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IN THE FIJI COURT OF APPEAL

SUVA, FIJI

[Criminal Appeal No. AAU 0033 of 2008]
(Lautoka High Court Appeal No. 62/2006L)

BETWEEN	:	**PENI MATAIRAVULA**
		APPLICANT
AND	:	**THE STATE**
		RESPONDENT
BEFORE THE HONOURABLE JUSTICE OF APPEAL	:	**Mr. JUSTICE JOHN E. BYRNE**
COUNSEL	:	**MS R. SENIKURACIRI (For the Applicant)**
	:	**Ms P. MADANAVOSA (For the Respondent)**
Date of Hearing and Submissions	:	**14th August 2009.**
Date of Ruling	:	**14th August 2009.**

RULING ON APPLICATION FOR BAIL PENDING APPEAL

[1] On the 12th of March 2008 the Appellant was convicted of two counts of Robbery with Violence after the unanimous opinion of guilty by the three Assessors at his Trial which was endorsed by the Trial Judge.

[2] This was a case where four people entered the offices of Navutu Star Resort, then managed by four female staff. The four people of whom the appellant was one were armed with cane knives.

[3] In passing sentence on the Appellant of a term of imprisonment of 5 ½ years on each count to be served concurrently the Learned Trial Judge said :

> ***"The Courts have repeatedly said that such invasions of offices or homes must attract the severest disapprobation. The trauma experienced by innocent citizens going about their lawful activities, even when the weapons are not used must be immense. In this case one complainant could not sleep properly for nearly two months. It is the duty of the Courts to protect society from such thuggery."***

[4] At page 8 of the Record the Learned Trial Judge who had much experience in the Criminal Courts referred to the aggravating features of this robbery such as being armed, being in company and the robbery being committed in commercial premises. Later on the same page of the record the Judge described the offence as: ***"audacious daylight robbery in an office which was aggravated further by the fact that the perpetrators carried cane knives, and none of the property was recovered".***

[5] On the 25th of June 2008 the appellant appeared before Bruce, J.A applying for leave to appeal against conviction and sentence. The appellant gave three grounds of appeal. As to the first of these Bruce, J.A commented in refusing leave on this ground that : "on any view the cross-examination on identification was well-focused and may have revealed a not inconsiderable experience of the Court system in view of the record of the applicant". I agree.

[6] As the Trial Judge commented when sentencing the appellant, the appellant was no stranger in the criminal courts, having sixteen previous convictions, included in these being Shop Breaking, Entering and Larceny, Damaging Property, Escaping from Lawful Custody, and committing an Act with Intent to Cause Grievous Harm.

[7] I mention this record because of the only ground on which the applicant now applies for bail pending appeal namely that one of the assessors who tried this case was an ex-convicted prisoner who had served six months in prison at Nasinu with the appellant before he was discharged.

[8] Bruce, J.A gave him leave to appeal on one ground only namely the possibility of bias on the part of that Assessor named AISAKE NAIVALU.

[9] When this matter came before me on the 23rd of July 2009 I gave directions for the filing of various affidavits because of the application then being made to me by the Appellant for bail pending his appeal.

[10] The applicant swore an affidavit on the 23rd of July 2009 in which he stated that Mr Aisake Naivalu was known to him and they did not have a very cordial history.

[11] He then deposed that he was not asked by the Trial Judge as to whether he knew Mr Naivalu nor did he know that he had the right to object to an Assessor. This latter statement is not borne out by the Court Record because at page 87 the Judge's notes are that he put each information to the Appellant who stated that he understood it and pleaded not guilty.

[12] The Judge also made a somewhat cryptic note : *"No problems to Assessors"*. I have no doubt that the Judge asked the appellant whether he had any objection to any of the Assessors sitting on his case and he replied that he had no problems with them.

[13] As I have said the appellant is no stranger to the Criminal Courts of this country and although he would have this court believe that he was an unrepresented and ignorant innocent so far as court practice and procedure are concerned, his criminal record is not consistent with such a claim.

