

**BOB SARUP**

v.

**THE STATE**

[HIGH COURT, 1990 (Fatiaki J) 24 August]

**Criminal Jurisdiction**

*Appeal- bail pending appeal- relevance of delay in preparing record of the proceedings in the lower Court- Criminal Procedure Code (Cap 21) Section 312.*

Section 312 of the Criminal Procedure Code (since amended, see Criminal Procedure Code (Amendment) Act 37/98) required the Magistrate, upon receiving a petition of appeal "forthwith" to forward the petition and record of the proceedings to the High Court. The Applicant appealed against his conviction but almost 2½ years later the record had still not been received. Granting bail the High Court deplored the delay and emphasised that such delays provided grounds for granting bail pending appeal.

Cases cited:

*Apisalome Galevu & Anr v. The State* (Misc Case Nos. 12 & 13/90)  
*Ernest Whippy v. The State* (Misc. Case No. 13/88)

Applicant in Person  
*S. Senaratne* for the Respondent

Application for bail pending appeal

**Fatiaki J:**

Last Monday the 13th of August this Court granted the applicant conditional bail pending the hearing of an appeal against a sentence of 3 1/2 years imprisonment imposed by the Suva Magistrate's Court notwithstanding the State's objections. On that occasion I said I would deliver my reasons in writing and this I now proceed to do.

So far as one is able to discern from the applicant and the papers available in the High Court's file he and a co-accused were jointly charged with 2 Counts of Obtaining Money by False Pretences in Suva Magistrates' Court Criminal Case No: 199/88.

The applicant had pleaded not guilty to the offences and after a short trial was convicted and sentenced on the 25th of February, 1988. In the applicant's case he received consecutive sentences of 18 months imprisonment on each count and his co-accused, concurrent sentences of 8 months imprisonment.

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The disparity in these sentences is manifest and needless to say forms one of the grounds advanced by the applicant in his appeal against sentence.

It might be that the trial Magistrate had good and sufficient grounds for making such a distinction between the applicant and his co-accused. It might be that the co-accused was a first offender who had pleaded guilty or was a secondary party in the commission of the offences. But in the absence of the relevant Magistrates' Court record these are all only speculations on the part of this Court.

B

Notwithstanding that however the applicant's principal complaint in this application is the seemingly inordinate delay in hearing his appeal petition which is dated the 9th of March, 1988 and was lodged some 2 1/2 years ago!

C

Since then the applicant has written several reminder letters and complaints to various government officials. This Court has examined some of the letters and it can safely be said that the applicant has very obviously been pursuing his appeal with almost no success at all.

D

To further amplify the delay in this appeal reference was made by the applicant to an appeal against sentence in another Suva Magistrates' Court Criminal Case No: 2940/86 which he lodged on the same date as the present appeal petition.

E

Like the present case under appeal, in that case, he was tried and convicted, yet unlike this case, the appeal against sentence in that case was finally disposed of by Jesuratnam J. in a judgment dated the 13th of September, 1988. i.e. 5 months after the petition of appeal was filed.

F

Why, the applicant very properly asks, should it then take this present appeal so long to be listed for hearing?

It seems and I say this advisedly that the problem lies in the failure of the lower Court to prepare and produce to this Court a certified record of the court proceedings in Suva Magistrate's Court Criminal Case No: 199/88.

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It might be that the record is a lengthy one and has not been typed up or it might be that there is a shortage of typing staff in the lower court or that the relevant Magistrate has not been able to certify the typed copy record or dare I say it, the file might have been misplaced or a combination of all these factors.

A Be that as it may can it be doubted in this case that the mandatory provisions of Section 312 of the Criminal Procedure Code (Cap. 21) have been totally ignored by the Magistrate concerned? and does this delay not reflect a scandalous state of affairs in the lower court?

B Whatever the reason might be the delay occasioned in this case is gross and what is more is no fault or doing of the applicant who must not be allowed to languish in prison for it.

In Ernest Whippy v. The State Misc Case No. 13/88 Justice Jesuratnam in granting the applicant bail pending appeal in circumstances not dissimilar to the present said:

C “An appellant is entitled to the hearing of his appeal as soon as the appeal brief is ready and the convenience of the Court permits it. The brief in a Magistrate’s Court case involving one day’s trial proceedings will normally be ready in about 3 or 4 months after the date of conviction and sentence. But in this case over 8 months have elapsed and no appeal brief is still ready..... The accused cannot be said to be responsible in any way for this inordinate delay. The blame for it has to be laid elsewhere. Is the accused to suffer for it by continuing to serve a substantial part of his term (or the whole of it) in jail when it may well be set aside in appeal? In my opinion the accused would be entitled to bail on this ground alone.”

E Then as recent as July this year this Court warned in Apisalome Galevu and anor v. The State Misc Case Nos: 12 & 13/90:

F “.....that in future applications for bail pending appeal, the court will look closely at the delay occasioned by the preparation of the relevant Magistrates’ Court record and the reason(s) for it and the Court may be constrained .....to hold that such delay is *per se* an exceptional circumstance sufficient to warrant the release on bail of a prospective appellant.”

G It is trite that every person convicted in a criminal case has a positive right (not a privilege) granted to him under our law, to appeal against any judgment, sentence or order of a Magistrate’s Court which he is dissatisfied with, and this Court will not lightly countenance any manner of interference with that right which tends to or renders it nugatory. Much less will this Court permit the continued deprivation or arbitrary withholding of a person’s liberty as a result of such interference. The fact that it should be so denied in this case through the tardiness or laxity of judicial officers is a poor reflection on the individuals concerned.

## HIGH COURT

In all the circumstances of this case and for the above reasons the applicant was released on bail pending the hearing of his appeal against sentence.

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*(Application allowed; bail granted)*

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