IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 91 OF 2020

BETWEEN:

RAVINESH VIDYA SAGAR

Applicant

AND:

STATE

Respondent

Counsel : Mr. N. Sharma with Mr. Nair for Applicant
Mr. Work for Respondent

Date of Hearing: 3 June 2020
Date of Ruling: 5 June 2020

RULING ON BAIL PENDING APPEAL

1. The Applicant was charged in the Magistrates Court at Suva with one count of Falsification of Documents contrary to Section 160(3) of the Crimes Act No. 44 of 2009 and one count of General Dishonesty -Obtaining a Gain contrary to Section 323 of the same Act. He pleaded guilty to the charges and, upon conviction, was sentenced on count one to an imprisonment term of 14 months and on count two to an imprisonment term of 18 months to be served concurrently.

2. Being aggrieved by the said conviction and the sentence, the Applicant filed a timely appeal in this Court. Having filed his appeal, the Applicant has fled this application seeking bail pending appeal.

3. The law relating to bail pending appeal is settled. It is accepted that a convicted person carries a higher burden as opposed to a person seeking bail pending trial of satisfying the court that the interests of justice require that bail be granted pending appeal. The fundamental difference between an applicant waiting trial and one who has been convicted or sentenced is that in respect of the former the applicant is innocent until proven guilty and in respect of the latter he or she remains guilty until such time as a higher court overturns the conviction. [Amina Koya v State unreported AAU 11 of 1996]

4. This fundamental deference has been recognised by the Parliament and is reflected in two ssections of the Bail Act. While Section 3(4) (b) displaces the presumption in favour of the granting of bail, Section 17 (3) of the Bail Act stipulates three conditions that a court must consider in granting of bail to a person who has appealed against conviction or sentence:

   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.*

5. Before the Bail Act came into being, the law relating to bail pending appeal was governed by common law whose position was clearly laid down in Fiji in a series of cases which held that bail pending appeal will only be granted in exceptional circumstances [Apisai Vunivavawa Tora & Others v R (1978) 24 FLR 28]

6. It appears that this test has sevived even after the Bail Act came into operation. In Ratu Jope Seniloli and others v The State (Crim App. No. AAU0041/04S. High Court Cr. App o.002S/003, 23 August 2004 the Court observed:

> "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."

7 However, the discretion is now subject to the mandatory considerations set out in s 17(3) of the Bail Act while the guidelines established by earlier court decisions remain relevant to the exercise of the discretion [Solomoni Qurai v State (AAU0036 of 2007)].

8. 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. Thus, 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.

9. In Ratu Jope Seniloli & Others v The State (Unreported Criminal Appeal No. 41 of 2004) delivered on 23rd August 2004) at page 4, Ward P suggested that exceptional circumstances should be viewed as a factor for the court to consider when determining the 'chances of success'.

> "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."

10. In its apparent reluctance to do away with the long standing practice requiring exceptional circumstances to be shown before a person convicted or sentenced being released on bail, the Court of appeal in its wisdom has raised the threshold by interpreting Section 17 (3) (a) to mean 'a very high likelihood of success". In light of this interpretation, the function of this court is to be satisfied on the face of the record that there are grounds, not merely arguable but having very high likelihood of success.

The likelihood of success in the Appeal

11. I now turn to the grounds of appeal to examine whether the Applicant's appeal is one having high likelihood of success. At the hearing, the Counsel for Applicant informed the Court that the Applicant is not pursuing the appeal against sentence. In view of that, what remains to be decided in the appeal is the grounds of appeal against the sentence. The Applicant has filed the following grounds of appeal against the sentence:

a. The Learned Magistrate erred in failing to consider that the plea of guilt by the Appellant was unequivocal as the Appellant did not receive legal advise nor legal representation prior to the taking of plea.

b. The Learned Magistrate erred in failing to consider that the plea of guilt by the Appellant was unequivocal as the Appellant had been misled by FICAC into believing that by pleading guilty and reimbursing the Ministry of Health, he would get a non-custodial sentence.

