenced hearing the bail application.

I have borne in mind the fundamental difference between a bail applicant awaiting trial and one who has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all, the conviction. It, therefore, follows that a convicted person carries a higher burden of satisfying the Court that the interests of justice require that bail be granted pending appeal.

Although discretion has been statutorily vested in this Court to grant bail in a fit case the general rule of practice has been that where an accused has been tried, convicted of an offence and sentenced to a term of imprisonment then only in exceptional circumstances will he or she be released on bail during the pendency of appeal.

But the expression "exceptional circumstances" is not a term of art or precision. It is not a term that lends itself to comprehensive definition. Nevertheless the expression does provide some criteria or guide to ensure a degree of consistency of approach.

No two cases are exactly alike in every respect and so each case has to be judged on its own merits. It is often necessary to fall back on examples or precedents. If an accused is likely to spend the whole or a substantial part of his or her term in prison before his or her appeal is heard then this situation may constitute a good ground for granting bail. If bail is not granted in such a case and the conviction is subsequently quashed or sentence substantially reduced then an injustice will have been done. At the same time it must be borne in mind that some delay in hearing of appeals is inevitable. Generally delay in hearing should not be looked at in isolation. All facts and circumstances surrounding the appeal should be looked at. A short delay in one case may be immaterial whereas a similar delay in another context may have a telling effect. When dealing with the question of delay the prospects of the appeal being successful and the length of the sentence are factors that are usually taken into account.

A factor which could tell against granting of bail would be the character of the appellant, e.g. that he or she is a

violent person with a string of serious convictions or that he or she is likely to reoffend whilst on bail; similarly if he or she has a history of jumping bail. A person who has pleaded guilty and prima facie has no prospect of success against sentence, cannot reasonably expect bail even if there is substantial delay in hearing.

In the application before me Mr H. Nagin who appeared for the Applicant on instructions from Mr H.A. Shah strongly submitted that the Applicant has very good prospects of succeeding at least against sentence on the ground that arson was not a prevalent offence, that the Applicant was a first offender with an exemplary character and with a record of community service, that she was already 66 years of age and was a widow suffering from hypertension which could be further aggravated in custody. He contended that in the case of the Applicant hypertension was an illness and it ought not to be equated with tension arising out of stress. He submitted that hypertension in an old person could easily produce stroke which in turn could be fatal. He also cited some English cases in support of his submission that in some arson cases a lighter or only token sentences were substituted by an Appeal Court having regard to the appellant's character and family circumstances. In appropriate cases appeals Courts have shown acts of mercy especially where life expectancy is a consideration, he said.

He also submitted that there was no case on record in Fiji where an old woman with a medical condition and an unblemished record, was sentenced to immediate imprisonment for 3 years in similar circumstances. He pointed out that punishment for arson in Fiji has ranged from binding over, suspended sentence to 10 years imprisonment.

Because neither Counsel nor I had before us the trial judge's Summing-up, submissions on the question of prospects of success against conviction were limited.

Mr Wilkinson who opposed the bail application argued that the sentence was neither harsh, excessive nor against principle having regard to degree of premeditation and the serious nature of the offence which carried a maximum of life sentence. He pointed out that all factors in favour of the Applicant were taken into account by the trial judge as was clear from his sentencing remarks. Whilst he agreed that arson was not a prevalent offence in the same way that breaking and entering, and robbery were, nevertheless arson was committed on a regular basis. He, therefore, could not agree that the Applicant had good prospects of succeeding in her appeal against sentence because a deterrent sentence was called for. He submitted that if the appeal cannot be heard in August it would at least be heard in the November Session this year. He contended that bearing in mind the length of the sentence, the delay would not be abnormal. It would be otherwise if the sentence was short. He submitted

there were no exceptional circumstances to justify granting of bail.

This has not been an easy application to deal with. The arguments for and against were almost evenly balanced. One of the difficulties about granting bail pending appeal is that it can raise false expectations of success. If this expectation does not materialise then an appellant will have to face the trauma of committal to jail after a spell of freedom, to serve the balance of the sentence. Thus it could be a case of merely putting off the evil day. However, this is one of the consequences that a successful bail Applicant must be prepared to face.

I have also borne in mind that it is not for a single judge to delve into the actual merits of the appeal. This is the function of the full Court which will come to a decision after hearing full arguments from both sides with the advantage of having the trial record before them. However, on the material before me I cannot say that the appeal is prima facie wholly unmeritorious and as such destined to fail. On the contrary Mr Nagin has satisfied me that the Appellant has an arguable case at least against sentence and prima facie it is not without some prospect of success. Furthermore there is little likelihood of the appeal being heard in the August Session even if the trial record is ready by then. I have

already listed appeals for the first half of August and more are awaiting to be listed for the second half of that Session.

I have come to the conclusion that having regard to all the facts and circumstances, the situation in this case is sufficiently exceptional to justify granting of bail pending appeal but conditions must apply.

In coming to this decision I have also borne in mind that the trial judge has not attributed to the Applicant the responsibility of the cowardly threats made against him following the Applicant's imprisonment.

I allow the application and grant bail to the Applicant on the following terms and conditions:

(1) that she enters into a personal bond in the sum of $5,000.00,

(2) that she is to provide a surety in the like amount,

(3) that she is to appear before the Court of Appeal and surrender herself to the Court at the hearing of her appeal in terms set out in the prescribed bail form,

(4) that she is not to leave Fiji in the meantime being a condition provided for in the prescribed bail form,

(5) that she is to surrender her passport to the Registrar of the Fiji Court of Appeal within 7 days of execution of bail bond by her and her Surety,

(6) that she is not to engage in any activity directly or indirectly which would be inconsistent with her being out on bail pending appeal.

The Court reserves the right to cancel or vary her bail bond at any time either of its own motion or on the application of the Director of Public Prosecutions.

I further order the Controller of Prisons to produce the Applicant Amina Begum Koya before the Registrar of the Court of Appeal, any Magistrate, or any Deputy Registrar to enable her and her Surety to execute the bail bond and upon being notified that such bond has been executed to release the said Amina Begum Koya from custody to awail the determination of her appeal by the Fiji Court of Appeal.

Sir Moti Tikaram
President, Fiji Court of Appeal

C:\WPDOCS\CHAND\AAU0011D.96S