

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAM NO. 167 OF 2016

BETWEEN : TASLIM ASHIF ALI

Appellant

AND : STATE

Respondent

Counsel : Ms. Baleilevuka for the Applicant

Ms. Shelyn Kiran for Respondent

Date of Ruling : 24th of October 2016

RULING

1. The Appellant files this Notice of Motion seeking an order to release him on bail pending the determination of his appeal filed against the conviction and the sentence imposed on him by the learned Magistrate of Nadi on the 19th of September 2016.
2. In an unusual manner this Notice of Motion is being supported by an affidavit of Mr. Sheik Riaz Munif, who claimed that he is the brother-in-law of the Appellant. Having claimed such, Mr. Munif went on and deposed about legal principles that are pertaining to an application of this nature. Apart from that he has deposed about the facts and materials that are related to the proceedings of the substantive matter in the Magistrates' court. I doubt that Mr. Sheik is a

suitable and competent person to provide such legal opinion and arguments in an affidavit form in this proceedings.

3. The learned counsel for the Responded informed the court that the State does not wish to file any affidavit in response, but preserved the rights to make submissions in opposing. I accordingly directed the parties to file their respective written submissions, however, only the Respondent filed it as per the directions. I presume that the Applicant does not wish to file any submissions.

4. The Appellant was charged in the Magistrate Court of Nadi, for one count of Driving Motor Vehicle without a driving licence, contrary to Sections 56 and 114 of Land Transport Act 35 of 1998 and one count of Dangerous Driving Occasioning Grievous Bodily Harm, contrary to Section 97 (4) (a) (b) and 114 of Land Transport Act No 35 of 1998. The Appellant pleaded guilty for the both counts on his own free will and accord on the 25th of July 2016. The learned Magistrate then sentenced him with fine of \$100, in default ten days of imprisonment for the first count and six months of imprisonment period and suspension of his driving licence for a period of nine months for the second count on the 19th of September 2016. Aggrieved with the above sentence, the Appellant filed an Appeal on the following grounds, inter alia;

i) 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 mitigating grounds,

ii) That the Learned Magistrate erred in fact and law when he failed to take into consideration the circumstances of the case,

iii) Alternatively, the overall sentence was harsh and excessive considering the circumstances of the case,

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 has appealed against the said conviction.
6. Justice Suresh Chandra JA 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 Rakuira 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 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 granting bail pending appeal to a person who has been convicted and sentenced. 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-

- 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 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”

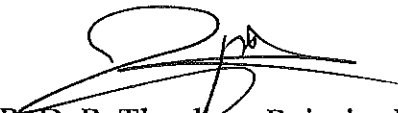
9. Justice Ward in Ratu Jope Seniloli (Supra) went further and expounded an appropriate approach for Section 17 (3) of the Bail Act, where his lordship held that;

“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. I now draw my attention to the ground of likelihood of success in the appeal.
11. 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"

12. It is the onus of the Appellant to satisfy the court that his appeal has a high likelihood of success. However, in this application it appears that Mr. Munif in his affidavit has merely stated that this appeal has a strong likelihood of success and the Appellant will vigorously battle to have his appeal a success. Indeed, this is not sufficient to satisfy the threshold for bail pending appeal. Apart from that, the Appellant has not made any submissions or provided any material to satisfy the court that this Appeal has a high likelihood of success.
13. Having considered the reasons discussed above, I refuse this application for bail pending appeal and dismiss it accordingly.


R. D. R. Thushara Rajasinghe

Judge



At Lautoka

24th of October 2016

Solicitors : Iqbal Khan & Associates

Office of the Director of Public Prosecutions