c. The Learned Magistrate erred in failing to consider that the Appellant in his caution interview and charge statement had denied the offending and raised sufficient defence to the charges. Annexed and marked as "RVS1" are copies of the Caution Interview and Charge Statement.

d. The Learned Magistrate erred in law and fact by not affording all the rights to the Appellant and in ensuring that the Appellant understood all and any rights available to him.

e. The Leaned Magistrate erred in failing to ensure that for all intents and purposes, the plea of guilty by the appellant was unequivocal.

f. The Learned Magistrate erred in law and in fact when he failed to give any appropriate discount for the mitigating factors of the Appellant.

g. The Learned Magistrate took irrelevant factors and failed to consider relevant factors in determining the sentence of the Appellant.

h. The Learned Magistrate relied on wrong principles in determining the sentence of the Appellant.

i. The Learned Magistrate failed to take into account the established tariff for such offences in sentencing the Appellant.

j. That the Learned magistrate failed to take into account restitution of the sum reimbursed to the Complainant. Annexed and marked as "RVS2" is a copy of the letter from Ministry of Health confirming payment of the same.

k. That the Learned magistrate failed to enquire and take into account the personal mitigating factors of the Appellant as follows:

   i. Age – 25 years – DOB 12/6/95
   ii. Married with 2 children aged 1 year and 6 months and another 2 months. Annexed and marked as "RVS3" are copies of the Birth Certificate.
   iii. Sole breadwinner.
   iv. His financial liabilities.

l. That the Learned Magistrate erred in law and fact by stating that breach of trust offenders require immediate custodial sentences as a deterrent which is contrary to section 4 (1) (a) of the Sentencing and Penalties Act 2009 and legal authorities in respect to such offences.

m. That the Learned Magistrate erred in law and fact in adopting a higher starting point for sentencing in respect of each count.

n. That the Learned Magistrate erred in law and in fact by imposing the custodial sentence of 18 months for both counts that is not only manifestly harsh but disproportionate and unjust in the prevailing circumstances.

o. The overall sentence was harsh and excessive considering the circumstances of the case.

12. As I said before, for the purpose of this application, the court is not supposed to delve into the actual merits of the grounds of appeal. When considered as a whole, if it appears that the appeal has a very high likelihood of success, the court is most likely to grant bail pending appeal.

13. The Applicant's complaint appears to be that the sentence imposed by the Learned Magistrate is harsh and excessive and/or wrong in principle. In deciding whether the Applicant has advanced appeal grounds having very high likelihood of success, the Court will look at the grounds at face value in light of the observations made by the Court of Appeal in Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015):

> "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.

14. Although the Applicant states that the Learned Magistrate relied on wrong principles, he has not specifically stated what wrong principles were applied.

15. At the hearing, the Counsel for Applicant conceded that the Learned Magistrate has taken into account the correct sentencing tariff for each offence and the sentence fell within the tariff. At paragraph 5 of the Sentencing Ruling, the Learned Magistrate has taken into consideration the early guilty plea, remorse, cooperation with the police and previous good character as mitigating factors and has allowed a considerable discount for all those. It does not appear that the restitution claims to have been done to the complainant by the Applicant was one of the considerations in the mitigation. Without the benefit of seeing the case record, it is difficult to ascertain that the fact of restitution was brought to the Learned Magistrate's attention at the appropriate stage. If it was, it is possible that the Learned Magistrate did not give much weight to the restitution as a matter of genuine remorse in light of the exculpatory position the Applicant had maintained at the caution interview.

16. At the hearing, the Counsel for the Applicant, having conceded that the receipt to prove the fact of restitution was not tendered in the Magistrates Court, argues that the Applicant was unrepresented at the Magistracy and therefore handicapped in not having been informed of his right to make an adequate mitigation submission. As the Applicant has waived his right to

legal representation (as it appears from the Sentencing Ruling) the merits of this argument can only be considered at the appeal hearing.

17. The term of imprisonment imposed by the Learned Magistrate is less than two years. Hence, the Learned Magistrate had discretion to suspend the sentence if he was satisfied that, in the circumstances of the case, it was appropriate for him to do so. The Learned Magistrate ordered an immediate custodial sentence in view of the gross breach of trust situation in the offending.

