

'ILAISAANE KAHO
Appellant

V

REX
Respondent

BEFORE THE HON ACTING CHIEF JUSTICE SHUSTER
MR POUNOU FOR THE APPELLANT
MR KEFU FOR THE RESPONDENT
HEARING DATE 13th NOVEMBER 2009
RULING DELIVERED- 16th NOVEMBER 2009 @ 14.00 hours

RULING ON THE ISSUE OF BAIL
PENDING APPEAL

INTRODUCTION

This is an appeal against a jury conviction of the Appellant, on the 30th October 2009 for the offence of murder and a request by the Appellant that she be released on bail pending her appeal - which appeal will likely be heard during the July 2010 session of the Court of Appeal.

The Court record notes the appellant was arraigned on the 18th September 2009 before FORD CJ, and at her arraignment the Appellant pleaded Not Guilty to an indictment alleging the crime of murder. The Court record indicates the appellant pleaded guilty, to a count alleging the crime of Manslaughter on that same date. The matter was adjourned for trial on the murder charge - commencing 26th October 2009, before Laurenson J and a jury- as the Crown wished to pursue the charge of murder as is their legal right.

The Court record indicates from 11th September 2009 -- to 30th October 2009 the appellant had been granted and she had enjoyed bail - granted by Ford CJ. The Court record also shows that the Appellant had remained on bail from that without problem and - this fact was readily conceded by the Crown in court on Friday the 13th November 2009 during the bail application.

The Court had also been informed by defence Counsel that as of today's date -- [the 13th November 2009] the appellant is 11 weeks into her pregnancy and I was informed that fact was unknown during the trial and during the sentencing process on the 30th October 2009 by Laurenson J.

THE CHARGE AGAINST THE DEFENDANT

- **Count One-** MURDER an offence contrary to section 86 (1) (a) and 87 (1) (b) and 91(1) of the Criminal Offences Act (Cap 18)
- Particulars of which are: - - **ILAISAANE KAHO** on or about the 18th April 2009 at MATAKI'EAU you did kill LESIELI 'OKUIS by unlawfully stabbing her with a knife and you intended to cause bodily injury knowing that such injury was likely to cause death, but you were reckless whether death ensued or not, when you stabbed her with a knife

After the trial of this matter before Laurenson J and a jury, the appellant was convicted as per the Court record dated 30th October 2009. The appellant was sentenced to - LIFE imprisonment (after trial) Crown Counsel told me the issue of the imposition of the death penalty did not arise.

NOTICE OF APPEAL

The appellant issued and filed her Notice of Appeal - against her conviction and sentence on the murder charge - on the 05th November 2009 and, at the same time the appellant applied for **BAIL** pending the final determination of her appeal.

The oral hearing upon the merits of her application for bail pending appeal was set for the 13th November 2009 the Court ordered that the appellant be present in court in person. The Court also ordered the Appellant to supply the Court with a medical report- indicating that the Appellant was in fact pregnant and that medical report was also required to indicate the period of the Appellants gestation.

On 13th November 2009 Mr. Pounou made his submission for his client to be released on bail pending appeal – ostensibly via his written submission which are now contained in the file record. For the Crown, MR KEFU simply argued the Crown opposes bail in this case - on the basis there is and can be no reasonable prospect of the appeal succeeding.

THE GROUNDS OF APPEAL

1. **His honour was erred in law and fact when he directed the jury on the element of intention to cause bodily harm**
2. **His Honour was erred in law and fact when he directed the jury on the element of knowing that such harm will likely to cause death**
3. **His Honour was erred in law and fact that he directed the jury on the elements of the offence which is reckless intention**

In the alternative

4. **The Supreme Court may make a recommendation that after a certain number of years, the appellant's sentence may be reviewed by the Prison department for a parole.**

THE GRANTING OF BAIL PENDING APPEAL POST CONVICTION

The granting of bail after conviction- is a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevails because a convicted person's right of appeal does not revive the pre-conviction presumption of innocence.

In most jurisdictions, admission to bail pending appeal is unusual, and - exceptional circumstances must be shown to exist, before bail will be granted. In those jurisdictions, as is noted in Halsbury- volume 11(2), paragraph 904 "*It is a power - which is rarely exercised.*"

The common-law principle has been considered in a number of cases and is probably best summed up in the following extract from Hall's Sentencing, LexisNexis NZ Ltd, 2004, paragraph VI.14.3: "The inveterate practice in the Court of Criminal Appeal in England; has been to refuse bail unless there are exceptional circumstances . . .

- **The true question is - are there exceptional circumstances, which would drive this Court to the conclusion that justice can only be done by the granting of bail.**

The High Court of Australia has adopted a similar approach . . . In this country the Court of Appeal observed in *R v Hartstone* (CA 261/87, 6 January 1988) 11 TCL 2/5 that different considerations apply to the granting of bail to a person who has been found guilty of an offence, than those that apply where it is sought pending the trial.

- In the first case, a determination of guilt has been reached;
- In the second, the presumption of innocence still applies.

For these reasons, the Court said (per McMullin J.) that, while the issue: whether bail is granted will depend on the circumstances of the particular case,

- *The grant of bail to convicted persons should be regarded as very much the exception rather than the rule.*

Moreover, if bail is granted pending the outcome of an appeal which proves to be unsuccessful . . . the appellant has to be recalled from the community, possibly months after his / her conviction, to serve the sentence imposed". *SEFO AND ANOTHER V REX + + 370 [2004] Tonga LR*

In an *Application by Giordano*- 6 A. Crim. R 397 at 398, the Court of Criminal Appeal of South Australia speculated on what the situation might be if a more relaxed approach was taken to applications for bail pending appeal:

- *"There is then the serious risk of availability of bail pending appeal leading to a proliferation of unmeritorious appeals, thereby adding to the strains on the system of justice.*

Persons undergoing punishment in custody are prone to seize any opportunity to secure release, perhaps leave the future to take care of itself. Appeals would be launched irrespective of the

prospects of success simply in order to secure release, or perhaps with a view to creating situations which would tend to frustrate justice by making it difficult to return the appellant to prison."

In *ex parte Mahera* [1986] 1 Qd R 303, 310, Thomas J. observed:

- *"The spectacle of a recently sentenced man walking free may be seen by the public as equivocation by the courts, and does not tend to foster respect for the system."*

IN TONGA, the position is governed by section 4B of the Bail Act 1990 - which reads as follows: "4B(1) A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against that conviction or sentence **SHALL** be granted bail **IF** the Court is satisfied that --

- (a) There is a reasonable prospect of the appeal succeeding; or
- (b) The appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
- (c) There are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will surrender to custody without committing any offence while on bail.

In taking the decision required by subsection (1), the Court shall have regard to all the relevant circumstances and in particular --

- (a) The nature of the offence and length of the sentence;
- (b) The grounds of appeal;
- (c) The character, antecedents, associations and community ties of the person; and
- (d) His record in surrendering to custody at the trial and on other occasions."

Although, with reservation, some guidance can no doubt be obtained from decisions in other jurisdictions, section 4B really contains a quite comprehensive code for dealing with applications for bail - pending appeal.

I must ask myself the following question, does this particular application today - come within the + + **Sefo anor v R (SC) 371** category of case envisaged in subsection (1)(b) where the appeal is unlikely to be heard before a substantial part of the sentence has been served.

In this case the Court of Appeal sits on the 5th July 2010 for three weeks that is by my calculation in **231 DAYS OR JUST THIRTY THREE WEEKS TIME**

The present application is made - pursuant to subsection 1(a) which requires the Court to have regard to the prospects of the appeal succeeding. This Court needs to be satisfied that there are **reasonable prospects** of the appeal succeeding and that element in turn requires a consideration of the grounds of appeal. On the one hand, Mr. Kefu for the Crown says her chances of success in this case are slim, while Mr. Pounou disagrees.

The Court's obligation under the Bail Act is less equivocal. As I see it, I am obliged by the statutory provisions of the Bail Act to give proper consideration to the grounds of appeal - and to the prospects of the appeal succeeding.

In dealing with a bail application pending appeal, the judge has to consider the force of a ground of appeal, which alleged that the trial judge had misdirected the jury on various matters as set out in counsel's very helpful written submissions.

This Court asked – Crown Counsel - if the learned trial judge had directed the jury on the issues of self defence and of provocation, and the - reply was in the affirmative any further questioning would of course tread on the feet of the Court of Appeal.

So to that extent, with the jury's finding of guilt on the murder charge and with the Appellants own guilty plea to a manslaughter charge in my respectful view - it would be inevitable that a lengthy custodial sentence would more likely than not be imposed upon this appellant.

With some diffidence, therefore, I now turn to consider the grounds and the merits of the appeals. On an application for bail pending appeal there is a reversal of the usual onus of proof obligation in criminal cases. The onus is on the applicant to show cause, by reference to the relevant statutory criteria, why bail should be granted.

At the bail hearings, both counsels were given the opportunity to present any submissions they wished to make - over and above the information that was already before the Court. Mr. Pounou addressed the court briefly on the merits the fresh evidence - ostensibly that the Appellant is now 11 weeks pregnant and he said the Appellant should not do hard labour whilst in prison - and she should be home for Christmas - waiting for her appeal with her family.

I stress that I do not wish to be seen in any way as appearing to pre-empt the ultimate decision the Court of Appeal will need to make after it has heard the full arguments in July of next year

Under the Bail Act, however, I am clearly required to make an assessment of the merits of the appeals at this stage based upon the material I have before me see the case of + + Sefo anor v R (SC) 375. Those decisions were made - by my findings of facts in what I considered to be a very grave crime. I heard the facts as alleged by the Crown Prosecutor Mr. Kefu that the accused went with the deceased to a Church function where at a point in time an argument ensued culminating in the Appellant pulling the deceased's hair.

I was told the Appellant that then reached into the pocket of her husband's coat which he was wearing, and pulled out a 12cm long sharp knife. I was told the Appellant then stabbed the victim in the chest - the knife puncturing the deceased's left and right ventricles of her heart. This was I was told the fatal blow, and I was also told there was another stab wound which did not go in far - but there were two stab wounds inflicted in anger. The Appellant then ran away from the scene. I am told the Appellant did co-operate with the police - when she was subsequently arrested and that is to her credit as is her guilty plea to Manslaughter.

Having carried out that exercise - and having made my assessment - all I can say is that, for this

appeal - the applicant can in my view have only a very limited prospect or chance of success.

The use of a knife against a person in a Church during a squabble- with the evidence of two stab wounds - one a deep cut to the heart - followed by a second wound in the chest area in my respectful view coupled with the fact the Appellant then RAN from the scene - R v B (a House of Lords decision) in my respectful view the surrounding facts would tend to show and to establish the necessary intent to prove a murder charge and would no doubt lead to a conviction as against this Appellant for murder.

MEDICAL TREATMENT - CONFINEMENT.

I have been assured by the Solicitor General in open Court that the appellant will be provided access to proper medical and hospital treatment - if she remains confined in prison, and of this I am quite sure she will be looked after.

CONCLUSION

Having reached that conclusion, it would in my view be inappropriate for me to grant bail to the Appellant in this case - at this time.

In this regard I am mindful of the admonition of the Court of Appeal in *Kafoa v R* (App No 347,348,743/1996, 20 June 1997, Court of Appeal) where the Court was critical of the Judge's decision to grant bail to three appellants in a rape case pending appeal having regard, in particular, to the gravity of the offences and the appellants' meager prospects of success.

There is one further consideration which I must also that is the welfare of the unborn child and the issue of hard labour. I order that during her confinement whilst pregnant the Appellant is not to perform hard labour - she is to be regularly seen by a medical officer and she is to be placed upon light duties within the prison confines.

Accordingly the applicant and her counsel have failed to persuade me that there is a reasonable prospect of the appeal succeeding, and accordingly her application for bail pending appeal is **REFUSED.**

