

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

CRIMINAL APPEAL NO. AAU 132 of 2018
(High Court Action No. HAC 347 of 2017)

BETWEEN : **KRITESH KUMAR**
Appellant

AND : **THE STATE**
Respondent

Coram : **Chandra, RJA**

Counsel : **Mr A K Singh for the Appellant**
Mr L Burney for the Respondent

Date of Hearing : **19 July, 2019**

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

RULING

- [1] The Appellant was charged with three counts of unlawful possession of illicit drugs and one count of unlawful cultivation of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act.
- [2] The Assessors unanimously opined that the Appellant was guilty of all four counts, but the learned trial Judge convicted the Appellant only on two counts of unlawful possession of illicit drugs and acquitted him of the other two counts.
- [3] On 18 December 2018 the Appellant was sentenced to 9 years 10 months imprisonment with a non-parole term of 7 years and 10 months for possession of 1.4 kg of methamphetamine, and a concurrent term of 3 months imprisonment for unlawful possession of 0.3 grams of cannabis sativa.
- [4] The prosecution case at trial was that the illicit drugs were seized at the Appellant's house giving rise to a presumption, pursuant to section 32 of the Illicit drugs Control Act that he was in possession of those drugs. The Appellant gave evidence at the trial. He did not dispute that a bag of white crystals was seized from his home, but maintained that the said bag was given to him by a friend and he believed it to contain battery acid. It was also taken up on his behalf that the police had framed him by contaminating the bag of battery acid with methamphetamine and the chain of custody was broken.
- [5] In his notice of appeal which was filed within time he appealed against conviction and sentence. The grounds of appeal were amended subsequently and the amended grounds of appeal are:

"Against conviction:

- 1. That the Learned Trial Judge erred in law when he failed to order the stay of the proceedings on the grounds that the prosecution had failed to provide the full and sufficient disclosures to assist the Appellant in his defence.*
- 2. That the Learned Trial Judge erred in law when he failed to hold that the search conducted at the accused's house on 30th October 2017*

and 1st November 2017 were unlawful and breach of the Applicant's rights under the Constitution of the Republic of Fiji and section 98 of the Criminal Procedure Decree 2009.

3. *That the Learned Trial Judge erred in law by shifting the persuasive burden to the Accused, contrary to sections 57 and 59 of the Crimes Decree and thereby causing miscarriage of justice.*
4. *That the testing or the Report of the Illicit drugs by Principal Scientific Officer of the Fiji Police Forensic Laboratory were contrary to section 36(1) of the Illicit Drugs Control Act No.9 of 2004 and should not have been rightly admitted in evidence.*
5. *That the trial Judge erred in law when he ordered the defence counsel to address the Assessors first in the closing address contrary to 128 of the Criminal Procedure Act 2009.*
6. *That the learned Trial Judge erred in law when he refused to redirect the Assessors on the request of the defence regarding the chain of possession and error in his direction on number of remote and house key.*
7. *That the Learned Trial Judge erred in his direction to the Assessors or misdirected himself regarding law on possession, knowledge and lawful authority.*
8. *That the Learned Trial Judge erred in law when he failed to properly direct the Assessors or himself or consider regarding the law of inconsistent or omission, contradiction of prosecution evidence and as such resulted in a miscarriage of justice.*
9. *That the Learned trial judge erred in law and facts when he misdirected himself or failed to direct the Assessors that he or they should take into consideration the entire or totality of the evidence presented in Court to decide whether the accused is guilty of the offence as charged.*
10. *That the Learned Trial Judge failed to direct the Assessors that it was mandatory on the Assessors to carefully examine evidence presented by the defence to decide, not necessarily whether they believe the evidence or not, but whether such evidence is capable of creating a reasonable doubt in Assessors' minds.*
11. *That the Learned trial judge erred in law when he without any evidence or reason stated that the prosecution witnesses were*

credible and did not given reason why the Appellant's evidence was not credible.

12. That the learned trial Judge erred in law regarding the chain of possession and failed to properly direct the assessors and/or failed to uphold that the chain of possession was broken in this matter.

Against Sentence

13. That the learned trial Judge erred in law based on R v Fatu (2006) NZLR 72 (CA) and that, given the uncertainty as to the purity of the methamphetamine, the case was more appropriately treated as being on the cusp of bands one and two and attracting a starting point of no more than three years the most.

14. That the learned trial judge erred in law when he acted upon a wrong principle."

Consideration of the Grounds of Appeal

- [6] The first ground of appeal is regarding the failure of the learned Trial Judge to order the stay of proceedings on the ground that the prosecution had failed to provide the full and sufficient disclosures to assist the Appellant in his defence.
- [7] The Appellant had through his counsel filed a motion seeking the following orders and had filed an affidavit of the Appellant in support:
- (a) That the current charge being count 1 against the Applicant be stayed as being an abuse of process.
 - (b) That the State be ordered to disclose:
 - (i) the running sheet and log book of the vehicle used for the operation of the vehicle from 29th October 2017 to 2nd November 2017;
 - (ii) Cell Book record of 30th October 2017 to 6th November 2017;
 - (c) That the search conducted of the accused house on 30th October 2017 and 1st November 2017 were unlawful and breach of the Applicant's right under the Constitution and Section 98 of the Criminal Procedure Decree 2009.
- [8] The learned Trial Judge had in dealing with this motion, found no merit in the first ground as it was a triable issue.

- [9] It is the second ground that dealt with disclosures. The learned Trial Judge in dealing with that ground had stated that both parties had agreed to endeavour to finalize it during the pre-trial process of the matter. At this stage, as the entire record is not available it is not certain whether these matters were finalized or not.
- [10] As to whether the learned trial Judge should have stayed the proceedings on the basis whether the disclosures were given or not can be ascertained only with the availability of the record.
- [11] The Appellant has cited the decision in Takiveikata v State [2008] FJHC 315; HAM039.2008 (12 November 2008) where it was stated that there is an obligation on the prosecution to disclose certain information, whether documentary or otherwise, to the defence in connection with the conduct of a criminal trial.
- [12] In view of this position I would leave the matter for the Full Court to decide whether the matters sought were disclosed and if they were not, whether any prejudice was caused to the Appellant.
- [13] The second ground of appeal is regarding the question of the search of the Appellant's house being lawful or not.
- [14] There is provision in the Illicit Drugs Control Act which enables a police officer to exercise the powers of search without a warrant if the officer believes that reasonable grounds exist (S.22) to effect a search. Further, it had been an admitted fact that the Police had seized a plastic container containing white powder from a wooden cabinet in the Appellant's house which was later found to have contained the illicit drug. In view of this position this ground is not arguable.
- [15] The Third ground is to the effect that learned Trial Judge shifted the persuasive burden to the Appellant contrary to section 57 and 59 of the Crimes Act.
- [16] In dealing with the presumption of possession in Section 32 of the Illicit Drugs Act, the learned Trial Judge in his summing up at paragraph 21 directed the Assessors about the burden cast on the Appellant. That he was not required to prove beyond reasonable doubt that he was not in possession of the illicit drugs but only on a balance of probability and

what was meant by that standard. I do not consider that the learned Judge was in error when he gave the direction regarding burden of proof. This ground is not arguable.

