

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU0084 OF 2010
(High Court No. HAC 43 of 2009)

BETWEEN : **ETUATE SUGUTURAGA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Chandra RJA**

Counsel : **Appellant in person.**
Mr L. Fotofili for the Respondent

Date of Hearing : **19 June 2013**

Date of Ruling : **29 July 2013**

RULING

1. This is an application for leave to appeal against conviction and sentence together with an application for bail.
2. This application had been taken up for hearing on 13th April 2011 but the ruling had not been delivered and the application was taken up for re-hearing on 25th March 2013 on which date the Appellant filed written submissions on the amended grounds of appeal and the Respondent sought time to file written submissions in response.

3. The application was taken up for hearing on 19th June 2013 and oral submissions were made by the Appellant and the Respondent in addition to written submissions that had been filed.

4. The Appellant was charged in the High Court at Lautoka for the following charges:
 1. Forgery contrary to Section 335(2)(a) of the Penal Code.
 2. Uttering forged documents contrary to Section 343(1) of the Penal Code.
 3. Obtaining goods on forged documents contrary to Section 343 (a) of the Penal Code.

5. The Appellant was convicted and sentenced as follows:

Forgery – 5 years imprisonment;

Uttering forged documents – 5 years imprisonment;

Obtaining goods on forged documents: 5 years with 4 years concurrent to Count 1 and 2 and 1 year consecutive to Count 1.

The total sentence to be served being 6 years imprisonment with a non-parole period of 4 years and 6 months.

6. The Appellant amended his grounds of appeal and relied on the following grounds:

Against Conviction:

 1. The learned trial judge erred in law by failing to consider the granting of bail pending trial to allow him to obtain unhindered and unrestricted legal advice and representation from a Solicitor of his own choice.

2. The learned trial judge erred in law by failing to direct the assessors on the inconsistent evidence on oath and statement on oath of PW Farish Mohammed in respect to the impersonation of Sakiusa Momoidonu.
3. The learned trial judge erred in law by failing to consider the lack of direct evidence to prove the elements of the offence that he was convicted of.
4. The verdict and or judgment is unreasonable and could not be upheld having regards to evidence and inadequate directions.

Against Sentence:

1. The learned trial judge erred in law by failing to consider the 8 months 21 days spent in remand.
 2. The learned trial judge erred in law in classifying the appellant as a habitual offender under section 10 of the Sentencing and Penalties Decree 2009 whilst the fraud offences are not covered under the aforestated provisions.
 3. The partly concurrent and partly consecutive sentence of 5 years in Count 3 is wrong in law as it breached the one transaction rule and totality principle.
 4. The learned trial judge erred in law and in fact in considering his previous conviction as justifying factors of the factors imposed.
 5. The 6 years imposed is manifestly harsh and excessive.
7. In ground 1 against conviction the Appellant's submission is that he was prevented from obtaining legal representation by not being granted bail pending trial. The right to legal counsel is not an absolute right and does not by itself afford an arguable point in an appeal. It has been held that the right to counsel is not an absolute right. **Balelala v State** [2004] FJCA 49. AAU0003.2004S (11 November 2004). Regarding the refusal of his bail

application pending trial, the Appellant could have appealed against the said order which he failed to do. Therefore the first ground raised by the Appellant lacks merit.

8. As regards the 2nd ground of appeal against conviction is concerned, it relates to the adequacy of the direction by the learned trial Judge in his summing up to the Assessors. It has been submitted that the learned trial Judge did not adequately direct the Assessors regarding the evidence of Farish Mohammed one of the main witnesses for the prosecution who when cross examined stated that what he stated to the Police in his statement to the Police was the truth. The witness had not stated to the Police in his statement the name of the person the Appellant was said to have impersonated and on that basis it was urged that the evidence of the witness was inconsistent and that the learned trial Judge had not directed the Assessors regarding such inconsistency in the evidence. In **R v Porritt** (1960) Cr. App. R 5, at p.11:

“In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statement, whether sworn or unsworn, do not constitute evidence upon which they can act.”

The learned trial Judge in his summing up to the Assessors stated that the evidence that they should consider is the evidence that a witness had given on oath in Court. He did not direct them regarding any other statement made by such witness to the Police. In view of the fact that there was some inconsistency in the evidence of the said witness there should have been a direction regarding that aspect.

The submission of the Respondent that the Appellant could have raised this matter in the High Court itself as a matter of re-direction cannot cure the deficiency in a direction to the Assessors especially when the Appellant was not represented. In view of this position leave would be granted on this ground of appeal.

