IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 206 OF 2016

BETWEEN : CHANDRA PRAKASH

Applicant

AND : STATE

Respondent

Counsel : Ms. U. Baleilevuka for Applicant

Ms. S. Kiran for Respondent

Date of Hearing : 30th January, 2017

Date of Ruling : 07th February, 2017

RULING

Introduction

1. The Applicant was charged in the Magistrates Court at Lautoka with one count of Indecent Assault contrary to Section 212(1) of the Crimes Decree 2009.

2. The Applicant pleaded not guilty to the charge and was convicted after a full hearing.

On 14th November, 2016, the learned Magistrate sentenced the Applicant to 18 months' imprisonment.

4. Being aggrieved by the said sentence, the Applicant filed a petition of Appeal against his conviction within time on the grounds stated therein.

5. The Applicant has filed this Notice of Motion supported by an affidavit seeking bail pending appeal.

6. Both parties have filed written submissions and in addition to that they have made oral submissions. I have considered all facts and evidence placed before this Court in arriving at my decision.

Law Relating to Bail Pending Appeal

Bail Act

7. The presumption in favour of the granting of bail is displaced where a person has been convicted. [Section 3 (4) (b)]

8. Section 17 (3) of the Bail Act deals with bail pending appeal. The Section reads as follows;

> *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.*

Case Law

9. The law relating to bail pending appeal is settled. Where an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pendency of an appeal. It is not sufficient that the appeal raises arguable points. The chances of the appeal succeeding factor in Section 17 (3) has been interpreted to mean a very 'high likelihood of success'.

10. In ***Ratu Jope Seniloli and others v The State*** (Crim App. No. AAU0041/04S. High Court Cr. App No.002S/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 he 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 of itself be such an exceptional circumstance".*

11. The fundamental difference between a person who has not been convicted and to whom the presumption of innocence still applies and a person who has been convicted and sentenced to a term of imprisonment was discussed in ***Amina Koya v. State*** (Crim App AAU0011/96) in following terms:

"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."

12. The Court of Appeal in ***Balaggan v State*** (2102) FJCA 100; AAU 48-2012 (3 December 2102) noted that even if the application is not brought through Section 17(3) of the Bail Act, there may be exceptional circumstances to justify a grant of bail pending appeal.

13. In ***Reddy v State*** [2015] FJCA 48; AAU6.2014 (13 March 2015), the President of the Court of Appeal Justice Calanchini discussed the scope of Section 17(3) of the Bail Act in a comprehensive manner.

"Once it has been accepted that under the Bill Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states: " 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 appellant when the appeal is heard."*

Although Section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the Section does not preclude a Court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances.

In Apisai Vuniyayawa Tora & Others –V- R (1978) 24 FLR 28, the Court of Appeal emphasized the overriding importance of the exceptional circumstances requirement:

> *"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."*

The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in Section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within Section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the Court to consider when determining the chances of success.

This second aspect of exceptional circumstances was discussed by Ward P in Ratu Jope Seniloli & Others –V- The State (Unreported Criminal Appeal No. 41 of 2004 delivered on 23rd August 2004) at page 4:

> *"The likelihood of success has always been a factor the Court has considered in applications 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 and it is not for the single Judge on an application for bail pending appeal to delve into the actual merits of the appeal. That as was pointed out in Koya'scase (Koya –V- The State unreported AAU 11 of 1996 by Tikaram P) is the function of the full Court after hearing full argument and with the advantage of having the trial record before it."*

It follows that the long standing requirement that bail pending appeal will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in Section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."

14. Although Section 17(3) imposes an obligation on the Court to take into account the three matters listed, the Section does not preclude a Court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances.

Analysis

[a]. High Likelihood of Success in the Appeal

15. I have considered the grounds of appeal filed by the Counsel for Applicant. Except ground 1, all the other grounds are in the 'standard format' that any appeal Counsel would generally wish to raise in an appeal and cannot at this stage be assessed whether they have any chance of success.

