

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAM 200 OF 2016

1. MANASA TALALA
2. SERUVI CAQUSAU
3. KELEVI SEWATU
4. PENAI A DRAUNA
5. FILISE VERE
6. VILIAME VEREIVALU
7. JONA DAVONU
8. PITA MATAIRAVULA
9. SENITIKI NATAKASAVU

Applicants

V

THE STATE

Respondent

Counsel: : Mr. Lee Burney with Ms. J. Fatiaki for the State

: Mr. I. Khan for Accused

Date of Hearing : 16th November 2016

Date of Ruling : 17th November 2016

RULING

1. This application has been made by the Applicant on behalf of all the accused pursuant to Section 253 (1) and (2) of the Criminal Procedure Decree and also to invoke the Inherent Jurisdiction of this Court.
2. The Applicant and all other accused were convicted on the 11th November, 2016 and the matter was set down for sentencing submissions and hearing on the 16th November, 2016.
3. The Prosecution filed its sentencing submissions and is relying on the same. Instead of filing any submission in mitigation, the Counsel for Applicant filed this Notice of motion to which the Prosecution strongly objected.
4. The objection of the Prosecution was that this application is frivolous and, like Defence's previous 'no case application' and recusal application, this application has been made without any valid or lawful basis in order to drag the matter on with the intention of obstructing the course of justice. Counsel for the Prosecution submitted that this Court has no jurisdiction to hear this application under Sections 253 (1) and (2) of the Criminal Procedure Decree or under inherent jurisdiction of this Court.
5. The Counsel for Defence strenuously argued that under Sections 253 (1) and (2) of the Criminal Procedure Decree this Court had jurisdiction to suspend the sentence and sought time to support his arguments with case law authorities. Having explained the consequence of Section 150 of the Criminal Procedure Decree as to accused's' liability for costs, Court granted an adjournment till today (17th November, 2016) and fixed the matter for further hearing.

6. The Defence Counsel Mr. Iqbal Khan filed written submissions on the same day (16th November 2016) and wanted to make further oral submissions. Mr. Khan is not present in Court today and his junior Counsel Ms. Baleilevuka informs that the Applicant's Counsel is relying on the written submissions already filed. However, not a single case authority has been cited to show that this Court has jurisdiction to suspend a sentence until the determination by the Court of Appeal of the envisioned appeal of the Applicant.
7. Under the heading '*Admission to bail or suspension of sentence pending appeal*' the Section 253 states:

253. — (1) Where a convicted person presents or indicates an intention of presenting a petition of appeal, the High Court or the court which convicted the person, may release the person on bail, with or without sureties.

(2) If the person is not released on bail, the High Court or the court convicting the person, shall at the request of the person, order that the execution of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal.

(3) Any order under this section which is made before the petition of appeal is presented and where no petition is presented within the time allowed, the order for bail or suspension shall be immediately cancelled.

(4) Where the appellant is released on bail or the sentence is suspended, the time during which the appellant is at large after being so released or during which the sentence has been suspended, shall be excluded in computing the term of any sentence to which he or she is for the time being subject.

(5) An appellant whose sentence is suspended but who is not admitted to bail shall during the period of such suspension be treated in like manner as a prisoner awaiting trial.

8. It is obvious that this Section has nothing to do with a suspension of the sentence (after a conviction by the High Court) pending the determination of an appeal by the Court of Appeal.
9. This Section is schemed under PART XV of the Criminal Procedure Decree which is dedicated to 'APPEALS FROM MAGISTRATES COURTS'. Therefore Section 253 clearly contemplates appeals filed or intended to be filed in the High Court against a conviction recorded in the Magistrates Court.
10. Furthermore, this application in a sense is premature on two premises. Firstly, the Section only states that "*if the person is not released on bail, the High Court or the court convicting the person, shall at the request of the person, order that the **execution of the sentence** or order against which the appeal is pending be suspended pending the determination of the appeal*". (emphasis added) Nowhere is it stated that a sentence shall be suspended. The question of execution of the sentence arises only where a sentence has already been passed. Still this Court has not handed down a sentence.
11. Secondly, the question of granting bail pending appeal arises only where the convicted person's liberty has been taken away. In this case, the Applicant and the other accused stand convicted are still on previous bail conditions although the presumption in favour them under the Bail Act has now been displaced upon their convictions. Hence, the Applicant can invoke the jurisdiction of the Court of Appeal and his Counsel can argue his case, armed with his thick bundle of case authorities filed in this Court in respect of bail pending appeal, once the sentence is handed down by this Court.

12. It is trite law that inherent jurisdiction of this Court shall not be exercised where a statutory provision provides for the situation. There are clear provisions as to the manner in which and to the forum to which this type of application should be made.
13. It appears to me that the Applicant and his Counsel Mr. Iqbal Khan by making this application have employed a 'delaying tactic' to drag the matter on without any lawful and rational basis.
14. When I inquired from Counsel Mr. Khan, he was resolute and seriously wanted to pursue this application on the basis of the instructions he received from his client and sought a ruling. To facilitate further hearing and to rule on this application, Court had to postpone the sentencing hearing.
15. I would like at this stage to quote from the article of Robert F. Cochran Jr. titled '**Professionalism in the Postmodern Age: Its death, Attempts at Resuscitation, and Alternate Sources of Virtue**' published in Notre Dame Journal of Law (<http://scholarship.law.nd.edu/ndjlepp>) as it provides a rational basis for the course of action that I am going to take next.

"The traditional lawyer's notion of professionalism was quite different from that of the hired gun. The traditional lawyer did not do what he was told by the client; he told the client what to do. Whereas some of today's lawyers see their obedience to client wishes as a mark of professionalism, the traditional lawyer saw his control of the relationship as a mark of professionalism. Judge Clement Haynsworth reflected this view to a law school graduating class:

[The lawyer] serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the

master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right, and, as a professional, he cannot give in to a client's attempt to persuade him to take some other stand..... During my years of practice,... I told [my clients] what would be done and firmly rejected suggestions that I do something else which I felt improper".

(Clement F. Haynsworth, Jr. Professionalism in Lawyering, 27 SCL Rev. 627,628 (1976)

16. Bearing in mind what Judge Clement Haynsworth has said of professionalism expected of a lawyer, I find this a fit case to apply the provisions of Section 150 of the Criminal Procedure Decree.
17. Therefore, pursuant to Section 150 of the Criminal Procedure Decree, I order the Applicant and his Counsel Mr. Iqbal Khan to pay a cost of \$ 2000 to the Prosecution (\$1000 by each).
18. Application of the Applicant to suspend the sentence until the determination of the intended appeal is refused. A cost of \$ 2000 is ordered to be paid to the Prosecution by the Applicant and his Counsel Mr. Iqbal Khan.



Aruna Aluthge

Judge



AT LAUTOKA

17th November, 2016

Counsel: Office of the Director of Public Prosecution for Prosecution
Iqbal Khan & Associates for the Accused