18. The Learned Magistrate remarked "The offending is a serious breach of the public service. Breach of trust offences require immediate custodial sentences as a deterrent". The Counsel for the Applicant submits that the circumstances of the offender justify a suspended sentence in view that the Applicant was a young and first time offender and that he showed genuine remorse by restitution and early guilty plea.

19. It cannot be said that the Learned Magistrate's decision to impose a custodial sentence is manifestly wrong in principle in light of the case authorities which provide guidance on this particular issue.

20. In State v Cakau unreported Cr. App. No. HAA 125 of 2004S; 10 November 2004, the offender who was a military officer stole $23,817.56 from the Fiji Military Forces after falsifying the accounts. He pleaded guilty to the charges and was handed a suspended sentence in the Magistrates' Court. On appeal by the State, the High Court quashed the suspended sentence and imposed a custodial sentence of 18 months' imprisonment. In that case, Shameem J said at p.5:

> "There is ample authority supporting the imposition of custodial sentences for serious fraud and breach of trust offences. Indeed custodial sentences are usually imposed despite the offender's good character. Good character is inevitably the condition precedent for breach of trust cases, because only people of previously good character are given positions of trust and responsibility in institutions and corporations. It is the betrayal of that trust that renders serious fraud offences the worst type of offending in property-related cases. It is for this reason, that a custodial sentence is inevitable

except in those exceptional cases where full restitution has been effected, not to buy the offender's way out of prison, but as a measure of true remorse"

21. In Barrick 81 Cr. App. R(S) it was stated:

> "The type of case with which we are concerned is where a person in a position of trust has used his trusted position to defraud his partners or employers. He will usually, as in this case, be a person of hitherto impeccable good character. It is practically certain, again as in this case that he will never offend again and in his life be able to secure similar employment with all that means in the shape of disgrace for himself and hardship for himself and also his family"

22. The issues raised by the Applicant require a consideration of the complete record. It is only after a close scrutiny of facts, perhaps after a full-fledged inquiry, and balancing all competing interests that this Court will be able to say that either a partial or full suspended sentence could have served the interests of justice in the circumstances of the case. That is not the function of this court at this stage. All what I can say at this stage is that the Applicant has failed to satisfy this Court that his appeal against sentence has a very high likelihood of success.

The Likely Time before the Appeal Hearing

23. The Applicant was sentenced on 29 April 2020. He filed his appeal on 21 May 2020. The appeal can be taken up hearing as soon as the parties have filed their respective submissions. There won't be any delay.

The Proportion of the Original Sentence which will have been served by the Applicant when the Appeal is Heard

24. The Applicant has only served approximately one month out of 18 months. The Appeal is likely to be heard in this month itself. The term which will have been served by the Applicant when the appeal is heard is not considerably lengthy.

Exceptional Circumstances

25. The Applicant has submitted that the Covid-19 outbreak currently prevalent worldwide will pose a health threat in the correction centre. However there is no evidence that there is a real threat of viral outbreak in the correction centre. The fear is rather imagined. If there was a real threat of a viral outbreak in the correction centre, that would have been an ideal case to justify an exceptional circumstance. However there is no such threat in Fiji. As of today, Fiji has successfully contained the spread of the virus. There are no infected active cases in the community.

26. The personal circumstances that the Applicant has children and his family is dependent on him are not exceptional circumstances. Most of the prisoners have children and are sole bread winners of the family. The fact that the Applicant was living in a rented house and his family runs the risk of being evicted is also not an exceptional circumstance.

27. The Applicant has failed to satisfy that the considerations provided in Section 17(3) of the Bail Act are fulfilled or any other ground that can be considered as 'exceptional' is made out.

Order

28. The application for bail pending appeal is dismissed.

HIGH COURT OF FIJI SUVA

Aruna Aluthge
Judge

At Suva
5 June 2020

Solicitors: **Nilesh Sharma Lawyers for Applicant**
Office of the Director of Public Prosecution for Respondent