

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO: AAU 116 OF 2011
(High Court HAC 115 of 2009)

BETWEEN : **ILIASERI SAQASAQA**
Appellant

AND : **THE STATE**
Respondent

Coram : **Calanchini P**
Kumararatnam JA
Bandara JA

Counsel : **Applicant/Appellant in Person**
Mr L Fotofili for the Respondent/State

Date of Hearing : **29 September 2013**

Date of Ruling : **25 October 2013**

RULING ON BAIL PENDING APPEAL

Calanchini P

[1]. I have had the opportunity of reading the draft judgment of Kumararatnam JA and agree with his proposed orders.

Kumararatnam JA

[2]. Iliaseri Saqasaqa the Applicant/Appellant was convicted by the High Court, after a trial on a count of “Robbery” contrary to Section 293(1) (a) and for “Unlawful Use of Motor Vehicle” contrary to Section 292 of the Penal Code Cap 17.

- [3]. The Applicant/Appellant was sentenced to 8 years imprisonment on the first count and 3 months imprisonment on the second count to run concurrently from 11 November 2011.
- [4]. The Applicant/Appellant in his initial bail pending appeal application raised two grounds which were dismissed by Basnayake JA on 28 September 2012.
- [5]. In this renewed bail pending appeal application the Applicant/Appellant raises several grounds to suggest that there is merit in his appeal and that there is a change in his circumstances. The grounds are summarised as follows:
1. The prosecution had no reasonable ground for bringing the proceedings against him on his admission to collect rent with PW 13 Sailasa Qalivere.
 2. The learned trial judge had misdirected the assessors that they must carefully consider the evidence against the Applicant/Appellant as reflected in paragraph 18 and 42 of the summing up.
 3. The learned trial judge did not warn the assessors that the evidence of PW 13 Sailasa Qalivere was of no value and needed to be corroborated.
 4. His reputation as the “General” of the criminal underworld was disclosed during the trial by the prosecution and referred to by the trial Judge in his summing up.
 5. His sentence of 8 years is unlawful and even if not unlawful, it is excessive.
 6. He has served 2 years and is waiting for his appeal to be determined.
- [6]. Bail Pending Appeal is governed under Section 17(3) of the Bail Act 2002. According to Section 17(3) of the Bail Act;
- “(3) When a court is considering the granting of bail to a person who has appealed against conviction and sentence the court must take into consideration-*
- (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/Appellant when the Appeal is heard.*”

[7]. The presumption in favour of granting bail is displaced where the person has been convicted and has appealed against conviction. The Applicant/Appellant therefore has to satisfy the requirements under Section 17(3) of Bail Act and establish exceptional circumstances.

The Likelihood of success on Appeal

[8]. In **Ratu Jope Seniloli and Others v The State** (unreported AAU41 of 2004) Ward P said:

*“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 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 a single Judge on an application for bail appeal to delve into the actual merits of the appeal. That (as was pointed out in **Koya v The State** unreported Criminal Appeal No: 01 of 1996) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it”*

[9]. It has been well established by cases decided in Fiji and in other common law jurisdictions that bail pending appeal should only be granted where there are exceptional circumstances. In **Sachida Nand Mudaliar v State** Criminal Appeal No: AAU0032 of 2006, Ward P stated the following at paragraph 5 of his judgment:

“The burden is on the applicant/appellant to establish that it is a proper case for the grant of bail. In order to do so, it is necessary to show that exceptional circumstances exist, namely, circumstances which drive the court to conclusion that justice can only be done by granting bail”

[10]. In **Qurai v The State** (unreported AAU 36 of 2007; 1 October 2012) it was stated that:

“I consider that the long standing requirement that bail pending appeal will only be granted in exceptional circumstances is the reason why the chances of the appeal succeeding under Section 17(3) has been interpreted by the Courts as to mean a very high likelihood of success”

[11]. In paragraph 2 of page 6 of the Court of Appeal Judgment in **Mark Lawrence Mutch v The State** (Criminal Appeal No: AAU0060 of 1999) Reddy P when discussing what amounted to a likelihood of success in the appeal stated that prima facie, it should be seen that the appeal has every chance of success.

