

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0099/2014

CRIMINAL APPEAL NO: AAU0108/2014

[High Court Case No: HAC026/2009]

BETWEEN : **KENI DAKUIDREKETI**

First Appellant

AND : **KALIVATI BAKANI**

Second Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

Respondent

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr. B. Keene QC and Mr. W. Clarke for First Appellant
Second Appellant in person
Mr. M. Blanchflower SC and Ms E. Yang for FICAC

Date of Hearing : 11th March 2016

Date of Ruling : 24th March 2016

RULING

[1] There are three applications before this court. The first two applications are by Mr. Keni Dakuidreketi. Mr. Dakuidreketi seeks leave to appeal against his conviction and sentence, and bail pending appeal. The third application is by Mr. Kalivati Bakani. Mr. Bakani seeks leave to appeal against his sentence only. The applications are timely.

- [2] Mr. Dakuidreketi was convicted after trial on five counts of felony abuse of office contrary to section 111 of the Penal Code, Cap. 17 and sentenced to a total term of 6 years' imprisonment with a non-parole period of 5 years by the High Court at Suva. Mr. Bakani was also convicted on five counts of felony abuse of office after he pleaded guilty to the charges before the trial commenced. He was sentenced to a total term of 4 years' imprisonment with a non-parole period of 3 years.
- [3] The charges arose from the same facts. It is not necessary to reproduce the entire evidence. Briefly, the charges related to the use of funds belonging to the indigenous people of Fiji and controlled by the Native Land Trust Board (NLTB). The NLTB was created by the Native Land Trust Act (NLTA) to control and administer native lands. The main source of income for the NLTB is the rent received from the leased land. At all material times, Mr. Bakani was the General Manager and Mr. Dakuidreketi was a member of the NLTB.
- [4] On 21 October 2003, NLTB established a limited liability company known as the Vanua Development Corporation Limited (VDCL), for the principal purpose of investing NLTB's funds. All the funds to VDCL were supplied by NLTB. The NLTB employees held the shares and all property of VDCL in trust for NLTB. Both Mr. Bakani and Mr. Dakuidreketi were appointed by NLTB to VDCL's Board of Directors and paid a director's fee.
- [5] On 11 February 2004, VDCL entered into a joint venture with a private limited liability company called Pacific Connex Limited (PCX) in which VDCL would own 51% of PCX, and the remaining 49% would be owned by Mr. Ballu Khan, the original owner of PCX. In July 2004, both Mr. Dakuidreketi and Mr. Bakani were appointed by VDCL as directors of PCX to represent VDCL's interests and paid a director's fee.
- [6] The prosecution case was that both Mr. Dakuidreketi and Mr. Bakani knew about PCX's poor financial situation and with that knowledge they facilitated release of Trust Funds in abuse of authority of their respective office to PCX either as loans, government grants or security for overdraft in a total sum of \$4.9m. The prosecution

argued PCX gained \$4.9m in terms of loans, grants and security but NLTB lost when the funds were not repatriated. Mr. Dakuidreketi's defence was that he was not employed in the public service and that he did not act with bad or improper motive in facilitating the loans, grants and security to PCX.

[7] In his initial Notice of Appeal Mr. Dakuidreketi advanced twenty eight grounds of appeal against conviction and one ground of appeal against sentence. However, at the leave hearing, counsel for Mr. Dakuidreketi did not pursue all the grounds but eight issues that he summarized in his written submissions on bail. The issues are:

- (a) He (Mr. Dakuidreketi) was not employed in the Public Service as a director of VDCL and so cannot be guilty of the offence of Abuse of Office for acting in that role (**Public Service Issue**);
- (b) FICAC did not prove the necessary criminal intent to make his acts arbitrary as required by the offence (**Intent Issue**);
- (c) FICAC's case that money paid by NLTB to VDCL was NLTB trust money is wrong. To the contrary it was paid and received as paid up capital in VDCL (**VDCL Capital Issue**);
- (d) FICAC did not prove any relevant purpose of gain to PCX as was the clear view of the Assessors (**Gain Issue**);
- (e) The trial judge had no powers to put to the Assessors the reduced charges excluding "gain" (**Charges Reduction Issue**);
- (f) The trial judge erred in invoking section 237(4) of the Criminal Procedure to overturn the Assessors' verdicts (**Overturning Assessors Verdicts Issue**);
- (g) The trial judge made adverse findings against him because he did not give evidence at trial (**Right to Silence Issue**);

(h) The Appellant's sentence is excessive (**Excessive Sentence Issue**).

