

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

MISCELLANEOUS CASE NO: HAM 04 of 2020

BETWEEN: KRISHNEEL RAHUL DEO

APPELLANT/APPLICANT

AND: STATE

RESPONDENT

Counsel : Mr. Sushil Sharma for the Applicant

Ms. Amelia Vavadakua for the State

Hearing : 20 March 2020

Ruling : 31 March 2020

RULING

[1] This is an application made by the Appellant/Applicant (hereinafter referred to as Applicant) for staying of the Orders made by the Learned Resident Magistrate,

Magistrate's Court of Labasa, on 21 February 2020, in Magistrate's Court Labasa, Criminal Case No 3 of 2017.

[2] This application has been made by way of Notice of Motion, which is supported by an Affidavit deposed to by the Applicant.

[3] As per the Notice of Motion filed the Applicant seeks the following Orders from this Court:

1. That the orders granted (In Magistrate's Court Labasa, Criminal Case No 3 of 2017) by imposing a disqualification of two months of the accused's license be stayed pending the outcome of the appeal.
2. That the time of service of this application be abridged to one (1) day.

[4] In the Affidavit filed in support of the Notice of Motion the Applicant, inter-alia, deposes the following:

- That he had been charged in the Magistrate's Court of Labasa with one count of Dangerous Driving Causing Grievous Bodily Harm, contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35 of 1998.
- That he is a School Teacher teaching at Bua Central College and resides at Malawai, Dreketi. Every morning and afternoon, he has to drive to and from the school, which is located 60-65 kilometres away from his residence.
- That he is the sole breadwinner of his family and is looking after the welfare of elderly parents.
- That he got engaged year before last and his religious marriage is scheduled to be held on the 24, 25 and 26 of April 2020. He will need his driving licence for shopping purposes and for attending to other matters relating to his traditional religious marriage.

- That he has been advised by his Counsel that the Grounds of Appeal filed have merit and have a high prospect of success. Annexed to the Affidavit (Annexure 'A'), is a copy of the Amended Petition and Grounds of Appeal filed by him.
- That no prejudice will be caused to the State by staying the disqualification of his driving licence pending the outcome of the appeal.

[5] The Applicant has filed a separate Appeal against the Order made by the Magistrate's Court Labasa, in Criminal Case No 3 of 2017, on 21 February 2020. The said Appeal has been assigned case number HAA 31 of 2019. As per the Amended Petition and Grounds of Appeal filed, the Applicant is appealing both the conviction and sentence imposed by the Learned Resident Magistrate, Magistrate's Court of Labasa.

[6] The Amended Grounds of Appeal filed in the appeal matter are as follows:

- i) That the Learned Trial Magistrate erred in law and in fact in failing to properly analyze the facts of the case in determining the elements of the offence particularly that the Appellant was driving in a dangerous manner.
- ii) That the Learned Trial Magistrate erred in law and in fact in not taking into account the extent of damages caused to the bus shelter and the length of the brake mark of the complainant's vehicle in determining the speed.
- iii) That the Learned Trial Magistrate erred in law and in fact in not taking into account that if the Appellant's vehicle would have turned into the junction without giving signal the left hand side of the Appellant's vehicle would have sustained damages.
- iv) That the Learned Trial Magistrate erred in law and in fact in determining that the point of impact was at the double lane which clearly reflects and contradicts the Magistrate's finding that the Appellant made a turn towards Malawai junction.

- v) That the Learned Trial Magistrate erred in law and in fact in not taking into account that the complainant admitted driving at the speed of 80 – 85 km per hour which is 5 km excessive of the national road speed limit.
- vi) That the Learned Trial Magistrate erred in law and in fact in her finding in absence of an expert witness that a twin cab vehicle with a freezer truck will make impossible for the complainant to stop the vehicle after applying brake for 54.3 meters.
- vii) That the Learned Trial Magistrate erred in law and in fact in her finding that the complainant was not speeding when the length of brake mark and the extend of damages to the bus shelter indicates that the complainant was driving at a very high speed, lost control and collided with the Appellant's vehicle.
- viii) That the Learned Trial Magistrate erred in law and in fact in imposing a fine of \$500.00 payable in 30 days in default 30 days imprisonment and a disqualification of 2 months of the accused (Appellant's) license was high and excessive.

[7] The Learned State Counsel objects to this application. She submits that this application is without merit and that none of the grounds stated in the Affidavit filed by the Applicant in support of this application can be considered as exceptional grounds for the granting of relief.

[8] I agree with the contention of the Counsel for the Applicant that the cases referred to by the Learned State Counsel are mainly concerning stay of proceedings for abuse of process. Those cases must be distinguished from the relief sought in this case, which is a stay of the Orders delivered by the Learned Resident Magistrate, pending the determination of the Appeal by this Court.

[9] The primary issue for this Court to consider is whether it has statutory power for staying of the Orders delivered by a Resident Magistrate, pending the determination of the Appeal by this Court.

[10] Section 253 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) sets out the provisions for *“Admission to bail or suspension of sentence pending appeal”*. For ease of reference the section is reproduced below:

“(1) Where a convicted person presents or indicates an intention of presenting a petition of appeal, the High Court or the court which convicted the person, may release the person on bail, with or without sureties.

(2) If the person is not released on bail, the High Court or the court convicting the person, shall at the request of the person, order that the execution of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal.

(3) Any order under this section which is made before the petition of appeal is presented and where no petition is presented within the time allowed, the order for bail or suspension shall be immediately cancelled.