[12]. During the hearing of this application the applicant/appellant invited this court to seriously consider the misdirections in the summing up. The main point he argued was that the trial judge referred to the Applicant as “General in the Criminal World”. According to him this has caused serious miscarriage of justice.

[13]. Further he submitted that he has been convicted on the uncorroborated evidence of Sailasa (PW13) who is an accomplice in this case.

[14]. In reply to the submissions of the Applicant/Appellant the learned State Counsel conceded that the Applicant/Appellant has very good grounds for argument. With the approval of the court the original case record was examined.

[15]. Although character had not been put in issue during the trial by the Applicant/Appellant, the learned State Counsel during the cross examination questioned the Applicant/Appellant whether he was known as “General”. The Applicant/Appellant answered in affirmative.

[16]. The trial judge in his summing up at paragraph 40 said:

“He admitted, he was known as the “General” in the criminal world. A general controls the troops, engaged in war, from afar, in the safety of his headquarters. Was Saqasaqa acting as a general in

directing Osea, Alipate and Isimeli in robbing the complainants at the material time. These are matters for you”

- [17]. In **Sheik M. Hussein v State** and **State v Prakash Chetty** [2001] 1FLR 347 at page 348 the court held:

“Where evidence of a previous conviction is led, where A1 was called “Master” in prison, and it is inconceivable that any person other than the two accused was responsible for the killing, there is a high degree of possibility that assessors will be prone to reason that the accused has a propensity to commit such an offence. Where there has been a misdirection or non-direction, a Court may still uphold the conviction if satisfied assessors would have reached the same conclusion. Here failure of the trial Judge to direct the assessors that they must not use the fact a previous conviction as tending to the guilt of A1 amounted to a miscarriage of justice”.

- [18]. In assessing the chances of the Applicant/Appellant, appeal’s succeeding, considering the prejudicial reference by the trial judge to the Applicant/Appellant as “General in the Criminal World” in the summing up, this court concludes that there is a very high likelihood of success in the Appeal. The appeal record has not been scrutinized but assessed on its likely outcome. **That is an assessment of likelihood not a prediction or judgment in respect of the appeal against conviction.**

- [19]. The total sentence the Applicant/Appellant has to serve as per the judgment is 8 years. He was sentenced on 11 November 2011. It is very unlikely that his appeal would be heard in the last session of the Court of Appeal in the year 2013. By that time the Applicant/Appellant would have served a substantial part of his entire sentence.

- [20]. Considering the above factors, this court has come to a conclusion that in his application the Applicant/Appellant has established exceptional grounds for the granting of bail pending appeal.

[21]. Bail is granted subject to following conditions:

1. The Applicant/Appellant has to enter into a bond of \$1,000.00.(Non cash)
2. He has to provide two sureties acceptable to this court and both are bonded for \$1,000.00 each.(Non cash]
3. He should report to the Officer in Charge of the Lami Police Station every Monday, Wednesday and Friday of the week between 6am and 6pm.
4. He is placed on a night curfew between the hours of 8pm and 6am until the determination of the court.
5. He is barred from leaving Fiji or Viti Levu. Nor may he visit any airport or port complex. The Director of Immigration to be informed about his travel ban.
6. His passport, if any, is to be surrendered to the court. If he has no passport, he is barred from applying for a travel document.
7. Not to interfere with or approach prosecution witnesses directly or indirectly.
8. He is to reside at Qauia Settlement, Lami and not to change his residential address without the prior written approval of the Registrar of the Court of Appeal.
9. Any breach of these conditions will lead to cancellation of his bail.

[22]. **Bandara JA**

I do agree with the contents and the conclusion of the draft Ruling of Kumararatnam JA.

HON. MR JUSTICE W CALANCHINI P

HON. MR JUSTICE P KUMARARATNAM JA

HON. MR JUSTICE A BANDARA JA