[8] Counsel for FICAC submits that the only grounds that are reasonably arguable are the issues pertaining to public service and sentence. The rest, counsel submits are unarguable.

[9] The test for leave to appeal against conviction is settled. The test is whether any of the ground is arguable (**Naisua v State** unreported Cr. App. No. CAV0010 of 2013; 20 November 2013).

[10] Counsel for Mr. Dakuidreketi and FICAC made detailed submissions on the evidence led at the trial and the law that will be substance of the appeal. At this stage I lack jurisdiction to express an opinion on any of the issues raised. It must suffice for me to say that these are arguable grounds of substance to be determined on appeal, but on the evidence Mr. Dakuidreketi faces a strong prosecution case.

[11] Mr. Bakani, unfortunately, appeared without his counsel and relied entirely on the written submissions previously filed by his counsel. Mr. Bakani advanced five grounds of appeal. Ground 3 was abandoned in the written submissions. The remaining grounds are:

(1) That the Learned Trial Judge erred in law allowing evidence in trial for the 2nd accused to be part of the Appellant's sentence.

(2) That the Learned Trial Judge erred in law in failing to consider that the Appellant did not gain personally and considered this issue to be "*immaterial*" in sentencing the Appellant.

(3) *Abandoned*

- (4) That the Learned Trial Judge erred in law in failing to consider the totality principle whilst sentencing consecutively on misdemeanour charges.
- (5) That the Learned Trial Judge erred in law when setting a non-parole period for 3 years for misdemeanour charges.

[12] Counsel for FICAC submits that the issue regarding consecutive sentence arising from ground 4 is reasonably arguable, while ground 5 raises a question of law alone for which leave is not required. In my opinion the concession by FICAC is fair.

[13] The test for bail pending appeal is more stringent. When considering granting of bail to a convicted person, the court must bear in mind that the presumption in favour of grant of bail is displaced. The Bail Act 2002 requires the court to consider the following factors:

- (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 appellant when the appeal is heard.

[14] The threshold for the likelihood of success is very high. Bail is granted only if the appeal has a very high likelihood of success (**Zhong v The State** unreported Cr App No. AAU44 of 2013; 15 July 2014, **Tiritiri v The State** unreported Cr App No. AAU9 of 2011; 17 July 2015). I do not accept the issues raised by Mr. Dakuidreketi satisfy that high threshold of success for bail to be granted.

[15] It therefore follows that the two remaining factors set out in section 17(3) are less significant when the threshold of a very high likelihood of success has not been met (**Seniloli & Others v The State** unreported Cr App No. AAU0041/04S; 23 August 2004). I have been advised by the Registry that the court reporters have already started typing the transcripts of the proceedings in the High Court. So far Mr. Dakuidreketi has

served less than one third of his sentence. If all efforts are made to ensure the appeal is ready for hearing, the appeal could be heard this year.

- [16] When considering the factors under section 17(3), the court may also consider exceptional circumstances, that is, “circumstances which drive the court to the conclusion that justice can only be done by granting bail” (**Mudaliar v The State** unreported Cr App. No. AAU0032 of 2006; 16 June 2006, at [5] per Ward P). Mr. Dakuidreketi has filed a lengthy affidavit in support of his application for bail. The affidavit mainly deals with the evidentiary and legal issues raised at the trial. Mr. Dakuidreketi in his affidavit also refers to the impact that his incarceration had on his family, business and health. But the impact of incarceration on family, health and business are not exceptional circumstances especially when the appellant has failed to satisfy the threshold of a very high likelihood of success in appeal (**Silatolu v The State** unreported Cr App No. AAU0024 of 2003; 27 September 2004). For these reasons, the application for bail should fail.

[17] **Result**

Mr. Dakuidreketi - Leave to appeal against conviction and sentence is granted.
The application for bail pending appeal is refused.

Mr. Bakani – Leave to appeal against sentence is granted.



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The Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Howards Lawyers for First Appellant
Second Appellant in person
Fiji Independent Commission against Corruption for Respondent