

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**MISCELLANEOUS JURISDICTION**

**HAM NO. 63 OF 2016**

**BETWEEN : ABDUL AZIM HAKIK**

**Applicant**

**AND : STATE**

**Respondent**

**Counsel : Mr. Fazilat Shah for the Applicant**

**Mr. J. Niudamu for Respondent**

**Date of Hearing : 31st of May 2016**

**Date of Ruling : 22nd of June 2016**

**BAIL RULING**

**Introduction**

1. The Applicant files this notice of motion seeking an order to release him on bail pending his appeal. The notice of motion is being supported by an affidavit of Menaz Zarin Azim, the wife of the Applicant, stating the grounds for this application.
2. The Respondent informed the court that the state does not wish to file any affidavit in opposition, but preserve their rights to make submissions during the hearing. Accordingly, the application was set down for hearing on the 31st of

May 2016. The learned counsel for the Applicant and the Respondent consented to conduct the hearing by way of written submissions. I accordingly directed the parties to file their respective written submissions, which they filed as per the directions. Having carefully considered the affidavit of the Applicant and the respective written submissions of the parties, I now proceed to pronounce my ruling as follows.

### **Background**

3. The Applicant was charged in the Magistrates' Court for one count of Obtaining Property by Deception, contrary to Section 317 (1) of the Crimes Decree. The Applicant pleaded guilty for this offence on his own free will on the 31st of August 2015. The learned Magistrate then sentenced him for a period of twenty one (21) months without setting a non-parole period on the 10th of February 2016. The Applicant has appealed against the said sentence of the learned Magistrate on the following grounds, *inter alia*
  - i) *The learned Magistrate erred in imposing a custodial sentence when the petitioner had made full reparation,*
  - ii) *The learned Magistrate erred in stating that this offence was committed whilst your petitioner was on bail for three counts of obtaining property by deception as per the criminal case CF 150 /12 and 152/12 when your petitioner was never charged with breach of bail condition,*
  - iii) *The learned Magistrate erred in stating that the petitioner's actions are suggestive that your petitioner had a repetitive trend to commit similar offences. In doing so,*

*the learned Magistrate seems to be suggesting that your petitioner is a habitual offender,*

*iv) The learned Magistrate erred in failing to declare your petitioner as the first offender despite taking into account that your petitioner had a previous conviction which was more than 10 years,*

*v) The learned Magistrate erred in failing to suspend the sentence imposed when he had earlier suspended two other cases that is CF 150/12 and 152/12 with similar offences,*

#### **The Law and Analyses**

4. Having briefly considered the background of this application, I now turn on to discuss the applicable law pertaining to an application of this nature.
5. According to Section 3 (4) (b) of the Bail Act the presumption in favour of bail is displaced in respect of a person who has been convicted and had appealed against the said conviction.
6. Justice Suresh Chandra in Arora v State [2012] FJCA 67; AAU001.2012 (16 October 2012) has discussed the applicable approach in granting bail pending appeal, where his lordship found that;

*The position regarding bail regarding a person charged for a crime and awaiting trial and one who has been convicted after trial was succinctly set out by his Lordship Sir Moti Tikaram in Amina Koya v State Cr App. No.AAU)11/96 as follows:*

*"I have borne in mind the fundamental difference between a bail applicant waiting Trial and one who has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all, the conviction. It therefore follows that a convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal."*

His Lordship Justice Ward in *Ratu Jope Seniloi, Ratu Rakuita Vakalalabure, Ratu Viliame Volavola, Peceli Rinakam and Viliame Savu v The State* (Crim. App. No.AAU0041/04S. High Court Cr App No.0028/003,23 August 2004) said:

*"It has been a rule of practice for many years that where an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will be released on bail during the pendency of an appeal. This is still the rule in Fiji. The mere fact an appeal is brought can never itself be such an exceptional circumstance."* (Emphasis mine)

*Scutt JA in Matai v The State* (2008) FJCA 89 AAU0038.2008 has set out in detail the manner in which applications for bail pending appeal have been dealt with in common law jurisdictions which all deal with the high threshold that has to be met with by an Appellant seeking bail pending appeal .

It has been clearly laid down in a series of cases that bail pending appeal will be granted only rarely and that too where there are exceptional circumstances. Therefore

*the threshold is very high when applications for bail pending appeal are taken up for consideration by Court.*

7. Section 17 (3) of the Bail Act has stipulated the main consideration that the court is required to take into consideration in respect of granting bail to a person who has appealed against the conviction or the sentence. Section 17 (3) of the Bail Act states that;

*“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 applicant when the appeal is heard.*

8. Justice Ward in Ratu Jope Seniloli, and others v The State (Crim. App. No.AAU0041/04S. High Court Cr App No.0028/003,23 August 2004) has outlined the scope of the Section 17 (3) of the Bail Act, where his lordship was held that;

*“It is clear that the terms of subsection (3) make it mandatory for a court, when considering bail pending appeal, to take into account those three matters but I cannot accept it excludes the court from taking into account any other factors it considers properly relevant”*

*The general restriction on granting bail pending appeal as established by cases in Fiji and many other common law jurisdictions is that it may only be granted where there are exceptional circumstances"*

9. Justice Ward in **Ratu Jope Seniloli (Supra)** went further and expounded an appropriate approach for Section 17 (3) of the Bail Act, where his lordship was held that;

*"The two remaining matters set out in Section 17(3) are only directly relevant if the court accepts there is a real likelihood of success. If the court does not, their determination becomes otiose"*

10. The approach enunciated by Justice Ward in **Ratu Jope Seniloli (supra)** was adopted in **Arora v State (supra)**, where Justice Suresh Chandra held that;

*"In Ratu Jope Seniloli & Ors. v The State (Supra) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely "the likely time before the appeal hearing" and "the proportion of the original sentence which will have been served by the applicant when the appeal is heard" are directly relevant ' only if the Court accepts there is a real likelihood of success' otherwise, those latter matters 'are otiose'.*

11. I now draw my attention to the ground of likelihood of success in the appeal.
12. Justice Ward in **Ratu Jope Seniloli (supra)** had discussed the scope of the ground of likelihood of success in the appeal in an elaborative manner, where his lordship found that;

*“The likelihood of success had always been a factor the court has considered in application 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.....”*


*In Sharda Nand v DPP, FCA Application 3 of 1979, Marsack JA repeated the warning that the court should not, on such an application, give any ruling on the legal issues raised and then stated*

*“ All that is necessary .....is to decide whether ( the issues) show, on the face of it, that the appeal has every chance of success”*

13. The affidavit of Menaz Zarin Azim has only stated that the appeal has good prospects of success. The learned Counsel for the Applicant submitted in his written submissions that the grounds of appeal filed by the Applicant has likelihood of success in the Appeal. Having carefully considered the grounds of appeal filed by the Applicant and the submissions of the learned counsel for the Applicant, it is my opinion that the grounds of appeal advanced by the Applicant do not cross the threshold of every chance of success at the appeal as discussed above, though they are arguable grounds, which could properly determine in the appeal.
14. The Applicant was directed by the court to file his written submissions in the appeal on or before 13th of May 2016. However, the Applicant has failed to file his written submissions as per the direction and sought further time to file his submissions on the 17th of June 2016. If the Applicant filed his submissions as

per the direction, the hearing would have concluded by now. However, it is my opinion that the hearing could be concluded in July 2016 as per the redirections given to the parties to file their respective written submissions.

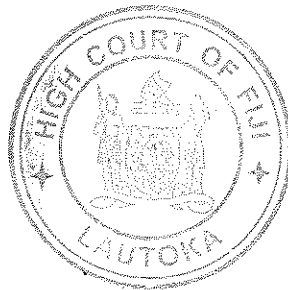
15. Having considered the reasons as per discussed above, I refuse this notice of motion and dismiss it accordingly.

  
**R. D. R. Thushara Rajasinghe**

**Judge**

**At Lautoka**

**22nd of June 2016**



**Solicitors : Fazilat Shah Legal for the Applicant**  
**Office of the Director of Public Prosecutions**