IN THE COURT OF APPEAL, FIJI
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU. 0042 of 2011
High Court Criminal Action No.HAC 24 of 2010

BETWEEN : **SHIRLEY SANGEETA CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra RJA**

Counsel : **Mr I Khan for the Appellant**
Mr L Fotofili for the Respondent

Date of Hearing : **10 June 2013**

Date of Ruling : **4 July 2013**

RULING

1. This is an application for leave to appeal against conviction and sentence and bail pending appeal.

2. The Appellant was charged in the High Court at Lautoka with five others for the offence of conspiracy to commit a felony namely causing the payment of money by virtue of forged instruments contrary to section 385 and 345(a) of the Penal Code, Cap.17.

3. The Appellant was convicted of the said offence and sentenced on 19th April 2011 to four and half years imprisonment and to serve a minimum of three years before being eligible for parole.

4. The Appellant who was the 5th accused and Reenal Rajneil Chandra who was the 3rd accused jointly filed a notice of appeal against their conviction and sentence on the following grounds:

Appeal Against Conviction

(a) That the learned trial Judge erred in law and in fact in not recusing himself when on the 10th of September 2010 he made a finding of fact that he was "satisfied beyond reasonable doubt that all of the subject property was obtained by illegal activities pursuant to section 19C of the Proceeds of Crime (Amendment) act 2004." And later presiding over the criminal trial against all 6 accused persons on the 28th of March 2011 had caused a substantial miscarriage of justice.

(b) That the learned trial Judge prior to the commencement of all the charges against the Appellants had already predetermined and prejudged the subject matter of the charges before the Court concerning all the Appellants and to preside over the criminal trial was with obvious bias and as such justice was not seen to be done and as such there was a substantial miscarriage of justice.

(c) That the learned trial Judge erred in law and in fact in not upholding the Appellants submission of No Case to Answer as the State failed to prove the essential ingredients of the charge of Conspiracy.

(d) That the learned trial Judge erred in law and in fact in not directing the Assessors the evidence admissible in respect of each accused and the case made against each should be identified with particularity and the assessors should be directed to consider their cases separately. By failing to do so there has been a substantial miscarriage of justice.

(e) That the learned trial Judge erred in law and in fact in not adequately directing the Assessors the significance of Prosecution witness conflicting evidence during the trial.

(f) That the learned trial Judge erred in law and in fact in not directing himself and or the Assessors to refer in the Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.

(g) That the learned trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing/putting the defence case to the Assessors.

(h) That the learned trial Judge erred in law and in fact in not adequately directing/misdirecting the Assessors the previous inconsistent statements made by the main Prosecution witness and as such there has been a substantial miscarriage of justice.

(i) That the learned trial Judge was biased when without giving any opportunity to the appellants remanded them in custody whilst they were on bail and had not breached bail conditions or any application made by the Prosecution.

(j) The learned trial Judge erred in law when he commented that the Appellant's Counsel was dishonest and had misled the Assessors when the learned Counsel for the Appellants had referred to an exhibit tendered in Court with the consent of the State. That the said remarks of the learned trial Judge was judicial misconduct and as a result of his comment the learned trial Judge's Summing Up to the assessors was biased and incorrect when he directed.

Appeal Against Sentence

(k) That the Appellants appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

(l) That the learned trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellants and not taking into relevant consideration.

5. Reenal Rajneil Chandra (the 3rd accused) on whom a sentence of 2 years of imprisonment was imposed completed his sentence and withdrew his appeal.

6. The Appellant had also applied for bail pending appeal which application was taken up along with the application for leave to appeal against sentence and conviction for hearing on 8th August 2011 but no ruling had been made thereon. The applications came up for re-hearing on 10th of June 2013.

Application for leave to appeal against conviction and sentence

7. At the re-hearing Counsel for the Appellant withdrew ground (g) in the notice of appeal.

8. Grounds (a) and (b) relate to the aspect of bias on the part of the learned trial Judge as he had not recused himself and proceeded with the trial. The learned Judge had given a ruling regarding the application for recusal wherein he had set out his reasons for the refusal to recuse.

9. The ground urged on behalf of the Appellant regarding bias is on the basis that the learned trial Judge had on 10th September 2010 in the civil action filed against the Appellant and the other accused had given a judgment whereby he ordered civil forfeiture over various properties owned by the Appellant and the other accused. The submission on behalf of the Appellant in the light of this judgment is that the learned trial Judge should have recused himself from proceeding with the trial where the Appellant and the other accused were charged as the learned Judge had prejudged the matter and therefore that justice would not be seen to be done.

