

MUSKAN BALAGGAN v STATE (AAU0048 of 2012)

COURT OF APPEAL — CRIMINAL JURISDICTION

5 CALANCHINI AP

2, 4, 19 October, 3 December 2012

10 **Criminal law — bail — bail pending appeal — attempting to export illicit drug — possession of illicit drug — whether application for bail pending appeal should be granted — discretion — exceptional circumstances — likelihood for success of appeal — Bail Act ss3(3), 3(4), 17(3); — Court of Appeal Act ss21(1)(b), (c), 23(1)(a), 23(3), 33(2), 35(1); — Illicit Drugs Control Act ss4, 5a, 9.**

15 The appellant was convicted of attempting to export an illicit drug, namely cocaine, and with possession of the same illicit drug and was sentenced. The appellant's application for leave to appeal against conviction and sentence was awaiting a hearing date, and the appellant applied for bail pending appeal.

Held –

20 (1) Exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in s 17(3) of the Bail Act. Thus, even if an applicant does not bring his application within s 17(3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Further, exceptional circumstances should be viewed as a factor for the Court to consider when determining the chances of success. In the present case, the Court is not satisfied that any of the grounds of appeal have a very high likelihood of success and as a result do not amount to exceptional
25 circumstances. Further, the appellant has not raised any personal matter that may have amounted to exceptional circumstances.

Application for bail pending appeal dismissed.

Cases referred to

Koya v State AAU 11 of 1996, approved.

30 *Ratu Jope Seniloli and Others v State* (unreported criminal appeal No 41 of 2004 delivered on 23 August 2004), cited.

Apisai Vuniyayawa Tora v Reginam [1978] 24 FLR 28; *Mack Lawrence Mutch v State* (criminal appeal AAU 60 of 1999 delivered 2 August 2000), considered.

35 *S. Vaniqi* for the Appellant.

L. Fotofili for the Respondent.

40 [1] **Calanchini AP.** This is an application for bail pending appeal made pursuant to s 33 (2) of the Court of Appeal Act Cap 12. The application came before me pursuant to the jurisdiction given to a single judge of the Court under s 35 (1) of the Act.

45 [2] The Appellant was charged with attempting to export an illicit drug, namely cocaine contrary to sections 4 and 9 of the Illicit Drug Control Act 2004. She was also charged with unlawful possession of the same illicit drug contrary to s 5 (a) of the Illicit Drugs Control Act. The learned trial judge convicted the Appellant following a unanimous opinion of the assessors that the Appellant was guilty on both counts. On 4 June 2012 the learned trial judge sentenced the Appellant on each count to 11½ years imprisonment to be served concurrently with a non-parole term of 9 years.

50 [3] The Appellant filed Notice and Grounds of Appeal on 27 June 2012. The Appellant relies on 31 grounds of appeal against conviction all of which purport to raise grounds of mixed law and fact. The Appellant raises six grounds of

appeal against sentence. The Appellant has filed an application for leave to appeal against conviction and sentence which awaits a hearing date. This Ruling is concerned only with the Appellant's application for bail pending appeal.

5 [4] Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The words used in s 33 (2) are clear. The Court may, if it sees fit, admit an appellant to bail pending appeal. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of the courts in this jurisdiction and other cases
10 determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act (the Act).

[5] The starting point in considering an application for bail pending appeal is to recall the distinction between a person who has not been convicted and enjoys
15 the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under s 3(3) of the Act there is a rebuttable presumption in favour of granting bail. In the latter case, under s 3(4) of the Act, the presumption in favour of granting bail is displaced.

[6] Once it has been accepted that under the Bail Act there is no presumption
20 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 s 17 (3) of the Bail Act which states:

25 *"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."

30 [7] Although s 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
35 only be granted where there are exceptional circumstances. In *Apisai Vuniyayawa Tora S v Reginam* [1978] 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:

40 *'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.'*

[8] 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 s 17(3) of the Bail
45 Act. Thus, even if an applicant does not bring his application within s 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.

[9] This second aspect of exceptional circumstances was discussed by Ward P
50 in *Ratu Jope Seniloli and Others v The State* (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at 4:

5 *'The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and s 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 [10] In assessing whether the appeal has a very high likelihood of success I must also recall that at this stage the Appellant, all of whose grounds of appeal allege errors of mixed fact and law, has not yet been granted leave to appeal as is required under s 21(1)(b) and (c) of the Court of Appeal Act.

15 [11] The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant. The Appellant's grounds of appeal raise a number of issues including procedural errors before and during the trial, allegations of bias on the part of the learned trial judge, the disqualification of the Appellant's counsel before the trial, evidentiary issues, alleged errors in the
20 summing up by the learned trial judge and other matters that allegedly constitute a miscarriage of justice.

[12] I have carefully considered the written submissions filed by Counsel for the Appellant. The submissions discuss the fact that the Appellant's trial was conducted by an unrepresented accused which is in turn connected with the
25 disqualification of her Counsel prior to the trial.

[13] There is a brief comment on the issue of the independent testing of the illicit substance, but no authority is cited. It is accepted in the submissions that adjournments are within the discretion of the learned trial judge. There is an
30 assertion in the submission that the Appellant was prejudiced by the rulings of the learned judge in relation to these two matters. The complaints concerning an amendment to the Information and the directions given to the assessors by the learned trial judge in his summing up are addressed in the written submissions. However it is not my task to delve into actual merits of any of the grounds of
35 appeal. As Reddy P noted in *The State v Mack Lawrence Mutch* (criminal appeal AAU 60 of 1999 delivered 2 August 2000) at 6:

40 *'In this respect I am mindful of the fact that it is not for me, sitting as a single judge of the Court to delve into the merits of the appeal in depth. That is the function of the full Court, which will have to make a decision after perusing the record of the evidence kept by the Trial Judge, and after listening to arguments from both sides.'*

[14] Whether any of the grounds of appeal against conviction and sentence raise an arguable point is not a matter which calls for a decision by me in this application. However having considered the written submissions and after
45 hearing Counsel for the Appellant, I am not satisfied that any of the grounds of appeal against either conviction or sentence have a very high likelihood of success and as a result do not amount to exceptional circumstances. It must be recalled that a very high likelihood of success on appeal means a very high likelihood of successfully establishing one of the conclusions for allowing the appeal that are set out in s 23(1)(a) and s 23(3) of the Court of Appeal Act. The
50 Appellant has not managed to satisfy me that any of her grounds of appeal have a very high likelihood of succeeding in terms of s 23.

[15] As a result of this conclusion and in view of the sentence imposed and the relatively short amount of time that has passed since conviction, I do not find it necessary to consider the remaining matters set out in s 17(3) of the Bail Act.

[16] Furthermore, the Appellant has not raised any personal matter that may have amounted to exceptional circumstances.

[17] For the above reasons the application for bail pending appeal is dismissed.

Application dismissed.

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