Ground 1 is as follows:

> *That the Learned Trial Magistrate erred in law and in fact in not directing himself to the evidence of the complainant/witness who were juvenile and as such proper direction ought to have been given regarding taking oath. The failure to do so caused a substantial miscarriage of justice.*

16. In respect of the 1st ground it is only suffice to highlight the following portion of the recent decision of the Court of Appeal in ***Chand v State*** [2016] FJCA 20; AAU065.2011 (26 February 2016) to conclude that this ground has a very little chance of success. In ***Chand*** it was held: *(at paragraph 15 to 19)*

> *"Counsel for the Appellant had sought to place reliance on the High Court case of The State v A.V, [2009] FJHC 24; HAC 192 of 2008 (21 February 2009) which he states was endorsed by the Court of Appeal in the case of Rahul Ravinesh Kumar v The State;Criminal Appeal No AAU0049 of 2012. In the case of The State v A.V the learned High Court Judge had stated that when a child of a tender age appears in court as a witness, the only obligation the magistrate or the judge has, is to remind the child of the importance of telling the truth before receiving his or*

of obiter. This undoubtedly is a good practice but it cannot be said that the failure to do so was fatal to the conviction of the Appellant. To hold otherwise would amount to a violation of section 26(1) of the Constitution, which states: "Every person is equal before the law and has the right to equal protection and benefit of the law". Section 26(3) of the Constitution prohibits unfair discrimination against a person directly or indirectly on the ground of age. Section 26(7) of the Constitution states treating one person differently from another on any of the grounds prescribed under subsection (3) is discrimination, unless it can be established that the difference in treatment is not unfair in the circumstances. Section 26(8) prescribes circumstances under which the right to equality and freedom from discrimination can be derogated but none of those circumstances apply to the evidence of children of tender years.

In the case of R. v W. (R.) [1992] 2 S.C.R 122 McLachlan J of the Supreme Court of Canada stated at 134:

"It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards. To do so would be to create new stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate".

Concentration should not be merely on the age of the child but to determine whether the child witness can understand the questions being asked and whether

the Assessors can understand the answers that are being given. In the case of R v B [2011] Crim L.R. 233 CA, it was said that the age of a witness is not determinative of his ability to give truthful and accurate evidence, and if found competent, it is open to a jury to convict on the evidence of a single child witness, whatever his age. Again in the case of DPP v M [1997] 2 Cr App.R. 70, DC, it was held that a child should not be judged incompetent on the basis of age alone.

The learned Trial Judge and the assessors have decided to accept as true the testimony of the victim as being truthful having gauged her mental development, understanding the ability to communicate and her demeanour when testifying. They were in the best position to make that assessment. It would be wrong on our part to decide otherwise not having had the opportunity to see her testify.

It would not be in the best interest of a child and will be inconsistent with the children's right to equality before the law if we are to allow this appeal merely because the learned Trial Judge had failed to remind the child of the importance of telling the truth before receiving his or her evidence. Section 41(2) of the Constitution states: "The best interests of a child are the primary considerations in every matter concerning the child."

[b] The likely time before the appeal hearing/ Proportion of original sentence served when appeal is heard:

17. The Applicant was sentenced on 3rd October, 2016. He filed his petition of Appeal on 14th November, 2016. Applicant has already filed submissions and a date has already been fixed for the State to respond on 14th February, 2017. The hearing can be taken up soon after filing the submissions. Since this Court has already

considered the grounds of appeal for the purpose of this application, the Appeal could be disposed of within one to two weeks thereafter if both parties co-operate. If judgment is accorded priority it should be available around March 2017. By that time the Applicant will have served only 4 ½ months of his 18 month sentence.

[c] Exceptional Circumstances

18. In the present application, the Applicant has only raised grounds of health condition to support his application. He submits that his bad health condition constitutes 'exceptional circumstances' that would warrant granting him bail pending appeal.

19. The Applicant submits that he is a heart patient on special diet that needs monitoring and is in need of a regular medical check up by a doctor. He says that due to the inadequate health and sanitary condition of the prison, his health would be at a great risk.