10. Counsel for the Appellant has made exhaustive written submissions on this point citing decisions relating to the common law position from England, Australia, New Zealand and even to the extent of citing the Bangalore principles. He cited the decision in **Gough** 1993 AC 646 where Lord Goff said:-

> *"There are difficulties about exploring the actual state of mind of a justice or juryman. In the case of both, such an inquiry has been thought to be undesirable and in the case of the juryman in particular, there has long been an inhibition against, so to speak, entering the jury room and finding out what any particular juryman actually thought at the time of decision,. But there is also simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias…. In any event, there is an overriding public interest that there should be confidence in the integrity with the statement of Lord Hewart CJ in* ***Rex v Sussex Justice****; Ex parte* ***McCarthy*** *1924 1KB 256, that it is of fundamental important the justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

In **Livesey v New South Wales Bar Association** 1983 151 C.L.R. 288 at 293-04, the relevant test was laid down as:

> *"(The) principle is that a Judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it ... although statements of the principle commonly speak of 'suspicion of bias', we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meanings".*

In Fiji the test of bias is as expressed by the Supreme Court in **Amina Begum Koya v The State** (1998) FJSC 2 :

> *"Subsequently, the New Zealand Court of Appeal, in **Auckland Casino Ltd v Casino Control Authority** (1995) 1NZLR 142, held that it would apply the Gough test. In reaching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias."*

11. The Respondent has submitted that bias does not create any arguable ground as the assessors had returned a unanimous verdict of guilty which was accepted by the Court. That if the assessors returned a verdict of not guilty and the trial judge overruled that verdict, that would have provided sufficient grounds to indicate that there would have been bias. Although there is much substance in this argument, I would prefer to leave this matter to be decided by the full court. Accordingly I would hold that this ground is highly arguable.

12. Ground (c) is to the effect that the learned trial Judge erred in law and in fact in not upholding the Appellant's submission of No Case to Answer as the State failed to prove the essential ingredients of the charge of conspiracy. As held in **Kalisoqo v Reginam** Criminal Appeal No.52 of 1984 it was for the Judge to consider whether there was no evidence that the accused committed the offence. I do not consider that there is merit in this ground as the learned trial Judge was satisfied at the close of the prosecution case that there was a case for the accused to answer.

13. The effect of ground (d) is that the learned trial Judge failed to direct the Assessors regarding the evidence admissible in respect of each accused and the case made out against each accused with particularity. On considering the summing up of the learned trial Judge it is evident that the evidence against each accused was narrated to them and

that the case made out against each accused was also identified. Therefore there is no merit in this ground.

14. In ground (e) the basis is that the learned trial Judge had not adequately directed the Assessors regarding conflicting evidence of the prosecution witness. The learned trial Judge had in fact specifically directed the Assessors on this aspect regarding the evidence of witness Senimili in relation to what she stated in Court and what she had stated to the Police. Therefore this ground fails.

15. In ground (f) the Appellant urges that the learned trial Judge had not directed himself and or the Assessors in his summing up regarding the possible defence on evidence. This ground is not very clear and is fortified by the fact that in the notice of appeal, soon after setting out this ground , it is stated that full particulars will be given upon receipt of the Court Record. This ground therefore does not need any consideration.

16. Ground (h) is similar to ground (e) and as stated in relation to ground (e) the learned trial Judge had given adequate direction regarding same and therefore there is no merit in this ground.

17. The ground urged as (j) relates to the remanding of the appellants whilst they were on bail and had not breached bail conditions and thereby the learned trial Judge was biased. Remanding accused persons in such situations is at the discretion of the trial Judge, and the learned trial Judge had exercised his discretion and therefore I see no merit in this ground.

18. Ground (j) refers to comments made by the learned trial Judge regarding Counsel and states that full particulars will be given upon receipt of the Court Record and therefore there isn’t sufficient material adduced in that ground to be considered.

19. Grounds (k) and (l) refer to the sentence being harsh and excessive. The learned trial Judge had considered the tariff for the offence of conspiracy and imposed a sentence which was within the tariff and therefore the sentence cannot be said to be harsh and excessive.

