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

CRIMINAL APPEAL NO. AAU 59 of 2018
(High Court Action No. HAC 1 of 2014)

BETWEEN : **ROHINESH RAJAN PRASAD**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

Respondent

Coram : **Chandra, RJA**

Counsel : **Mr M Yunus for the Appellant**
Mr R Aslam with Ms S Datt for the Respondent

Date of Hearing : **30 September, 2019**

Date of Ruling : **21 November, 2019**

RULING

[1] The Appellant was charged with 3 counts of Bribery contrary to Section 4(2)(a) of the Prevention of Bribery Promulgation No.12 of 2007.

[2] After trial the Assessors unanimously opined that the Appellant was not guilty but the learned Trial Judge overturned the opinion of the Assessors and found him guilty on each count of Bribery and convicted him.

[3] The Appellant was sentenced to 3 years imprisonment with a non-parole period of 18 months and ordered to pay a fine of $1000.00 in default a further 100 days imprisonment to be served consecutively.

[4] The Appellant filed a timely notice of appeal and an application for bail pending appeal supported by an affidavit. In the notice of appeal the following grounds of appeal have been set out:

> *"Conviction*
>
> 1. *The learned Trial Judge erred in law and in fact when he failed to consider that police officers do not fall within the ambits of Public Official as per the interpretation section of the Prevention of Bribery Promulgation (Act) No. 12 of 2007.*
>
> 2. *The Learned Trial Judge erred in law and in fact to allow the prosecution of the matter, despite the information filed by the Respondent was defective from the outset of the trial. In that the Appellant being a police officer(special constable) did not fall within the ambit of Public Official under the interpretation section of the Prevention of Bribery Promulgation (Act) No. 12 of 2007.*
>
> 3. *The Learned Trial Judge erred in law when he failed to give cogent reasons for overturning the unanimous not guilty opinion of the Assessors.*
>
> 4. *The learned Trial Judge erred in law and in fact to convict the Appellant despite the unanimous not guilty verdict of the three Assessors.*
>
> 5. *The Learned Trial Judge erred in law and in fact to convict the Appellant despite the unanimous not guilty verdict of the three Assessors.*

Sentence

6. *The learned Trial Judge erred in his sentencing discretion to state that for the tariff of bribery by a Public Official under the Bribery Act is not well settled, when in fact the Tariff was well settled by Justice Madigan in State v. Blake [2014]*

7. *The learned Trial Judge erred in his sentencing discretion to state that in Beranaliva v Fiji Independent Commission Against Corruption (FICAC) [2017] FJHC 911; HAA 30.2017 (1 December 2017) this Court in its appeal judgment had erroneously identified the tariff set by Madigan J in State v Blake [2014] FJHC 375 (29 May 2014) (as being between 9 months and 3 years. The Appellant believes that in fact there was a proper tariff of between 9 months and 3 years. The Appellant believes that in fact there was a proper tariff of between 9 months and 3 years set in State v Blake thus there was no error by the learned Judge to identify the tariff in Beranaliva v FICAC.*

8. *The learned Trial Judge erred in his sentencing discretion to state that there was no exceptional circumstances in this case to suspend the matter, despite the Appellant in mitigation praying that he had started a new business, and had an infant child under his care and custody. Also providing medical certificate of his father and good character references. The Appellant is of the view that these were exceptional circumstances to attract a non-custodial sentence and/or suspended sentence.*

9. *The learned Trial Judge erred in his sentencing discretion to state that the offenders who have betrayed the trust in office are not given concessions on account of good character, despite the fact that the Appellant being a Special Constable in the Fiji Police Force performed duty on hourly basis but did not hold any office of trust with the Fiji Police Force.*

10. *That the sentence is harsh and excessive taking all circumstances of the matter."*

[5] The first two grounds of appeal against conviction can be dealt with together. It is the submission on behalf of the Appellant that charges against police officers cannot be laid under the Prevention of Bribery Act, 2007. It is submitted that the interpretation section and schedule of the act does not include police force or police officers in the definition of

public servants until the Act was amended in 2016. That the Appellant was charged for offences committed between 20th to 22nd January 2014 and therefore the Act would not apply to him.

[6] The Respondent in their submissions in reply submit firstly, that the Appellant being a Public Servant was part of the Agreed Facts at the pre-trial stage and that this issue was not taken up before the High Court, and secondly that the definition of Public Servant under section 2 of the Act would include Special Constables.

[7] At the trial this issue was not taken up and the learned Trial Judge proceeded on the basis of the agreed facts and in his summing up (paragraphs 21 to 23 and 99) and the Judgment (paragraph 18) this was referred to as an admitted fact at all times material to the case. Therefore the High Court cannot be faulted for proceeding on that basis.

[8] Although the Appellant submits that the term Public Servant does not include the category of Special Constables, as he was one of them, the term Public Servant does include them as the Police Force is a public body and special constables are employed within the Fiji Police Force and their emoluments are paid by the Government.