(4) Where the appellant is released on bail or the sentence is suspended, the time during which the appellant is at large after being so released or during which the sentence has been suspended, shall be excluded in computing the term of any sentence to which he or she is for the time being subject.

(5) An appellant whose sentence is suspended but who is not admitted to bail shall during the period of such suspension be treated in like manner as a prisoner awaiting trial.”

[11] The Counsel for the Applicant has referred to the case of ***Rajendra Narayan v. The State*** [2004] FJHC 205; HAM0028J.2004S (21 May 2004); in which case too, the Applicant applied for staying of an order made by the Magistrate disqualifying him from driving, pending the appeal. At the time the corresponding provision of the Criminal Procedure Code was Section 315. Her Ladyship Madam Shameem held:

“Section 315(1) of the Criminal Procedure Code provides:

“Where a convicted person presents or declares his intention of presenting a petition of appeal the [High Court] or the court which convicted such person may if in the circumstances of the case it thinks fit, order that he be released on bail, with or without sureties, or if such person is not released on bail shall, at the request of such person, order that the execution of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal. If such order be made before the petition of appeal is presented and no petition is presented within the time allowed the order for bail or suspension shall forthwith be cancelled.”

This provision appears to apply only to custodial sentences. In Hayat Mohammed v. R 9 FLR 53, MacDuff CJ said of the predecessor to section 315:

“It is clear from the wording of the section that an order that the execution of the sentence or order against which an appeal is pending be suspended has no application in the case of a sentence of a fine or of an order of disqualification under the Traffic Ordinance. The qualification “if such person is not released on bail” restricts the suspension to a sentence or order entailing a person’s detention in custody.”

This statement was adopted by Fatiaki J in Sefanaia Marau v. The State Crim. App. No. 79 of 1990. Of course, neither appellate court was asked to consider whether an inherent jurisdiction existed in the High Court to stay any of the orders of a lower court pending appeal. However Byrne J was asked to consider exactly that question in State v. Ratu Ovini Bokini HAM0032 of 1998. In that case, the State asked for the stay of committal proceedings until an interlocutory appeal from a refusal of the presiding magistrate to disqualify himself. Byrne J adopted the following passage from the speech of Lord Devlin in Connelly v. Director of Public Prosecutions (1964) AC 1254 at 1347:

“My Lords, in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court’s process is used fairly and conveniently by both sides.”

Byrne J then said:

“I respectfully adopt that passage and say that if the High Court has power to stay its own processes, even more so it has the power to stay proceedings in an inferior court.”

This view was endorsed by the Court of Appeal in the same case (Crim. App. AA001 and 003 of 1999S). After finding that the High Court had statutory jurisdiction to hear interlocutory appeals, the Court said, at page 7:

“If it had jurisdiction to hear the appeal, then it follows inexorably that the High Court had power to order and stay pending the hearing of the appeal. The High Court has inherent power to control its own processes and to ensure that holding measures are taken pending the hearing of the appeal to enable the exercise of its appellate jurisdiction to be meaningful.”

In this case, in the absence of a statutory power to stay a disqualification order, I find that an inherent jurisdiction exists to order such a stay, where it is necessary for the meaningful exercise of the High Court’s appellate jurisdiction. However, I do not consider it necessary to exercise that power in this case. The order for disqualification is for 12 months from the 7th of April 2004. The court record must be sent to the High Court within 28 days of the filing of the petition of appeal. With the evidence of only two prosecution witnesses, there is no reason for undue delay in the typing of the record. It is not suggested that the court had no powers to order disqualification, and the Applicant made no attempt to mitigate after conviction. Although the order will undoubtedly affect his business, I see no hardship in the Applicant employing a driver with a valid license to drive for him whenever necessary. I cannot accept that the disqualification order will cost him irreparable loss pending appeal.

For these reasons, while I consider that I do have inherent powers to consider a stay, I refuse the application in this case.”

[12] It is clear from the above Judgment that the High Court has inherent jurisdiction to consider applications made for staying of the Orders delivered by a Resident Magistrate, pending the determination of the Appeal by this Court. However, such a stay should only be granted in exceptional cases and the Court in doing so must exercise its discretion in a judicious manner.

[13] I have considered the reasons set out by the Applicant in his Affidavit for seeking a stay of the Magistrate’s Order. In my opinion, none of the reasons set out therein, tantamount to exceptional circumstances for the granting of relief.

[14] The Applicant states that there is a high prospect of success of his Appeal. This Court is not in a position to make a determination on the likelihood of success of his Appeal at this

point in time since the Magistrate's Court copy records have still not been received. The Appeal matter is fixed for mention on 15 May 2020.

[15] In any event, the suspension or disqualification of the Applicant's Driving Licence is only for a period of two months, from 21 February 2020. The period of disqualification would be completed on or about 21 April 2020. As stated by the Applicant, his religious marriage ceremony is scheduled to be held from 24, 25 and 26 of April 2020. By that time the period of disqualification of his Driving Licence would have been completed.

[16] Therefore, taking into consideration all the above facts and circumstances, I am of the opinion that the application made by the Applicant is without merit.

[17] Accordingly, the relief sought in the Notice of Motion filed by the Applicant is refused and the application is dismissed.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 31st Day of March 2020

Solicitors for the Applicant : Sushil Sharma Lawyers, Labasa.

Solicitors for the State : Office of the Director of Public Prosecutions, Labasa.