

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

CRIMINAL APPEAL AAU 45 of 2016
(High Court HAM 7 of 2016)
(Magistrates Court No.342 of 2015 at Sigatoka)

BETWEEN : ELIKI MOTOTABUA *Appellant*

AND : THE STATE *Respondent*

Coram : Calanchini P

Counsel : Appellant in person
Mr A Singh for the Respondent

Date of Hearing : 25 November 2016

Date of Ruling : 2 December 2016

RULING

- [1] There are two applications before the Court. The first is an application for leave to appeal the bail decision of the High Court filed pursuant to section 21(3) of the Court of Appeal Act Cap 12 (the Act) which states:

“(3) The Court of Appeal may, if it gives leave, entertain an appeal from the High Court against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, upon the application either of the person granted or refusal bail or of the Director of Public Prosecutions.”

[2] The second application is an application for bail pending the determination of the appeal pursuant to section 33(2) of the Act which states:

“(2) The Court of Appeal may,, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.”

[3] Under section 35(1) of the Act the power of the Court of Appeal to give leave to appeal and to admit an appellant to bail may be exercised by a Judge of the Court.

[4] The Appellant has been charged with one offence of unlawful possession of an illicit drug contrary of Section 5 of the Illicit Drugs Control Act 2004. He has been in custody awaiting trial since 12 December 2015. The Appellant was granted bail by a Magistrate sitting at Sigatoka Magistrates Court on 20 January 2016. One of the conditions of bail was a requirement that the Appellant provide a \$500.00 cash bail together with two sureties of the same amount making a total of \$1500.00 cash bail.

[5] Being dissatisfied with the bail condition concerning the \$1500.00 cash bail, the Appellant applied to the High Court for a review of the bail conditions. On 2 March 2016 the High Court varied the cash bail condition by substituting the condition that the Appellant provide \$1000.00 bail bond with two sureties. The order of the High Court does not expressly state that the condition of bail is cash bail. It is against that condition of bail that the Appellant now seeks leave to appeal to the Court of Appeal.

[6] The Appellant filed a timely notice of appeal to this Court on 22 March 2016. The Appellant relies on 4 grounds of appeal which are stated as:

- “1. *That the learned High Court Judge erred in law in not giving the Appellant a fair hearing in the High Court.*
2. *That the learned High Court Judge erred in not giving the Appellant a fresh bail condition but only to provide sureties for a bail bond of \$1000.00 bail.*
3. *That the learned High Court Judge erred in not viewing the alleged cannabis that the Police state ___ is only 137.2 grams.*
4. *That ___ the Appellant has already served (time in prison) for ___ 137.2 grams of cannabis.”*

[7] The applications were supported by an affidavit sworn on 20 October 2016 by Eliko Mototabua. The Appellant filed written submissions on both applications. The Respondent filed written submissions only on the question of the jurisdiction of the single judge of the Court of Appeal.

[8] The test for granting leave to appeal is whether the Appellant has raised an arguable ground that warrants the consideration of the Court of Appeal. The Appellant states in his affidavit that he was not given an opportunity to address the Court on the bail conditions with reference to the bond and sureties amounting to \$1000.00. He also claims that the bond and sureties of \$1000.00 are excessive. The fact that he is still in custody raises an arguable point that the conditions are excessive. The principal purpose of imposing bail conditions is to ensure the attendance of the Appellant at his trial. This objective can be achieved in a number of ways. The imposition of a cash bail or non-cash bail bond is one but not the only way to ensure the attendance of the accused at trial. In my opinion the Appellant raises an arguable ground and leave to appeal is granted.

[9] Turning to the application for bail pending appeal, it is necessary first to note one significant aspect relating to this application. The Appellant does not make his application for bail pending appeal as a convicted person. He awaits trial at sometime in the future next year. Although the matter is listed for mention in December, Counsel for the Respondent informed the Court that a trial date will be fixed at the mention for

sometime next year. Under those circumstances this Court must recall that the presumption in favour of granting bail under section 3(3) of the Bail Act remains.

- [10] Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The discretion is to be exercised in accordance with established guidelines. Furthermore the discretion is subject to the provisions of the Bail Act 2002 and must be exercised in a manner that is not inconsistent with the Bail Act. However Section 17(3) of the Bail Act does not apply to this appeal as that section expressly provides, as a form of condition precedent, that the matters to which reference is made in that section are to be considered in the case of an appellant who has appealed against conviction or sentence. That is not the position in this case. The Appellant is appealing pursuant to section 21(3) of the Act in respect of the conditions fixed for bail pending trial.
- [11] This Court has frequently observed that section 17(3) does not preclude a court from taking into account any other matter which it considers to be relevant to the application (see: **Khera -v- The State** AAU 117 of 2014; 27 February 2015). It is also well settled that bail pending appeal should only be granted in exceptional circumstances (see: **Tora and Others -v- The State** (1978) 24 Fiji LR 28). The combined effect of these two propositions is that when a court is considering granting bail in circumstances such as in the present application any relevant matter relied upon, other than those specified in section 17(3), must amount to or constitute exceptional circumstances in order to justify granting bail pending appeal.
- [12] In this application there are exceptional circumstances. The Appellant has been charged with one offence of possessing 137.2 grams of cannabis. He has been in custody since 12 December 2015 which is almost 12 months. By the time the matters is called for mention on 6 December it will be virtually 12 months and by the time he is tried it will be well over 12 months.
- [13] The decision of this Court in **Sulua -v- the State** (AAU 93 of 2008; 31 May 2012) set out the guidelines for sentencing those convicted under the Illicit Drugs Control Act for

offences relating to cannabis. At page 57 of that decision, Temo JA, with whom P Fernando JA agreed, set out in summary form the penalty range for four categories of offenders. Category 2 applied to those persons convicted of possession of cannabis with weight ranging from 100 to 1000 grams of cannabis sativa. In such cases the tariff is a sentence of imprisonment between 1 to 3 years with those possessing below 500 grams being sentenced to less than 2 years and those possessing more than 500 grams being sentenced to more than 2 years imprisonment. In the present case the Appellant is alleged to have been in possession of 137.2 grams which is considerably less than half of 500 grams. It would appear that the sentence that the Appellant could reasonably expect to receive if convicted (on a plea of not guilty) would be not much more than 12 months imprisonment. I was informed by the Appellant from the bar table that his previous relevant convictions are more than 10 years old. Counsel for the Respondent State was not in a position to contradict that assertion and as a result I am prepared to accept his previous record is not relevant to any possible sentence that may be imposed should the Appellant be convicted.

[14] I have therefore concluded that the Appellant has established exceptional circumstances sufficient to justify granting bail pending appeal. The following conditions are to be observed by the Appellant as bail conditions and in default of which he is to be regarded as being in breach of bail:

- 1. The Appellant is to attend at the Sigatoka Magistrates Court for mention on 7 December 2016 at 9.30am.*
- 2. The Appellant is to reside at Naiyalayala Settlement Korovou Tailevu.*
- 3. The Appellant is subject to a curfew between the hours of 8.00pm and 6.00am each day.*
- 4. The Appellant is to report to the Korovou Police Station between 6.00am and 6.00pm each Monday and Friday.*
- 5. The Appellant is required to surrender any passport and travel documents to the Office of the Director of Public Prosecution.*

6. *The Appellant is to be subject to a Stop Order preventing him from travelling overseas and is also ordered not to leave Viti Levu.*
7. *The Appellant is not to re-offend in any manner whatsoever.*

[15] The Appeal under section 21(3) of the Act is listed for callover on a date to be fixed.



W. D. Calanchini
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Hon. Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL