

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: HAM 07 OF 2015

BETWEEN : **PETER YAU**

Applicant

AND : **STATE**

Respondent

Counsel : **Mr. A. Vakaloloma for the Applicant**
Mr. S. Babitu for Respondent

Date of Hearing : **9 February 2015**

Date of Ruling : **13 February 2015**

RULING
(Bail pending Appeal)

1. The applicant applies for bail pending appeal having been convicted and sentenced in the Magistrates Court at Lautoka of one count of Obtaining Property by Deception contrary to Section 317 (1) of the Crimes Decree No. 44 of 2009.
2. The applicant was sentenced to 3 years imprisonment on 22.8.2014.
3. The applicant had filed an appeal against the conviction and sentence within time. This appeal was taken up for hearing on 24.10.2014. As some of the appeal grounds were not supported by the copy record, the counsel for the applicant moved time to make an application to the learned Magistrate for correction of copy record.
4. No application was made up to date to the Magistrate. The counsel for the applicant was absent in this Court due to his other commitments from 24.10.2014. The appeal is to be mentioned on 10.3.2015 on application of the counsel for the applicant to fix a date for hearing.

5. This application was filed on 13.1 2015.
6. The grounds for bail pending appeal are:
 - (i) That the appellant is sick, suffering from a stroke on the right side of his body;
 - (ii) That the appellant's health and medical condition renders his stay in prison with present prison living condition as difficult, unhealthy, inhuman and unconstitutional;
 - (iii) That the appellant's health and medical condition requires daily medical and health attention and rehabilitation.
7. The applicant submitted a medical report dated 6.1.2014 to support his application. This Court called for a medical report from the same doctor on present medical condition of the applicant.
8. According to the report dated 6.2.2015 the applicant has shown some degree of independency and presently clinically stable but will need assistance for indefinite period of time. Rehabilitation exercises and treatment modality may enhance his recovery and reduce dependency.
9. The state had opposed the application.
10. It is not for the Court on this application to examine too closely the merits of the appeal, given that it may be called upon to hear the appeal proper itself; however it can be said that the grounds presently filed for both conviction and sentence are not in themselves convincing enough to pass as the state submits, the very high threshold needed for bail pending appeal to succeed.
11. There is of course no presumption in favour of bail when the applicant has been convicted and he is appealing the conviction according to Section 3(4) (b) of the Bail Act 2002.
12. Section 17 (3) of the Bail Act sets out the considerations a Court should take into account when determining bail pending appeal and these are:
 - (i) The likelihood of success in the appeal
 - (ii) The likely time before the appeal hearing
 - (iii) The proportion of the original sentence which will be served by the applicant when the appeal is heard.
13. In **Balaggan v State** [2012] FJCA 100; AAU48.2012 (3 December 2012) it was held:

[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 emphasized 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."

14. In addressing these considerations, this Court finds that:

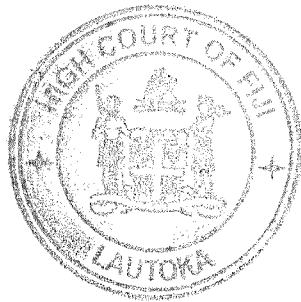
- (i) The applicant had failed to satisfy this Court that his present medical grounds are sufficient to consider those as exceptional. According to report dated 6.2.2015 the applicant has shown some degree of independency and presently clinically stable but will need assistance for indefinite period of time. Nothing in the medical report to say that the medical condition of the applicant deteriorated as a result of the applicant being kept in custody.


(ii) The grounds of appeal are arguable but not compelling. As Ward, J.A. said again in Ratu Jope Seniloli "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 a single Judge on the application for bail pending appeal to delve into the actual merits of the appeal".

(iii) The hearing of the appeal can be listed after 10th March 2015 on a date suitable to the counsel for the appellant. Such an expedited hearing would presumably satisfy the second limb of Section 17 (3).

15. Despite the fact that the grounds of appeal are arguable and may succeed, there is not every likelihood that they will succeed. The applicant had served less than five months of the sentence 3 years imprisonment.

16. In the premises the application for bail pending appeal is refused.




Sudharshana De Silva
Judge

At Lautoka
13th February 2015

Solicitors : Vakaloloma & Associates for the Applicant
Office of the Director of Public Prosecutions for Respondent