

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 182 OF 2023

BETWEEN

FARASIKO ADROLE

Applicant

AND

STATE

Respondent

Counsel: **Applicant in Person**
 Mr. Baleilevuka for Respondent

Date of Hearing : **16 November 2023**
Date of Ruling : **17 January 2024**

RULING ON BAIL PENDING APPEAL

Introduction

1. The Applicant was charged in the Magistrates Court at Lautoka with one count of Aggravated Robbery contrary to Section 311(1) (a) of the Crimes Decree 2009. The trial proceeded in absentia on 19 February 2021 where the Applicant was convicted and sentenced to seven years' imprisonment.
2. Being aggrieved by the said conviction and the sentence, the Applicant filed a petition of appeal on the grounds stated therein.
3. The Applicant filed an application seeking bail pending appeal. The matter was adjourned on several occasions for the Respondent to file its Response, but it failed to file its response in time.

The Law Relating to Bail Pending Appeal

4. The law relating to bail pending appeal is settled. Section 3(4) (b) of the Bail Act provides that the presumption in favour of the granting of bail is displaced where a person has been convicted. Section 17 (3) of the Bail Act specifically deals with bail pending appeal. The Section provides:

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.

5. In **Ratu Jope Seniloli and others v The State** (Crim App. No. AAU0041/04S Cr. App No.002S/003 (23 August 2004). The High Court observed as follows:

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.

6. In **Amina Koya v. State** (Crim App AAU0011/96) the Court of Appeal observed 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.

7. 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.
8. In **Reddy v State** [2015] FJCA 48; AAU6.2014 (13 March 2015), the Court of Appeal 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

[a]. High Likelihood of Success

9. All the grounds of appeal filed by the Applicant in person would boil down to a single issue, namely, whether the conviction recorded could stand in view that the trial proceeded, and the conviction recorded in absentia violated the right guaranteed under Section 14 (2) (h)(i) of the Constitution.
10. The Applicant alleges that the trial Magistrate proceeded to trial *in absentia* without him being satisfied that the accused has chosen not to attend. The Applicant submits that he was in the Suva Remand Centre between 2020-2023 in respect of a pending case HAC 230 of 2020 during the period of trial in Lautoka in which he was convicted and sentenced.
11. This claim of the Applicant is supported by an affidavit filed by his father Josefa Soko Vakagone. In his affidavit Vakagone states that he personally informed the Lautoka Magistrates Court Registry that his son was being remanded in the Suva Remand Centre

when the Lautoka case was being heard. This assertion has not been disputed by the Respondent.

12. The assertion of the Applicant that he was in Suva Remand Centre during the time the trial was taken up for hearing was not disputed by the State although it was given ample opportunity and time to do so. Therefore, this Court is bound to accept that the Applicant was in remand when the Lautoka case was being heard *in absentia*.
13. Section 131 of the Criminal Procedure Act (CPA) provides that (subject to any other provision of the Act) all evidence taken in any trial under the Act shall be taken in the presence of the accused. Section 14(2) (h) (i) of the Constitution provides that every person charged with an offence has the right to be present when being tried unless the Court is satisfied that the person has been served with summon or similar process requiring his or her personal attendance at the trial, and chosen not to attend;
14. This right is guaranteed in the Constitution as it forms the basis of a fair trial. The right to challenge the evidence of the opposing side is at the heart of a fair trial. This right cannot be taken away by a Court unless it was satisfied that the accused has chosen not to attend (court). If the accused is in remand custody, it is for the trial court to issue a production order and to ensure that he or she is brought before the Court for the hearing. It appears that the Learned Magistrate who tried the Applicant had failed to satisfy himself that the accused had chosen not to attend. Therefore, I cannot help but to find that the Applicant is equipped with a very strong case likely to be successful in his appeal.

[b] The likely time before the appeal hearing

15. The Applicant filed his petition of appeal on 08 June 2023. This Court is still awaiting the copy record from the Magistrates Court. The hearing can be taken up after filing the submissions by both parties. Final disposal of the appeal could take another 2-3 months. In view of the high likelihood of success in his Appeal, the likely time the Applicant will have to be in incarceration is not justified.

Proportion of original sentence served when appeal is heard:

16. The Applicant was sentenced in February 2021 to a term of imprisonment of seven years. Three years have elapsed since then. The proportion of the original sentence served by the Applicant when the appeal is heard will considerably be long and not justified in view of the high likelihood of success in his Appeal.
17. For the above reasons, the application for bail pending appeal is allowed. The Applicant is released on bail pending appeal on the following bail conditions:
- (i). Surety bail bond of FJD 500 with two sureties.
 - (ii). Reporting to Lautoka Police Station on every last Saturday of the month between 8 a.m. to 4 p.m.
 - (iii). Not to re-offend whilst on bail.



Aruna Aluthge
Judge



At Lautoka

17 January 2024

Counsel: Applicant in Person

Office of the Director of Public Prosecution for Respondent