[14] An Affidavit by Pravin Anand Sundaram a Court Officer based at the Family Court in Lautoka, sworn on the 3rd of August 2009 was tendered on behalf of the respondent. Mr Sundaram deposes that he was the Assisting Officer to the Deputy Registrar in selecting the Assessors for criminal cases in Lautoka. He states that the Assessors in the case of Peni Matairavula were selected by him in consultation with the Deputy Registrar from the Government of Fiji Gazette No. 241/07 Lautoka High Court Assessor List.

[15] In the Appellant's case the Assessors were:

1) Mr. Aisake Naivalu;

2) Mr. Govind Raj; and

3) Mr. Mohammed Shameem

[16] He also deposes that the listing of the above Assessors was printed, the Officer-in-Charge Criminal Section kept the original list in the file, a copy list was served on the Director of Public Prosecutions, Lautoka for checking of Criminal Record and a copy list given to the Defence.

[17] Under Section 267 of the Criminal Procedure Code Chapter 21 the following persons are disqualified from serving as an assessor:-

(a) Persons disabled by mental or physical infirmity;
(b) Persons who have been convicted of any offence punishable with imprisonment for more than five years and have not received a free pardon. (substituted by 13 of 1969 s.34).

[18] It would appear that Aisake Naivalu was not disqualified from serving as an Assessor in the Appellant's trial although it is true that the appellant states in his Affidavit that he was a fellow-prisoner with him in Nasinu Prison for six months before Mr Naivalu was discharged.

[19] It must also be remembered that according to the Court Record, all three Assessors found the appellant guilty on both counts of the charges against him. There is no evidence to suggest that the other two assessors were influenced by Aisake Naivalu giving any directions or expressing any opinions to them.

[20] The Appellant is obviously asking this Court to speculate which it will not.

THE LAW GOVERNING APPLICATIONS FOR BAIL PENDING APPEAL

[21] This is well settled and has been stated many times for example **Criminal Appeal No. AAU 0014 Of 2007 Orisi Tamani v. The State , Ratu Iope Seniloli and Others vs. The State Criminal Appeal No. AAU 0041 of 2004 , Apisai Tora vs. The Queen (1978) 24 FLR 28, Koya vs. The State AAU 0011 of 1996 and Mutch vs. The State AAU 0060 of 1999.**

[22] It is clear from these Authorities that the Courts in Fiji have long required a very high likelihood of success in an appeal before bail will be granted. It is not sufficient that the appeal raises arguable points and it is not for a single Judge on an application for bail pending appeal to delve into the actual merits of the appeal.

[23] In this regard an applicant for bail pending appeal is different from a person charged with an offence and applying for bail pending the hearing of a charge against him. To that extent the appellant in this case, as are all others like him, is disadvantaged and rightly so. Section 17 (3) of the Bail Act 2002 states that when a court is considering the granting of bail to a person who has an appeal against a conviction or sentence it must take into account :-

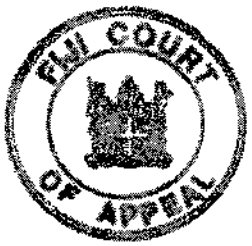
(a) The likelihood of success in the appeal;
(b) The likely time before the appeal hearing;
(c) The proportion of the original sentence which will have been served by the applicant when the appeal is heard.

[24] Yesterday at the Criminal Appeals call-over the appellant's appeal was fixed for hearing on the 19th of November 2009, only three months away.

[25] Given the fact that the appellant was sentenced to a total of 66 months imprisonment (5½ years) and with the benefit of remissions for good behaviour this is automatically reduced by 22 to 44 months and the appellant has so far served 17 months, the result is that at the present time he must serve another 27 months before he is released.

[26] I find nothing in that calculation which offends against the principles of justice. **For these reasons I refuse this application for bail pending appeal.**

Dated this 14th day of August 2009.



JOHN E. BYRNE
JUDGE OF APPEAL