20. The Applicant has attached three medical reports to his affidavit to support his application. According to the first medical report issued by the Lautoka Hospital, the Applicant had been admitted at the Coronary Care Unit on the 17th April, 2010 for five days following a heart attack.

21. The second medical report has been issued by the Orthopedic Surgeon of the same hospital after a medical review done in 2012 on injuries suffered in an accident occurred in 2008.

22. The letter dated 1st April 2015, has been issued by a specialist physician/ Dermatologist of Tamavua Twomey Hospital after a follow up medical examination. According to this letter the Applicant had complained to the doctor of having sleeping problems at night because of shortness of breath and reduction in his capacity to climb a flight of stairs. He had been prescribed necessary medications along with dietary changes to be adopted and advised to refrain from engaging in strenuous activities.

23. Having perused those medical reports, I am not convinced that the Applicant has an exceptional medical condition that warrants him to be granted bail pending appeal. The three medial reports are not current and do not speak of the medical condition of the Applicant after his incarceration. They do not support the proposition that the Applicant is in need of immediate medical attention. There is also no evidence to suggest that his medical condition is due to the condition of the correction centre. I am satisfied that the Applicant can be afforded necessary medical care and attention whilst being in remand.

24. In coming to this conclusion I was helpfully guided by following authorities cited by the Counsel for Respondent.

25. In ***Singh v State*** [2010] FJCA 53; AAU0083.2010 (16 December 2010) it was observed :

> *"The approach to medical conditions within sentencing policies in Fiji are the same as in mainstream common law jurisdictions such as England, Scotland and Australia. Shortly stated ill health is not a reason for a non custodial sentence if the Court is of the view that only a custodial sentence is appropriate in all the*

circumstances. The only exception is where an incurable illness is in its last phase and the prisoner has only a few months to live. In 2009 with a prognosis of six months at most Al Megrahi, the Lockerbie bomber, was returned to Libya on a compassionate basis within this policy, which decision was made by the Scottish Executive and by the Minister for Justice in Scotland. Some time ago, in a similar situation, Great Train robber Ronald Biggs was allowed within policy by the Home Secretary to leave prison.

26. In ***Patel v State*** [2011] FJCA 30; AAU0039.2011 (12 May 2011) Marshall J, having observed the following, refused bail pending appeal to the Applicant.

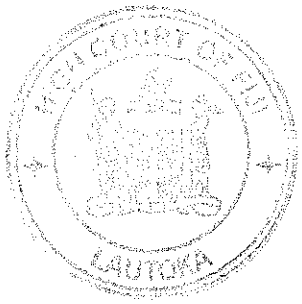
Mr Patel is 71 years of age and I have read the report of Dr Ram Raju of Nadi Fiji and that of Emeritus Professor John R Turtle who lives near Sydney, Australia. I accept all that they say. That includes what they say about diabetes and cardio vascular disease. I accept that stress increases the risk of deteriorations in these conditions. I also accept from Dr Brian Harrisberg of Sydney that he would like to operate upon his cataracts as soon as possible.

I am personally sympathetic to anyone having to endure trials and then imprisonment when they are getting older and suffer from these conditions. At least in modern times monitoring and checkups and medication can maintain stability and prolong life for many years. As I observed recently in the Brian Singh case the prison authorities in Fiji arrange for emergency attendance at hospitals and clinics when there is a health crisis. They also allow attendance at private clinics or the Colonial War Memorial Hospital if monitoring and adjustments in medication are a requirement for persons such as Mr Patel.

However my duty is to apply the law relevant to the matters that come before me. I explained the principles in my bail pending appeal ruling in the case of Brian Singh. For these reasons while generally sympathetic, I must rule that the medical matters raised concerning Mr Patel do not affect the position in respect of granting bail pending appeal.

27. The Applicant has not effectually raised any substantial ground that may have amounted to exceptional circumstances.

28. For the above reasons, the application for bail pending appeal is dismissed.



Aruna Aluthge
Judge

AT LAUTOKA
07th February, 2017

Counsel: **Iqbal Khan & Associates for Applicant**
Office of the Director of Public Prosecution for Respondent