

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAM NO. 90 OF 2016

BETWEEN : HAMENDRA RAJ

Applicant

AND : STATE

Respondent

Counsel : Mr. Iqbal Khan 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 filed this notice of motion seeking an order in which 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.
2. The Respondent filed an affidavit of Directive Constable Saleshe Kumar, stating the objection for this application. The matter was then set down for hearing on the 14th of June 2016, where the counsel of the both parties informed the court that they prefer to file written submissions. I then accordingly directed them to

file their respective written submissions, which they filed as per the direction. Having carefully considered the respective affidavits and the written submissions, I now proceed to pronounce my ruling as follows.

3. The Applicant was charged with another in the Magistrates' court of Lautoka for one count of Theft contrary to Section 291 (1) of the Crimes Decree. The Applicant pleaded guilty for the charge on his own free will on the 8th of February 2016. The learned Magistrate then sentenced him for a period of eight (8) months imprisonment on the 11th of May 2016. The Applicant appeals against the said sentence on the following grounds *inter alia*;

- i) *The appellant appeals against the sentence being manifestly harsh and excessive and wrong in principle in all the circumstance of the case,*
- ii) *The learned trial judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration in particular that the police had fully recovered the 5 x 50 kg bags of sugar, the subject matter,*
- iii) *The learned trial judge erred in law and in fact in passing sentence of imprisonment for 8 months was disproportionately server punishment contrary to Section 25 of the Constitution of Fiji,*
- iv) *The learned trial magistrate erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree 2009, when he passed the sentence against the Appellant,*

- v) *The learned trial magistrate misdirected himself to the application 4(2) (j) of the Sentencing and Penalties Decree in failing to suspend the sentence of the accused,*
- vi) *That the learned trial magistrate erred in law and in fact by failing to give sufficient weight to the accused character and the mitigating factors in imposing custodial sentence and that the accused was a first offender,*
- vii) *The Appellant reserves his right to add/largue to the above grounds of appeal upon receipt of the court records in this matter,*
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 Savou 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 within 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)** has 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

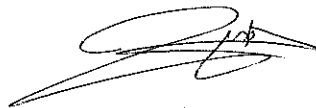
“All that is necessaryis to decide whether (the issues) show, on the face of it, that the appeal has every chance of success”

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 advanced by the Applicant in his petition of appeal, it appears that they are mainly founded on the issues of discretion exercised by the learned Magistrate in his sentence. Hence, I find that the grounds of appeal are not falling into the scope of high likelihood of success, though they are arguable grounds, which can properly and appropriately considered in the hearing.
15. Having concluded that the grounds of appeal do not come within the scope of every chance of success, I find the other two grounds has less importance. The Applicant and the Respondent have already filed their written submissions in the appeal matter. It has fixed for mention on the 27th of June 2016. Accordingly the appeal would be concluded without any delay.

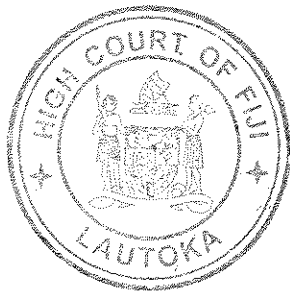
16. Having considered the reasons as per discussed above, I refuse this notice of motion and dismiss it accordingly.



R. D. R. Thushara Rajasinghe

Judge

**At Lautoka
27th of June 2016**



**Solicitors : Iqbal Khan & Associates for the Applicant
Office of the Director of Public Prosecutions**