[9] The first two grounds of appeal are not arguable.

[10] Grounds 3 and 5 also can be dealt with together as they relate to the learned Trial Judge disagreeing with the opinion of the Assessors and overturning it.

[11] The trial Judge is the final arbiter in proceedings before the High Court with Assessors and has the authority to overturn the opinion of the Assessors by giving cogent reasons.

[12] The learned Trial Judge in a detailed judgment has reasoned out as to how he arrived at the conclusion overturning the opinion of the Assessors.

[13] The learned trial Judge has at paragraph 60 has concluded thus:

> *"60. For aforementioned reasons, I reject the evidence of the Defence. I disagree with the unanimous opinion of the Assessors which is not available on evidence led at the trial. Prosecution proved the case beyond reasonable doubt. I find the Accused guilty on all three counts of Bribery."*

[14] In view of the reasoned judgment of the learned trial Judge, these two grounds of appeal are not arguable.

[15] The 4th ground of appeal is to the effect that the learned trial Judge erred in convicting the Appellant despite serious contradictions in the evidence of the prosecution witnesses per se and inter se.

[16] Counsel for the Appellant has not set out the contradictions which are referred to as serious contradictions and therefore cannot be discerned.

[17] The learned Trial Judge has addressed the issue of contradictions in his judgment. At paragraph 23 of the Judgment the learned Trial Judge has stated that there were no material contradictions between the evidence of Vivek (one of the main witnesses for the Prosecution) and his previous statement or evidence of other witnesses who gave evidence in the case. Again at paragraph 27 of the judgment the learned Judge has after referring to the evidence of the prosecution stated that their evidence was never shaken and that they corroborated each other on material points. That minor contradictions highlighted by the Accused were not significant or material to discredit the version of the prosecution.

[18] In view of this position ground 4 is not arguable.

[19] Grounds 5 to 10 are on the sentence. An appeal against sentence would be arguable if as set out in **Simeli Bili Naisua v The State** Criminal Appeal No. CAV 0010 of 2013 the trial Judge had acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect him or had mistaken the facts.

[20] The learned trial Judge in his sentencing judgment has cited several judgments where sentences had been handed down regarding bribery cases and arrived at the conclusion that he was identifying the tariff for the offence of Bribery under section 12(1)(a)(iii) as follows:

For category A, 3 – 5 years imprisonment,

For category B G, 2 – 4 years imprisonment and

For category C, 12 months – 3 years imprisonment.

[21] The learned Judge categorized the culpability of the Appellant under Category B and sentenced him to a term of 3 years with a non-parole period of 18 months having considered the position regarding the granting of suspended sentences and also the mitigating factors of the Appellant. He had stated that he was fixing the non-parole period at 18 months with the purpose of rehabilitating the Appellant.

[22] I do not consider that the learned trial Judge had erred in sentencing the Appellant in the manner that he had proceeded and do not consider it to be harsh and excessive. Therefore, the grounds of appeal against sentence are not arguable.

Application for bail pending appeal

[23] The Appellant in his motion applying for bail pending application states that the grounds of the application are set forth in the affidavit that has been filed along with the motion.

[24] In his affidavit he has stated that he believes that the grounds of appeal are meritorious and stand good chances of success on appeal, his first wife had left him after he was arrested for this offence and has obtained a divorce, that he has a six year old daughter who wants to be with him, he is the sole bread winner of his family and his wife is unemployed, that his parents are retired and sickly and he was providing support to them, he started a business prior to being incarcerated, that the business was subject to robbery in August 2018. That in the event that he is not granted bail that his appeal be listed for hearing in the next session of appeal hearings.

[25] He has already served one year and 5 months of his sentence of three years.

[26] Unlike in an application for bail pending trial before the High Court, the threshold for granting bail pending appeal is much higher as set out in Section 17(3) of the Bail Act,2002.

[27] In **Balaggan v The State** (unreported AAU 48 of 2012; 3 December 2012) Justice Calanchini AP (as he then was) set out the principles relating to the grant of bail pending appeal:

> *"[4]. Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to bail pending appeal. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of the courts in this jurisdiction and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act (the Act).*
>
> *[5]. The starting point in considering an application for bail pending appeal is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Act, the presumption in favour of granting bail is displaced.*
>
> *[6]. Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
>
> > *"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 appellant when the appeal is heard."*
>
> *[7]. Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In **Apisai***

Vuniyayawa Tora and Others –v- R *(1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[8]. The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.

[9]. This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

> *"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's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[28] In considering the grounds of appeal filed on behalf of the Appellant, they should have a high likelihood of success if an application for bail is to succeed. I have concluded that they are not arguable as stated above. In those circumstances the application for bail has to be refused.

Orders of Court:

(1) Application for leave to appeal against conviction and sentence is refused.

(2) Application for bail pending appeal is refused.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL