IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

PETITION FOR SPECIAL LEAVE TO APPEAL NO: CAV0003/2016

IN THE MATTER OF AN APPEAL from the decision of the Court of Appeal of Fiji in Criminal Appeal No: AAU117/2014 [on appeal from High Court Crim. Case No: HAC195 of 2012].

BETWEEN: **MANOJ KHERA**

Petitioner [Applicant]

AND: **THE STATE**

Respondent

Coram: **The Hon. Chief Justice Anthony Gates**
President of the Supreme Court

Counsel: **Mr. I. Khan for the Petitioner [Applicant]**
Ms J. Prasad for the Respondent

Date of Hearing: **24th March 2016**

Date of Ruling: **1st April 2016**

RULING ON BAIL PENDING APPEAL

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[1] The Petitioner applies for bail pending the outcome of his petition for special leave to appeal to the Supreme Court. The petition was filed on 25 January 2016 and it may be listed for hearing in the sittings set for 9–23rd June 2016.

[2] He had been tried in the High Court at Suva on 4 counts of false pretences and one count of money laundering. On 3rd October 2014 he was sentenced to 4 years imprisonment on the money laundering and 2 years concurrent on the false pretences.

The total sentence to be served was 4 years imprisonment with a non-parole period of 3 years.

[3] He had been represented by counsel at his trial. He has since engaged a different counsel for the appeals.

[4] He had applied to the single justice of appeal of the Court of Appeal for leave to appeal his conviction and sentence. He was granted leave to appeal his conviction on one ground and on one ground for the sentence. Bail was refused.

[5] Before the Court of Appeal, as litigated, there were 2 grounds of appeal. They were:

> 1. *That the Learned Trial Judge erred in law and in fact in admitting evidence of lay witnesses as opinion evidence particularly evidence of the purported signatures on vital documents which were fundamental to the prosecution case.*
>
> 2. *That the Sentence is wrong in principle, harsh and excessive in the circumstances of the case.*

[6] The Court did not consider that the lay opinion of identification of handwriting could be relied upon [Ground 1], but nonetheless applied the proviso under section 23(1) of the Court of Appeal Act, Cap 12, and dismissed the appeal against conviction.

[7] On the sentencing ground for which leave had been granted the question of restitution was raised. Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences. The Respondent's argument that these were monies that the appellant was compelled by law to pay to FRCA, the State Inland Revenue Authority. They were, as appellant's counsel had admitted in argument, administrative penalties imposed under the VAT decree, not voluntary payments. The court accepted the submissions and admissions on this point and said the trial judge was correct to conclude therefore that the appellant had expressed no remorse.

[8] Bail is available to an accused person, "who is appealing against conviction or sentence" [section 2(1)(d)(iii) Bail Act 2002].

[9] Whilst there is a presumption of an entitlement to bail prior to conviction, this is not the case when the matter goes on appeal [section 3(1) and 4(b) Bail Act]. The classic approach has been set out in the ruling of Tikaram P in ***Amina Begum Koya v. The State*** (1996) Crim. App. No. AAU0011/96S, 1st July 1996. His lordship stated at p.4 of the Ruling:

> *"I have borne in mind the fundamental difference between a bail applicant awaiting 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."*

[10] His lordship continued:

> *"..... then only in exceptional circumstances will he or she be released on bail during the pendency of appeal."*

[11] In the process of looking into those circumstances the Lord Chief Justice in ***Wise*** 17 Cr. App. R. 17 said:

> *"In order to adjudicate on the question of bail it is useful to see if there is any prospect of success on appeal, or if it is a case where it would be of assistance for the preparing of a real case for appeal if the appellant were released."*

The second limb of that test is not relevant here. The same ground on admissibility of lay opinion evidence with regard to the identification of a signature is put forward, and the same ground as in the court below on sentence. Little or no assistance would be required from the petitioner himself for a second tier appeal of this nature pursuing the same grounds as argued in the Court of Appeal. In any event, this line of submission has not been urged in the instant application.