Application for Bail pending Appeal

20. The application for bail pending appeal was supported by an affidavit sworn on 19th April 2011.

21. In her affidavit, the Appellant has stated:

(a) that her appeal has merits and reasonable prospects of success.

(b) that she would have served a substantial portion of her sentence.

22. Section 17(3) of the Bail Act 2002 provides as follows:

"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."

23. In terms of Section 33(2) of the Court of Appeal Act (Cap.12), the Court of Appeal may, if it sees fit, admit an appellant to bail pending the determination of his appeal. Under section 35(1)(d) a Judge of the Court of Appeal is empowered to admit an appellant on bail.

24. According to section 3(4)(b) of the Bail Act the presumption in favour of granting bail is displaced where the person has been convicted and has appealed against the conviction. In **Amina Koya v State** Cr. App. No.AAU 11/96 it was stated that a convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal.

25. In **Ratu Jope Seniloli and Others v The State** (Crim App. No.AAUoo41/04S, High Court Cr App No.002S/003, 23 August 2004) His Lordship Justice Ward said:

> *"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 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 itself be such an exceptional circumstance."*

26. Bail pending appeal will be granted only rarely and that too where there are exceptional circumstances. The threshold is very high when applications for bail pending appeal are taken up for consideration by Court.

27. In the present case the Appellant is relying on the grounds set out in her notice of appeal on the basis that her appeal is highly likely to succeed. As I have considered the grounds urged in the said notice of appeal above and considered only grounds (a) and (b) to be highly arguable, the chances of their being highly likely to succeed is not apparent as that would be a matter that could be considered by a full court rather than by a single judge as required by Section 17(3)(a) of the Bail Act. In **Ratu Jope Seniloli and Others v The State** (supra) Ward P stated:

> *"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 v The State** unreported criminal appeal No.1 of 1996), is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

28. The other grounds to be considered in terms of section 17(3) are the "Time before the appeal is heard" and "Time served before the appeal is heard". These two grounds have been considered to be otiose if the first ground fails. In **Ratu Jope Seniloli v The State** (Supra) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act are directly relevant only if the Court accepts that there is a real likelihood of bias, otherwise those latter matters are otiose.

29. The Appellant has been imposed a sentence of four and a half years with a non-parole period of 3 years. When her application was taken up for re-hearing, it was stated that she has to serve only a further 11 months before she could be considered eligible for parole. The affidavit filed by the Appellant in support of her application does not state any personal reasons apart from the fact that there is a high likelihood of success in her appeal based on the grounds set out in her notice of appeal. As a result there are no exceptional circumstances apart from the grounds urged in the notice of appeal which would come within the requirement of exceptional circumstances.

30. The circumstances which has led to the delay in taking up her application has been due to the fact that no ruling had been made by the Judge who heard the application in August 2011 and the fact that he is no longer sitting in the Court of Appeal.

31. The question to be considered is as to whether the appeal could be taken up without much delay and whether the delay in taking up the appeal which is not due to any fault that can be attributed to the Appellant, can be considered as an exceptional circumstance.

32. In considering that position it would be relevant to consider applications for bail pending appeal in cases where the sentence has been regarded as a short sentence as opposed to a long sentence. In **Mahendra Motibhai Patel and Tevita Peni Mau** Crim. Appeal No.AAU0039 of 2011 (12 May 2011) where the sentence was 12 months and a period of four and a half months would have been spent by the time that the appeal would be decided was not considered as an exceptional circumstance and bail was refused. In the present case it is very likely that this case will be heard in the session of the Court of Appeal in September 2013 and this case would therefore stand in a situation similar to that of Patel's case. In view of that position I do not consider the fact that that the Appellant has to spend only a further 11 months before she can be considered eligible for parole as an exceptional circumstance.

33. Further, if the grounds urged by the Appellant in the notice of appeal regarding recusal and bias do succeed, the question would arise as to whether there should be a re-trial before another Judge. Such a result would delay the process of the final outcome regarding the charge leveled against the Appellant.

34. For the reasons set out above I refuse the application for bail pending appeal.

Orders of Court and Directions :

1. Application for leave to appeal allowed on grounds (a) and (b) of the notice of appeal.

2. Application for bail pending appeal is refused.

3. The Record be filed as soon as possible and before the call over for the Court of Appeal session in September 2013 and the appeal be heard in the September 2013 session of the Court of Appeal.

Suresh Chandra
Resident Justice of Appeal