

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: HAM 137 OF 2015

BETWEEN : ZAINAL ZAIM ADAM

Applicant

AND : STATE

Respondent

Counsel : Mr I. Khan for Applicant
Ms. W. Elo for Respondent

Date of Hearing : 13 August 2015

Date of Ruling : 17 August 2015

BAIL RULING

1. Applicant applies for bail pending appeal. In support of his application, Applicant has filed two affidavits.
2. State has filed its submission and objects to bail pending appeal.

Background

3. Applicant was charged with Theft contrary to Section 291 of the Crimes Decree No. 44 of 2009 before the Magistrate of Nadi.
4. He pleaded guilty to the charge and was sentenced to 11 months and 22 days of imprisonment.
5. Having aggrieved by the sentence, the Applicant filed an appeal in this Court on 16th July, 2015.

Law Relating to Bail Pending Appeal

6. The presumption in favour of the granting of bail is displaced where the person has been convicted and has appealed against the conviction [Section 3 (4) (b)]
7. Section 17 (3) of the Bail Act reads as follows;

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.

- 8. Relevant case law indicates that even after the Bail Act coming into force, the court hearing the bail pending appeal application is not precluded from looking at exceptional circumstances that justify granting of bail.
- 8. The Court of Appeal in **Balaggan v State** (2012) FJCA 100; AAU 48-2012 (3 December 2102) noted that even if the application is not brought through Section 17(3) of the Bail Act, there may be exceptional circumstances to justify a grant of bail pending appeal.
- 9. In **Reddy v. State [2005]** Justice Calanchini, President of the Court of Appeal has discussed the scope of Section 17(3) of the Bail Act in a comprehensive manner.

“Once it has been accepted that under the Bill Act there is no presumption 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 section 17 (3) of the Bail Act which states: “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.”*

*Although Section 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 only be granted where there are exceptional circumstances.*

In Apisai Vuniyayawa Tora & Others -V- R (1978) 24 FLR 28, the Court of Appeal emphasized the overriding importance of the exceptional circumstances requirement:

“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.”

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 Section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within Section 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.

This second aspect of exceptional circumstances was discussed by Ward P in *Ratu Jope Seniloli & Others -V- The State* (Unreported Criminal Appeal No. 41 of 2004 delivered on 23rd August 2004) at page 4:

*“The likelihood of success has always been a factor the Court has considered in applications for **bail pending appeal** and Section 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.”*

It follows that the long standing requirement that **bail pending appeal** will only be granted in exceptional circumstances is the reason why “the chances of the appeal succeeding” factor in Section 17 (3) has been interpreted by this Court to mean a very high likelihood of success.”

10. It should be noted that in **Apisai Vuniyayawa Tora & Others** (*supra*) the Court of Appeal had emphasized the need to consider the presence of exceptional circumstances in granting bail pending appeal where an accused person has been **tried** and convicted of an offence and sentenced to a term of imprisonment. In this case the Applicant has not been tried. He has been sentenced on his own guilty plea.

a) The likelihood of success in the Appeal.

In light of legal authorities cited above, I venture into consider whether there is a very high likelihood of success in the Applicant's appeal.

The Applicant has appealed the sentence on following grounds:

- a) **THAT** the Learned Trial Magistrate misdirected himself as to the application of Section 4(2)(j) of the Sentencing and Penalties Decree 2009 in failing to suspend the sentence of the accused.
- b) **THAT** the Learned Trial Magistrate erred in law and in fact by failing to give sufficient weight to the Accused character and the mitigating factors in imposing a custodial sentencing that the Accused was a first offender.
- c) **THAT** the Learned Trial Magistrate failed to consider and/or was not appraised of the true summary of facts by the Prosecution in that the Accused had repaid the monies misappropriated by him.

9. In the supplementary affidavit filed, the Applicant has stated as follows;

THAT in particular I have fully restituted the amount of money that was the subject matter of the charge and I enclose herewith copies of correspondence from the Complainant and the Director of the Complainant Company marked as Annexures **"ZZA1 and ZZA2"**.

THAT on the 14th of April, 2014 when I first appeared before the Learned Magistrate I advised the Court after the charge was read and explained to me that I have repaid all the monies to the Complainant and that we had reconciled.

THAT the Learned Magistrate then advised me to get the Complainant's letter to confirm that I had paid and fully restituted to the complainant.

THAT the Complainant gave me a letter which was taken to the Sabeto Police Station whereby the Investigating Officer received the Complainant's letter and I advised the Investigating Officer if you could deliver the said letter to the Learned Magistrate before the 1st of May, 2015.

THAT I went to Court on the 1st of May, 2015 when I was advised that the Learned Magistrate was on bereavement leave and my matter was adjourned to 5th of June, 2015 for mention.

THAT on 5th of June 2015 I pleaded guilty on the understanding that the Complainant's letter was before the Court confirming that I have fully made restitution.

THAT only after my sentence I realized that the police prosecutor had not advised the Court of my restitution and the letter that was confirmed by the Complainant.

10. The facts in the affidavits have not been challenged by the Respondent. If the learned Magistrate had considered the true summary of facts, especially the fact of restitution, the Applicant could have been given at least a discount in the overall prison term or non-parole period. Having considered the grounds of appeal and the facts placed before me, I'm satisfied that the Applicant's appeal incorporates a point that is not merely an arguable but having a very high likelihood of success.

b) The likely time before the appeal hearing.

11. Applicant has been convicted on 12th June, 2015. He has filed his appeal on 16th July 2015. The State has yet to file its objections and date for hearing has not yet been fixed. It may take another two months to dispose of the Appeal.

C) The proportion of the original sentence which will have been served by the Applicant when the Appeal is heard

12. The Applicant has already served more than two months in prison. Compared to his term of imprisonment, and the likely time before the appeal hearing, the proportion of the term which will have been served by the Applicant when the appeal is heard is considerably high.

13. For the reasons aforementioned, Court decides to allow the application of bail pending appeal. The Applicant is granted bail on following conditions.

1. Personal bail for FJD 1000.
2. Surety bail for FJD 2000 with two sureties.

3. Not to reoffend.
4. Reporting to the nearest Police Station on every Saturday between 8 am. and 4 p.m.
5. Passport to be handed over to Court.



At Lautoka
17th August 2015


Aruna Aluthge
Judge

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