

IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 25 of 1990

BETWEEN

SUBHASH CHANDRA AND  
BAL DEO

Appellants

- and -

STATE

Respondent

Mr J.R. Reddy for the Applicants  
Ms N. Shameem for the Respondent

DECISION

(Chamber application)

This is an application for bail pending appeal. The two Applicants were convicted of murder on 8/12/90 by the High Court sitting at Labasa. They were given the mandatory sentence of life imprisonment. On 28/12/90 they filed their Notice of Appeal against conviction. This was followed by the present application which was filed on 8/1/91 and which is supported by their joint affidavit.

The grounds on which this Application is made may be summarised as follows:-

- ( i) There is every likelihood that the appeal will succeed.
- ( ii) There is every likelihood that substantial delay will occur before the appeal is heard.

It is the contention of Mr Jai Ram Reddy the learned counsel for the Applicants that his clients have compelling and weighty grounds of appeal and therefore it would be unfair to keep them in prison pending the hearing of their appeal. He submitted that there were serious misdirections and non-directions in the trial Judge's summing up. He particularly emphasized the ground of appeal relating to the alleged misdirection on provocation. Ground 7 of the Notice of Appeal reads as follows:-

*"Prosecuting Counsel has suggested that you ask yourselves whether you yourselves would think it reasonable to react as the first accused to the words spoken. With respect I suggest that is a very sensible way for you to begin your consideration of the question of provocation."*

Ms Shameem, the learned counsel for the Respondent, opposed the application on the ground that there were no exceptional circumstances to justify granting of bail pending appeal. In support of her argument she cited the following observations of the Court of Appeal (per Gould J) made in Apisai V Tora and Others v. R. in Criminal Appeal Nos. 3 and 4 of 1978 -

*"It has been a rule of practise for many years that whether an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pendency of appeal----This is still the rule in Fiji".*

She also pointed out that the learned trial Judge's remarks quoted in ground 7 of the appeal should not be read out of context because his summing up on the question of provocation was quite extensive.

I agree with the learned counsel for the Applicants that if there is prima facie good prospect of the appeal succeeding it will constitute exceptional circumstances. As was pointed out in Watton (1979) 68 Cr. App. R. 293..

*"The only ground for the granting of bail on an appeal to the Court of Appeal.... is the existence of special circumstances, i.e. whether it appears, prima facie that the appeal is likely to be successful, or whether there is a risk that the sentence will be served by the time the appeal is heard".*

During the hearing of this argument it was pointed out that the High Court in Fiji did admit to bail a number of prison officers charged with murder on the ground that their lives were at risk while being held in custody in prison - see Isikeli Tamani and Others v. R. Suva Criminal Misc. Case No. 5 of 1987. However, there is a world of difference between granting bail to a person awaiting trial (and therefore presumed to be innocent until proved guilty) and a person found guilty, convicted and sentenced after a proper trial. Furthermore, in respect of the

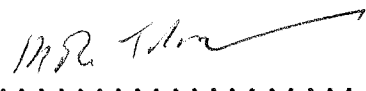
latter the more serious the conviction the greater the need, in general, for exceptional circumstances to exist to warrant release on bail. However, I am inclined to agree with Mr Reddy that exceptional circumstances as defined in Apisai Tora's case and in the Watton case should not be regarded as exhaustive. Nevertheless, as regards the first ground (on which Mr Reddy primarily relies) the prospect of success must prima facie be obvious. It is not the function of a single Judge of Appeal to deliberate on the actual merits of the appeal for to do so would be to usurp the function of the Court of Appeal. To evaluate the grounds of appeal would require careful examination not only of the summing up and the addresses but also of the mass of evidence tendered in the Court below. The prospects of success in this appeal therefore can only be evaluated by this means. It must be conceded that occasionally there are cases where prospects of success become patently clear on the mere reading of the summing up and the grounds of appeal lodged. But with respect I am unable to say that this is one of those cases. The most I can say after having read the affidavit, listened to the arguments, and having perused the ground of appeal and the summing up, is that the Applicants appear to have an arguable case. This in itself will not suffice to grant the application sought.

With regard to the second ground Mr Reddy submits that the substantial delay factor should be taken into account. He contends that the appeal is not likely to be heard until the second session of the Court of Appeal's sittings which takes

place about the middle of the year. He also pointed out that the trial took almost 4 months to complete and therefore the record is voluminous and so the transcript for the Appeal Court will take considerable time to prepare. But the nature of the mandatory sentence is such that there is no risk that the Applicants will have served their sentence before the appeal is heard. This ground of application must therefore also fail.

In the outcome therefore I am duty-bound to refuse the application for bail because it does not satisfy the established principles on which bail pending appeal is granted.

However, there is indeed some likelihood of considerable delay before the appeal is heard. As yet the commencement date of even the first session of the Court of Appeal this year has not been fixed. I, therefore, propose to accede to Mr Reddy's alternative request for an expedited hearing in an endeavour to minimize any avoidable delays. I propose to issue instructions to the Registry that every effort be made to prepare the trial record for the appeal as soon as possible. Furthermore, I propose to ask the Registrar to place the Applicants' appeal in the priority list.

Sgd  .....  
Sir Moti Tikaram  
Resident Justice of Appeal

Suva  
18<sup>th</sup> February, 1991.