9. The third ground of appeal against conviction relates to the lack of evidence to prove the elements of the offences. As regards count 1, the charge of forgery the question would have arisen as to whether the Appellant had forged the two signatures on the cheque that was presented. There appears to be the question of conclusiveness regarding the same as the Respondent has in their submissions stated that this depended on circumstantial evidence. If that were so, there should have been a direction by the learned trial Judge regarding circumstantial evidence. The direction to the Assessors therefore would have been inadequate on that score. There is merit in this ground especially regarding Count 1.
10. The fourth ground of appeal against conviction is that the verdict and/or the judgment is unreasonable and could not be upheld having regard to evidence and inadequate directions. In view of the fact that there is merit in grounds 2 and 3 as stated above especially in relation to count 1 there would be merit in this ground.
11. The first ground urged against sentence is that the period spent in remand had not been taken into consideration when sentencing. The learned trial Judge had failed to consider this period in imposing the sentence on the Appellant which was necessary to be considered in terms of Section 24 of the Sentencing and penalties Decree, 2009 and therefore there is merit in this ground.
12. In the second ground of appeal against sentence, the Appellant has urged that the learned trial judge classified him as a habitual offender in terms of section 10 of the Sentencing

and Penalties Decree 2009. The question at issue is as to whether the charges against the Appellant would come within the offences coming within the said section 10. Since the offences relating to fraud are not listed under section 10, this point raises an arguable ground and the Appellant is granted leave.

13. The third ground of appeal against sentence relates to the totality principle in relation to section 23 of the Sentencing and Penalties Decree 2009. The Appellant's sentence regarding the third count was to commence a year after the sentences in counts 1 and 2. This raises an arguable matter as the consequence of this sentence was to make the total sentence that the Appellant had to serve being six years. Leave is granted on this ground.
14. The fourth ground of appeal against sentence is to the effect that the learned trial judge considered the Appellant's previous convictions as justifying the sentence that was imposed. The learned trial Judge's consideration of the Appellant as a habitual offender was dealt with above as being a matter which is arguable and would apply to this ground too.
15. The fifth ground of appeal against sentence that the sentence imposed is harsh and excessive would be an all encompassing ground and would be considered in dealing with the other grounds of appeal against sentence which have been dealt with above.
16. The Appellant is granted leave to appeal against conviction as well as sentence.

Application for bail pending appeal

17. The Applicant in his application for bail pending appeal relies on the following grounds:
 - a. The likelihood of success in the appeal.

- b. The likely time before the appeal hearing.
- c. The proportion of the original sentence.
- d. That he is not a flight risk.

18. 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.”*

19. 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.
20. The presumption in favour of granting bail is displaced by section 3(4)(b) of the Bail Act 2002, where the person has been convicted and has appealed against such conviction.
21. The threshold for bail is higher in application for bail pending appeal. **Pita Matai v State** [2008] FJCA 89; AU0038.2008 (22 December 2008).
22. In **Ratu Jope Seniloli and Others v The State** (Crim App.No.AAU0041/04S, High Court Cr App No.002S/003,23August 2004) His Lordship Justice Ward stated:

“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. There mere fact an appeal is brought can never itself be such an exceptional circumstance.”

23. The Appellant is relying on the grounds of appeals urged by him stating that they are highly likely to succeed. Although I have granted him leave to urge those grounds before a full court, it is for the full court to consider whether they would be successful.
24. It has been stated that if the first ground, namely the likelihood of succeed fails that the other two grounds in section 17(3) would be otiose. **Ratu Jope Seniloli v The State** (supra).
25. More than two years of the sentence out of 6 years have been served by the Appellant and it is likely that the appeal would be taken up for hearing early.
26. In the grounds urged by the Appellant there are no exceptional circumstances urged by him regarding his application for bail and his application for bail is refused.
27. The circumstances which has led to the delay in taking up the application of the Appellant has been due to the fact that no ruling had been given by the Judge who heard the application in April 2011 and he is no longer sitting in the Court of Appeal. The question that would have to be considered is whether the appeal could be taken up for hearing without much delay.

28. I would in all the circumstances of this case direct the Court of Appeal Registry to list this appeal for hearing as early as possible.

Orders of Court and Directions:

1. Application for leave to appeal against conviction and sentence allowed.
2. Application for bail pending appeal is refused.
3. The Appeal to be listed for hearing as early as possible.

Suresh Chandra
Resident Justice of Appeal