

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

**CRIMINAL MISCELLANEOUS CASE NO: HAM 170 OF 2018**

**BETWEEN** : **DASPREET SINGH**  
**Applicant**

**AND** : **STATE**  
**Respondent**

**Counsel** : **Ms. S. Khan for Applicant**  
**Ms. S. Kiran for Respondent**

**Date of Hearing** : **17<sup>th</sup> October, 2018**  
**Date of Ruling** : **26<sup>th</sup> October, 2018**

**RULING**

1. The Applicant was charged in the Magistrates Court at Nadi with one count of Dangerous Driving Occasioning Grievous Harm under Section 97(4)(c), and 5 (d) read with section 114 of the Land Transport Act 1998 and one count of Dangerous Driving under Section 98(1) read with Section 114 of the Land Transport Act.
2. The Applicant pleaded guilty to the charge on his own free will. On 13<sup>th</sup> September 2018 he was sentenced to 7 months' imprisonment, custodial sentence of 4 months and the balance 3 months to be suspended for a period of 3 years. In addition, his driving license was suspended for a period of 1 year.
3. Being aggrieved by the said sentence, the Applicant filed a petition of Appeal within time on the main ground that the sentence is manifestly harsh and excessive.
4. The Applicant simultaneously filed a Notice of Motion supported by an affidavit seeking bail pending appeal.

5. Both counsel filed written submissions and the Counsel for Applicant made an oral submission. I considered all submissions made by counsel in arriving at my decision.

### Law Relating to Bail Pending Appeal

#### **Bail Act**

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

8. The law relating to bail pending appeal is well settled. Where an accused person has been convicted and sentenced to a term of imprisonment, courts will grant bail only in exceptional circumstances. It is not sufficient that the appeal raises arguable points. The applicant must show that likelihood of his appeal being successful is very high.
9. 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".*

10. 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):

*"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."*

11. The Court of Appeal in Balaggan v State (2012) FJCA 100; AAU 48-2012 (3 December 2012) 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.

12. 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’s case (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."*

## **Analysis**

### **The High Likelihood of Success in Appeal**

13. The Applicant filed following grounds of appeal in case No HAA 66 of 2018.
  1. *That the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.*
  2. *That 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.*
  3. *That the Learned Trial Judge erred in law and in fact in passing sentence of imprisonment was disproportionately severe punishment Contrary to Section 25 of the Constitution of Fiji (1998) (Section 11 (1) of the 2013 Constitution of Fiji).*
  4. *That the Learned Trial Judge erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.*
  5. *That the Appellant reserves his right to add/argue to the above grounds of appeal upon receipt of the Court records in this matter.*
14. In his appeal, the Applicant has taken up the position that the Learned Magistrate fell into error when he was sentenced to 4 months' imprisonment.
15. The sentence prescribed for the offence of Dangerous Driving Causing Grievous Bodily Harm under Section 98(1) read with Section 114 of the Land Transport Act is a fine up to \$ 1000 and 12 months imprisonment with a disqualification for up to 12 months for a first time offender.
16. The tariff for the offence of Dangerous Driving Causing Grievous Bodily Harm ranges from fine and suspended sentence to 12 months imprisonment with

disqualification for up to 12 months Chand v State [2015] FJHC 192 ( 18 March 2015) Ali v State [2016] FJHC 1137 (29 December 2016]

17. The custodial sentence of 4 months imposed on the Applicant is within the tariff range.
18. The Fiji Court of Appeal in Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015) stated that even if there has been an error in the exercise of the sentencing discretion, the appellate court will still dismiss the appeal if in the exercise of its own discretion the court considers that the sentence actually imposed falls within the permissible range. The court observed:

*“In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust”*

19. The final sentence imposed by the Learned Magistrate is not wrong in principle.
20. The Applicant argues that the Learned Magistrate misdirected himself when he did not suspend the whole sentence. This ground may be arguable but not sufficient to meet the threshold set by the Court of Appeal in Reddy and Balaggan cited above.

**The likely time before the appeal hearing**

21. The Counsel for Appellant has already filed her submission. The Appeal could be disposed of within two weeks when the Counsel for Respondent has filed her submission.


**Proportion of original sentence served when appeal is heard**

22. The Applicant was sentenced on 13<sup>th</sup> September 2018. The Applicant would roughly serve only 2 months of his custodial sentence by the time the substantive matter is heard.

**Exceptional Circumstances**

23. The Appellant in his Petition of Appeal has stated (paras 9, 14) that he has exceptional circumstances. However he has failed to show the circumstances which he says are exceptional.
24. For the reasons given, the application for bail pending appeal is dismissed.



  
Aruna Aluthge  
Judge

**AT LAUTOKA**  
**31<sup>st</sup> October, 2018**

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