- [17] The fourth ground is as regards the admissibility of the testing or the report of the Illicit Drugs by the Principal Scientific Officer at the Fiji Police Forensic Laboratory as being contrary to section 36(1) of the Illicit Drugs Control Act.
- [18] The learned Trial Judge at paragraph 7 of his summing up dealing with this issue stated that the prosecution was not relying on section 36 but upon the common law to lead the evidence of the witness which was scientific in nature. That it was not necessary to consider whether a scientific officer employed by the Fiji Police Officer was a Government Analyst under the Act.
- [19] As the prosecution was not intending to rely on an Analyst's certificate as prima facie evidence this ground is not arguable.
- [20] In Ground 5, the Appellant has taken up the position that the learned Trial Judge erred in law when he ordered defence counsel to address the Assessors first in the closing address and that being contrary to Section 128 of the Criminal Procedure Act, 2009.
- [21] This is a question of law and no leave is required.
- [22] The 6th Ground of appeal is that the learned Trial Judge had refused to redirect the Assessors on the request of the defence regarding chain of possession and error in his direction on number of remote and house key.
- [23] The learned Trial Judge had directed the Assessors in his summing up regarding the chain of possession and about the remote and house key. Although on the face of it the directions seem to be adequate, it may be necessary to consider the evidence relating to these matters and therefore I would consider it appropriate to leave it to the Full Court when the entirety of the evidence is available.
- [24] Grounds 7, 8, 9, 10 and 12 relate to different aspects regarding the summing up such as law on possession, knowledge, lawful authority, inconsistencies, omission, contradiction of prosecution evidence, the entirety or totality of evidence and evidence capable of creating a reasonable doubt and chain of possession.

- [25] To consider whether the summing up was adequate or whether there were non-directions, it would be necessary to consider the entirety of the evidence led at the trial. I would allow these matters to be considered by the full court when the entirety of the record is available.
- [26] In ground 11 the position taken up is that the learned trial judge erred in law when he without any evidence or reason stated that the prosecution witnesses were credible and did not give reason why the Appellant's evidence was not credible.
- [27] It is argued that the Appellant's evidence did not have any inconsistencies whereas there were inconsistencies in the evidence of the prosecution and that the learned Judge failed to give cogent reasons for rejecting the Appellant's evidence.
- [28] In his judgment the learned trial Judge had given reasons for his verdict where he agreed with the Assessors regarding two counts. He had also given his reasons regarding the two counts where the Assessors found the Appellant guilty but the learned Judge disagreed with them.
- [29] This ground lacks merit.
- [30] Grounds 13 and 14 relate to the sentence.
- [31] The main contention of the Appellant is that the percentage purity of the drug should have been taken into account for the purpose of sentencing. The New Zealand decisions in **R v Fatu** (2006) NALZ 72(CA), **Gush v The Queen** [2006] NZCA 438(14 September 2016), **Haarhaus v Queen** [201] NZCA 41 (1st March 2010) were relied upon by Counsel in his submissions to support this contention.
- [32] In view of the fact that the evidence of the Police Scientific Officer that the white substance may have about 90 to 98% impurities it may be necessary to consider the New Zealand decisions cited above. These grounds are arguable.

Application for Bail Pending Appeal

- [33] 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.
- [34] In his affidavit which has 49 paragraphs, all that has been stated are regarding the conduct of the proceedings and the strength of the grounds of appeal.
- [35] 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:

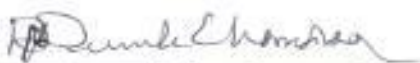
"The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in 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."

- [36] What has been included in the written submissions regarding his personal circumstances should have been included in the affidavit of the Appellant.
- [37] Although I have ruled that some of the grounds of appeal are arguable I am not satisfied that any of the grounds of appeal against conviction or sentence have a very high likelihood of success and as a result do not amount to exceptional circumstances.
- [38] Although the Appellant's Counsel has stated in his written submissions that at present the Full Court is presiding over 2015 matters and that it is unlikely that this appeal will not be heard until 2021, that statement is not quite accurate as some of the 2018 matters are also being taken up for hearing by the Full Court.
- [39] Having considered the affidavit of the Appellant, the written submissions filed on his behalf and the grounds of appeal against conviction and sentence, the application for bail pending appeal is refused for the reasons stated above.

Orders of Court:

- (1) Leave to appeal is not required regarding Ground 5 as it is a question of law.*
- (2) Leave to appeal is allowed on grounds 1, 6, 7, 8, 9, 10 and 12.*
- (3) Leave to appeal against sentence, (Grounds 13 and 14) are allowed.*
- (4) Application for bail pending appeal is refused.*




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL