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

IN CHAMBERS

CRIMINAL APPEAL NO. AAU0041/04S
(High Court Cr. Appeal N0.0028/003)

BETWEEN:

1. RATU JOPE SENILOLI
2. RATU RAKUITA VAKALALABURE
3. RATU VILIAME VOLAVOLA
4. PECELI RINAKAMA
5. VILIAME SAVU

APPELLANTS

AND:

THE STATE

RESPONDENT

A K Singh and Raza for appellants
Allan and Prasad for respondent

Hearing: 18th and 19th August, 2004
Ruling: 23rd August, 2004

RULING

The appellants all pleaded not guilty to charges of taking an unlawful oath to commit a capital offence, contrary to section 5(b) of the Public Order Act, Cap 20. They were convicted and sentenced, on 6 August 2004, to terms of imprisonment ranging from one to six years and have appealed against conviction and sentence. They now apply for bail pending appeal.

Section 33(2) of the Court of Appeal Act gives the Court a discretion to admit an appellant to bail pending the outcome of his appeal and, by section 35, such an application may be determined by a single judge of the Court. The exercise of discretion involves a judicial and not a personal decision and the court must exercise it in

accordance with established guidelines. Those guidelines are to be found in earlier cases where bail pending appeal has been sought and any discretion in relation to bail is now also subject to the terms of the Bail Act, 2002.

The Bail Act largely consolidates the law on bail and provides, by section 3, that there shall be a rebuttable presumption in favour of granting bail to a person charged with a criminal offence. However, there is a considerable difference between a person who has not been convicted and to whom the presumption of innocence still applies and a person who has been convicted and sentenced to a term of imprisonment and so section 3(4) of the Act provides:

"The presumption in favour of the granting of bail is displaced where –
....(b) the person has been convicted and has appealed against the conviction."

That has, in practice, long been the position and clearly applies in the present case. Some years before the passing of the Bail Act, Tikaram P explained:

"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." (Amina Koya v State [1996] (unreported) AAU0011/96.)

As was stated there, the burden is on each appellant to establish that this is a proper case for the Court to exercise its discretion to grant bail.

Section 17 of the Act, under the heading, "General provisions for bail determination", provides in subsection (3):

"(3) 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 when the appeal is heard."

Prior to the passing of the Bail Act, these were some of the matters the Court would take into account when considering such an application. Counsel for the respondent suggests that the Act is a code setting out the complete law in relation to bail and that section 17(3) limits the court to a consideration only of those matters specified in (a) to (c). In particular, he suggests the court is no longer entitled to consider the personal circumstances of the applicants – a ground upon which applicants in this case place considerable weight. If his interpretation of the section is correct, it must, presumably, follow that the court is no longer able to consider such matters as an applicant's bad

character, the likelihood the applicant will answer to his bail or any previous failures to comply with the terms of bail.

It is clear that the terms of subsection (3) make it mandatory for a court, when considering bail pending appeal, to take into account those three matters but I cannot accept it excludes the court from taking into account any other factors it considers properly relevant.

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. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to that determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition.

The rule was stated by Gould VP in Apisai Tora v R, [1978] 24 FLR 28:

"It has been a rule of practice for many years that where an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pendency of an appeal. This is still the rule in Fiji. The mere fact an appeal is brought can never of itself be such an exceptional circumstance..."

The rule was confirmed by Tikaram P in Koya v State [1996] AAU0011/96 and Reddy P in Mutch v State [2000] AAU0060/99. The latter case was decided after the Bail Act had come into force and Reddy P specifically accepted that bail would still only be granted in exceptional and rare cases.

Exceptional circumstances are such as will drive the court to the conclusion that justice can only be done by granting bail; R v Watton [1978] Cr App R 293.

In the present case, the petition of appeal was filed on 9 August 2004 and contained 16 grounds all of which are stated to be questions of law. A very cursory perusal shows that they are, in fact, mostly questions of mixed law and fact and, as such, require leave. Subsequently to filing the petition, the appellants have filed affidavits suggesting a further ground of appeal based on the discovery, purportedly since the case was completed, of matters which could suggest bias by one of the assessors at the trial. However by the time the bail application was heard, no application for leave to appeal the mixed questions of law and fact had been made and neither had any further ground of appeal been drafted or filed nor had any application been filed for leave to call fresh evidence

As the case stood at that time, the Court would have been limited to a consideration of the application on the basis of the limited grounds of appeal on law alone. I suggested

adjourning the hearing to allow counsel to put these matters in order and, although counsel for the State had properly raised these objections, he equally properly consented to the adjournment.

An application for bail is a matter to which the court must always give prompt attention. I have still to consider which, if any, of the mixed grounds should have leave and the form of the evidence proposed to support the fresh ground at the appeal if leave to adduce it is granted but, rather than delay the question of bail, I have considered this application on the basis that all the grounds will be part of the appeal. Again it is to the credit of counsel for the State that he accepted that would be an appropriate course in this case.

The first question is the likelihood of success in the appeal. Counsel for the respondent correctly points out that, although there are, now, 19 grounds of appeal, many are effectively expansions of the same point and others are vaguely worded and give little or no indication of the basis of the challenge. Counsel for the appellants does not argue with that but suggests that two particular grounds of appeal, namely the denial of an adjournment to allow counsel to be properly instructed and the suggested bias by one of the assessors, are bound to succeed. I accept that both raise serious questions for the Court to consider at the hearing of the appeal.

The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and section 17(3) now enacts that requirement. However, it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for bail pending appeal to delve into the actual merits of the appeal. That, as was pointed out in Koya's case, is the function of the full Court after hearing full argument and with the advantage of having the trial record before it. Whilst I accept the importance of the cases counsel for the appellants has cited in relation, in particular, to the ground of bias, the detailed consideration of them and their effect in relation to the facts of this case are all matters for the appeal proper.

In Sharda Nand v DPP, FCA Application 3 of 1979, Marsack JA repeated the warning that the court should not, on such an application, give any ruling on the legal issues raised and then stated:

"All that is necessary ... is to decide whether [the issues] show, on the face of it, that the appeal has every chance of success."

That was confirmed still to be the test by Reddy P in Mutch's case.

I do not accept the grounds in the present case satisfy that test. They undoubtedly raise arguable points but that is a long way from saying that they have every chance of success. Counsel particularly emphasised the strength of the ground alleging bias. It is not disputed that one of the assessors was represented (in a totally different but continuing case) by counsel defending Leweniqila at the trial. The Court will need to consider the

real danger or likelihood that gave rise to bias not just in favour of the lawyer or his client in the trial, who was the only accused acquitted, but against the co-accused whom he did not represent and its effect on the final decision of the court. Clearly that, and some of the other grounds, raise important issues but the determination of those are, as has been stated, a matter for the Court at the hearing.

The two remaining matters set out in section 17(3) are only directly relevant if the court accepts there is a real likelihood of success. If the court does not, their determination becomes otiose. However, the Court was advised that, although the transcript of this case will be very lengthy, it is already largely complete. Thus it could be possible to list the appeal in the November session of the Court and counsel should, in the interests of their clients, strive to attain that date. That being the likely time of hearing, the question of the proportion of the sentence which will have been served if the appeal is ultimately successful does not persuade me it is a ground for granting bail. I acknowledge that, in that case of Viliame Savu, his sentence is considerably shorter than those of the other appellants but, if the appeal is heard in November, and in view of the court's decision on the first matter, I do not consider he should be treated any differently under section 17(3)(c).

Having reached those conclusions, the Court must still stand back as it were and consider whether, although those issues in themselves fall short of establishing a reason to grant bail, when considered with any other matters which apply to a particular applicant, they could amount in their totality to exceptional circumstances.

The first and second appellants have each filed affidavits pointing out that the consequence of being sentenced to imprisonment will be the loss of their positions as Vice President and Deputy Speaker respectively. Denial of bail at this stage will make that effect immediate and irremediable. However, the loss of employment is never a ground which can in itself amount to an exceptional circumstance. In almost every case where imprisonment has been ordered, it will result in loss of employment with all the resulting detriment to the appellant and his family. The fact these are particularly important posts does not alter the position. The loss of a lowly job by an uneducated and poor appellant may well have far more profound consequences on him and his dependants.

Although only the first and second appellants have filed affidavits of their particular circumstances, no one in Fiji can fail to know the position of all these appellants. However, the prosecution points to the fact that they have been convicted of serious offences. The actions alleged were generally not denied by the appellants at the trial. Their motives and understanding of those actions were matters for the trial court and should not form part of the Court's consideration at this stage.

This Court is well aware of the status and position these men hold and have held, of their contributions to and obligations under Fijian custom and tradition and of their contributions over many years to public life in this country. The significance of those was no doubt also considered by the trial court. However, they do not amount to

exceptional circumstances such as will override the fact that they have been convicted and sentenced and neither does it discharge the burden of satisfying this Court that the interests of justice require bail to be granted pending appeal.

The applications are refused.

FIJI COURT OF APPEAL

GORDON WARD
President
FIJI COURT OF APPEAL

23RD AUGUST, 2004

Solicitors:

A. K Singh for the Appellants
M. Raza for the Appellants
Office of the Director of Public Prosecutions, Suva for the Respondent