

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAM NO. 89 OF 2016

BETWEEN : PRAVIN KUMAR

Applicant

AND : STATE

Respondent

Counsel : Mr. M. Anthony for the Applicant

Mr. S. Kiran for Respondent

Date of Hearing : 14th of June 2016

Date of Ruling : 27th of June 2016

BAIL RULING

1. The Applicant invoked the jurisdiction of this court by filing this notice of motion pursuant to Section 17 (3) of the Bail Act and inherent jurisdictions. The Applicant in this notice of motion seeks an order to the effect that the Applicant be admitted to bail, pending his appeal. The notice of motion is being supported by an affidavit of the Applicant stating the grounds for this application for bail.
2. The Respondent filed an affidavit of W.P.C. Seruwaia Mouga, stating the objection of the State for this application. Subsequent to the filing of the affidavits

of the parties, the matter was set down for hearing on the 14th of June 2016. The learned counsel for the Applicant and the Respondent informed the court that they wish to conduct the hearing by way of written submissions. I then invited them to file their respective written submissions, which they filed accordingly. Having considered the respective affidavits and the written submissions of the parties, I now proceed to pronounce the ruling as follows.

3. The Applicant was charged in the Magistrates' court of Lautoka for one count of Criminal Intimidation, contrary to Section 375(1) (a) (i) (iv) of the Crimes Decree and one count of Breach of Domestic Violence Restraining Order contrary to Section 77 (1) (a) of the Domestic Violence Decree. The Applicant pleaded guilty for both counts on the 5th of May 2016. He was not represented by a lawyer. He waived his right to engage a lawyer when he was given and explained that right by the court. The Applicant admitted the summery of facts. Having satisfied that the Applicant pleaded guilty on his own free will, the learned Magistrate then convicted the accused for the both counts.
4. On the 12th of May 2016, the Applicant engaged a lawyer and informed the court that the Applicant wishes to make an application to withdraw his plea of guilt. The learned Magistrate has refused that application and proceeded with his sentence. The Applicant was sentenced for a period of ten month imprisonment for the first count and 2 month imprisonment for the second count by the learned Magistrate on the 12th of May 2016. Both sentences to be served concurrently. Having being aggrieved by the said sentence, the Applicant filed a petition of appeal in the High Court on the following grounds *inter alia*;

- i) *The learned Magistrate erred in law and in fact when he failed to give sufficient time to the accused to read his discloses and seek legal advice before the accused could take a plea,*
 - ii) *The learned Magistrate erred in fact and law when he failed to give the accused sufficient time to seek further legal advice and submit his mitigation grounds,*
 - iii) *The learned Magistrate erred in law and fact when he refused an application to vacate the plea of the accused by his counsel on the 12th of May 2016,*
 - iv) *The learned Magistrate erred in fact and law when he sentenced the accused on 12th May 2016 just a week after the matter was first called on the 5th of May 2016 without giving the accused sufficient time to analyses and prepare his case,*
 - v) *Alternatively, the overall sentence was harsh and excessive considering the circumstance of the case,*
 - vi) *The Appellant reserve rights to add further grounds of appeal upon receipt of court records,*
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 Seniloli, Ratu Rakuita Vakalalabure, Ratu Viliame Volavola, Peceli Rinakama 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 account 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 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 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 necessaryis to decide whether (the issues) show, on the face of it, that the appeal has every chance of success”

13. Justice Gounder JA in **Dakuidreketi v Fiji Independent Commission Against Corruption [2016] FJCA 48; AAU0099.2014 (21 March 2016)** held that;

“The threshold for the likelihood of success is very high. Bail is granted only if the appeal has a very high likelihood of success”

14. Having considered the grounds of appeal filed by the Applicant in his petition of appeal, it appears that his appeal is founded on three main grounds, that;

i) The learned Magistrate erred in law and in fact by not giving the Applicant time to prepare his case by perusing the discourses, obtain legal advice and analyse his case,

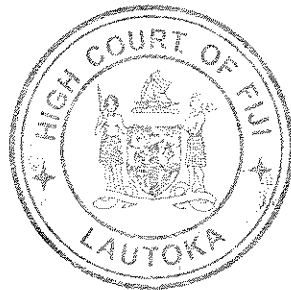
ii) The learned Magistrate erred in law by refusing an application of the Applicant to vacate the plea,


iii) The Sentence is harsh and excessive.

15. Having considered the above grounds of appeal advanced by the Applicant, it is my view that they are arguable grounds. However, they do not cross the threshold of high likelihood of success as required under Section 17 (3) of the Bail Act.

16. The Applicant and the Respondent have already filed their written submissions in the appeal matter and it has fixed for mention on the 27th of June 2016. Accordingly the appeal would be concluded without any delay.

17. 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
27th of June 2016

Solicitors : A.C. Law for the Applicant
Office of the Director of Public Prosecutions