[12] Referring to ***Wise***, Marsack JA in ***Sharda Nand v. DPP*** Court of Appeal Bail Application No. 3/79 commented:

> *"It is to be noted that the Lord Chief Justice does not lay it down as a rule of law that bail should be allowed if there is a prospect of success on appeal. He merely indicates that it is a factor which could be taken into consideration in determining whether or not bail should be granted."*

[13] In ***Davidson*** 20 Cr. App. R. 66 at 67 the Court of Criminal Appeal considered the test to be well established:

> *"This Court has repeatedly laid it down that it will not grant bail to a prospective appellant except in very special circumstances .... we are not aware of any special circumstances in this case."*

Bail was refused in that case, though the Court of Criminal Appeal later went on to quash the conviction because the summing up had lapsed into inadequacy.

[14] The considerations for determining bail pending appeal are set out in the Bail Act:

> *"Section 17*
> *(3) 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."*

[15] Both counsel have submitted careful and detailed submissions by which I have been assisted.

Proportion of Sentence served

[16] It will have taken 20 months of his sentence [out of 48 in all] to be served from the time of his conviction, to the time of a hearing in the second appeal court. Whilst this is not an ideal period within which to reach the end of the appellate process, it is to be expected following a heavy load of appeals lodged with the Court of Appeal in recent

years. Many jurisdictions are having to consider imposing further restrictions on the right of appeal because of the burdens felt by their appellate courts and the imbalance recognised of allocating further resources for such procedures.

[17] Under this head, I find no exceptional grounds for granting bail.

Likely time before the appeal hearing

[18] This petition as I have indicated is likely to be listed in the June 2016 sittings, just over 2 months away. No exceptional grounds indicating the need for bail arise from that likely date of hearing.

Likelihood of success

[19] In ***Ratu Jope Seniloli and 4 others v. The State*** (2004) Crim. App. No. AAU0041/04S Ward P [at p4] said:

> *"..... 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."*

[20] Whether the Court of Appeal should have applied the proviso to the error in admitting lay opinion evidence to identify handwriting is an arguable ground. No doubt that is why the single justice granted leave to argue that point. The ground is not conceded by the State. The admission of such evidence was not objected to. I understand that it was not referred to in the summing up either. My own view is the evidence should not have been led. It had been the petitioner's case that all of the offending had been carried out by his cousin, and that he had nothing to do with the acts amounting to the crimes. Such evidence by lay persons either in part or alone could not have proved the involvement of the petitioner by those documents and signatures. The prosecution had brought to court a circumstantial case. However it cannot be said, without full argument, that a substantial miscarriage of justice has thereby occurred. As Goundar JA said below:

> *"The question for this court is whether the assessors would on the evidence properly admissible and properly directed without doubt have been of the same opinion* ***Shameem v. R*** *29 FLR 154."*

[21] Such ground remains arguable but not certain of result.

Ground against Sentence

[22] On the issue of the details of the monies paid to FRCA, I have to rely on the judgment below. The full record including of the High Court trial proceedings will be available for the hearing before the Supreme Court. The petitioner for this hearing has not chosen to submit details of what was before the High Court judge. Restitution could prove an important issue in Sentence.

[23] However the making of restitution is regarded as an expression of sorrow for what has admittedly been done, and as a demonstration of regret and remorse. The conviction in this case has been fought all along. The petitioner's case is that it was not him, but another, who carried out the false pretences on the Revenue and laundered the money. On that defence, remorse or regret does not arise. You cannot defend your innocence all the way to the Supreme Court, and simultaneously say you regret what you did and argue that repayment of the monies found to have been dishonestly obtained or utilized, was an act of remorse. In such circumstances whether there was an obligation to pay the monies as administrative penalties or they were paid voluntarily by the petitioner is of much lesser significance.

[24] This ground has little likelihood of success, and both grounds will be difficult to urge on the court that they meet the thresholds for special leave from the Supreme Court [section 7(2)].

[25] It is also unlikely that leave would be granted for any additional grounds which were not allowed to be argued by the Court of Appeal.

Conclusion

[26] In the result, bail is refused.

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Hon. Justice Anthony Gates
President of the Supreme Court

Solicitors for the Petitioner [Applicant]: Iqbal Khan & Associates
Solicitors for the Respondent: Office of the Director of Public Prosecutions

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