FIJI LAW REPORTS

IN THE SUPREME COURT OF FIJI
Criminal Appeal No. 25 of 1958

ISAD ALI *alias* NABI — Applicant

v.

REGINA — Respondent

Application to the Supreme Court for bail pending appeal, following a refusal by the trial Magistrate to grant bail—procedure to be followed. Ss. 321 and 314 Criminal Procedure Code.

Held.—(1) Section 321 (1) C.P.C. enables a convicted person to make application for bail to the subordinate court by which he was convicted or to the Supreme Court.

(2) The refusal of a subordinate court to grant bail is a final order disposing of the application then before that court.

(3) Successive applications for bail can be made by a convicted person.

(4) If the subordinate court which convicted the person refuses his application for bail he may appeal to the Supreme Court, under section 314 (1) C.P.C., against the order of refusal.

A. Lateef for the applicant.

J. F. W. Judge, Crown Counsel, for the Crown.

LOWE, C.J. [1st May, 1958]—

I dismissed this application for reasons which I agreed to give later. I now state my reasons.

The accused was convicted by the first class Magistrate at Nausori on the 22nd of April, 1958, for attempting to obtain money by false pretences. He made application for bail to the trial Magistrate and his application was refused. He has now made a further application seeking the grant of bail by this Court. It is noted that the application is stated in its intituling to be " for bail pending trial " whereas it is clearly for bail pending appeal. The respondent is stated in the application to be " First Class Magistrate's Court Nausori " whereas in all such applications the respondent is Her Majesty the Queen, described in the intituling as " Regina ". The question arising from the instant application is whether or not this Court is empowered by section 321 (1) of the Criminal Procedure Code to entertain the application. For convenience I quote the subsection:

> " Where a convicted person presents or declares his intention of presenting a petition of appeal the Supreme 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 persons, 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."

There can be no doubt that this Court *or* the Magistrate's Court can grant bail to a convicted person pending appeal but I asked Counsel for the Crown and Counsel for the accused to express their respective opinions as to whether or not, having had an application refused by the Magistrate, the accused could seek an order from this Court while the Magistrate's order was still *extant* or whether the correct procedure was to appeal against the Magistrate's order refusing bail. Section 314 (1) of the Criminal Procedure Code appears to contain the necessary authority to enable such an appeal to be lodged.

Mr. Lateef urged that the Magistrate's refusal to grant bail was not a final order but was of the nature of an order collateral to the pending appeal. He conceded that if the refusal did in fact amount to a final order, the accused, then being aggrieved, must appeal against that order. He pointed out also that the procedure in England allowed an application to the superior Court although the inferior court had refused to grant bail but he agreed that the relevant section of the English law was different from section 321 (1). He referred to *Stroud*, 3rd Edition, to show that a refusal to give leave to appeal was not an " order " within the relevant English section and urged that the refusal of the Magistrate to grant bail to the accused was in no better position but Counsel could find little assistance from this *dictum* because of the difference between the English section and section 321. Mr. Lateef referred also to *Archbold* 33rd Edition, 75, where it was clearly shown that a further application could be made to a court after there had been a refusal of bail. I must make it clear that I am in no doubt that an accused, who has been refused bail, can make subsequent applications to the court to which he had made his previous unsuccessful application or indeed applications. Changed circumstances might well justify the granting of bail after a previous refusal.

Mr. Judge, for the Crown, also considered that the refusal of the Magistrate was not a final order, his reasoning being that the accused still had the right to come to the court with a similar application. However, he did not dispute that the refusal appeared to amount to an " order " as section 321 (1) used that word with reference to the granting of bail.

In my view the refusal is in effect an order that the accused shall not be granted bail just as the allowing of bail is an order granting liberty to an accused pending trial or appeal as the case might be. The order refusing bail is also a final order. It is not collateral in any way. The Magistrate in such a case has before him an application for bail, unconnected with any other aspect of trial or appeal. It is an application which calls for final disposal. The fact that an accused may come to the same court again with a similar application does not, in my view, affect the position. It merely comes about that a fresh and entirely separate and independent application is then before the court, also for final disposal. Counsel both agreed as to the right of an accused to make successive applications for bail and considered that it followed that a second or subsequent application could, under the authority of section 321 (1), be made to this Court following the refusal of a Magistrate to grant bail pending appeal. That argument has persuasive value but Counsel did not consider the converse which, if their argument was correct, would also follow, namely that should this Court refuse an application for bail pending appeal against a conviction by a Magistrate, the accused could then use section 321 (1) and apply to the Magistrate for the grant of bail. That is not the intention of the section. Under its provisions an accused person, who has presented or has declared his intention of presenting a petition of appeal, may apply to the court of his trial *or* to this Court if he was tried by a Magistrate, but he is to make his election.

If his trial was in the Supreme Court any such application must necessarily be made to that Court. The wording of section 321 (1) " the Supreme Court or the court which convicted such person may . . . order that he be released on bail " makes that abundantly clear.

As I have said, Counsel argued that an accused person who intended and had given notice of his intention to appeal, could after refusal, make a subsequent application for bail to this Court, but it might well be that the Attorney-General in a case where bail had been granted, was dissatisfied with the order of the Magistrate granting such bail, the granting of which might be against the public interest. The only apparent remedy of the Attorney-General would be to appeal against the Magistrate's order under section 314 (1) of the Criminal Procedure Code. It seems, on the face of it, anomalous that an accused could go from one court to another in order to pursue an application for bail and might in the process fail to disclose a prior refusal of bail, whereas the Attorney-General would be precluded from adopting the same procedure had bail been granted by a Magistrate in the first instance.

I am fortified in my opinion by the decision of the Supreme Court of Kenya in *Nemchand Govinji v. Regina*, (Criminal Appeal No. 236 of 1954), where that Court in its appellate jurisdiction appears also to have decided, *inter alia*, that the refusal of bail by a Magistrate is a final order. In the judgment on that appeal the Court said:

> " The correct method of seeking reversal of an order by a subordinate court refusing bail pending appeal is by appeal to the Supreme Court under section 356 (1) of the Criminal Procedure Code. An application to the Supreme Court by way of Chamber Summons is correct procedure only where there has been no application to and hence no refusal by a subordinate court."

Section 356 (1) of the Kenya Criminal Procedure Code is substantially the same as section 321 (1) of the Fiji Code but Kenya has added a proviso as follows:

> " Provided that, where a subordinate court refuses to release such person on bail, an appeal shall lie to the Supreme Court."

The proviso, however, does not in any way alter the substantive provisions of section 356 (1) which, in its effect, is contained within section 314 (1) C.P.C.

In all the circumstances it seems to be clear that the intention of section 321 (1) is that an accused person, pending appeal, may make application for bail to either the court which convicted him or to the Supreme Court but he must elect. If his application is refused by the lower court his remedy is to appeal against the order of refusal to the Supreme Court. For these reasons I refused the application.