

IN THE FIJI COURT OF APPEAL

459

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0015 OF 1994
(Misc. No. HAM0005 of 1994)

BETWEEN:

KAYLESH CHANDRA
(f/n Ramesh)

Applicant

and

THE STATE

Respondent

Mr M. Raza for the Applicant
Ms Elizabeth Rice for the Respondent

Date & Place of Hearing : 5 September, 1994, Suva
Date of Ruling : 7 September, 1994

R U L I N G

(In Chambers)

Re Jurisdiction, if any, of a single judge to grant
bail to an accused person awaiting trial
in the High Court

This is an application "For Bail Pending Trial" brought by way of a Notice of Motion before a single judge. The Applicant is awaiting trial in the High Court on a charge of murder. The application is supported by an affidavit deposed to the Applicant's Counsel Mr Mehboob Raza.

On 4 June, 1994 the Applicant filed in the High Court a notice of motion for bail pending trial.

The thrust of the Applicant's contention was that the case against him is extremely weak.

On 24 June, 1994 the High Court (Pain J.) in a reserved and considered decision refused Applicant's request for bail pending trial on the ground that there were no exceptional circumstances to warrant grant of bail.

When the matter first came before me on 12 August, 1994 Mr D. Sharma appeared on instructions from Mr Raza and sought an adjournment so that Mr Raza himself could plead on behalf of the Applicant. I adjourned the application sine die and asked that Applicant's Counsel file written submissions as to whether a single judge of the Court of Appeal has jurisdiction to grant bail in respect of a person who was awaiting trial in the High Court. This has been done and the Office of the Director of Public Prosecutions has also filed written submissions opposing the application on the primary ground that this Court has no jurisdiction to entertain such an application.

As Mr Raza's written submission, insofar as jurisdiction is concerned, is brief I will quote it in full. It is as follows:

Section 33(i) of Court of Appeal Act Cap. 12 says:

"An Appellant who is not admitted to Bail pending the determination of his appeal may, at his own request, be treated in like manner as a prisoner awaiting trial".

Although Section 33 of Fiji Court of Appeal Cap. 12 - speaks of "where a convicted person .etc", it is submitted that this Bail application ought to be treated ...in like manner as a Prisoner awaiting trial".

Accordingly, it is submitted that because of the Order refusing Bail was made, it ought to be treated as a final order of the Justice Pain and hence, this appeal from the decision of the subordinate Court to the Fiji Court of Appeal - Refer to ISAD ALI v REGINA [1958-1959] Fiji Law Reports page 1.

Also in the absence of any Bail Act in Fiji, unlike United Kingdom Legislation on Bail, the only recourse open to the Appellant against any Order of the subordinate Court is to the higher Courts only.

To sum-up we submit the Fiji Court of Appeal has Jurisdiction to hear this Bail Application.

The fundamental error in the approach adopted by the learned Counsel for the Applicant in that he is equating the Applicant with a non-existent appellant. There is, in this case, no appeal so there can be no appellant.

Section 33(2) of the Court of Appeal Act vests jurisdiction in the Court of Appeal to grant bail to an appellant pending determination of his appeal. The whole of this Section reads as follows:

" 33.¹(1) An appellant who is not admitted to bail pending the determination of his appeal may, at his own request, be treated in like manner as a prisoner awaiting trial.

(2) The Court of Appeal may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

¹Substituted by 14 of 1973 s.3

(3) When an appellant under this Part is admitted to bail under this Act the time during which he is at large after being so admitted shall be disregarded in computing the term of any sentence to which he is for the time being subject.

(4) Subject as hereinafter provided, six weeks of the time during which any appellant, when in custody, is treated as a prisoner awaiting trial in pursuance of the provisions of subsection (1), or the whole of that time if it is less than six weeks, shall be disregarded in computing the term of any such sentence as aforesaid:

Provided that-

(a) the foregoing provisions of this subsection shall not apply where leave to appeal is granted under this Part or where any such certificate as is mentioned in paragraph (b) of section 21 has been given for the purpose of the appeal; and

(b) in any other case, the Court of Appeal may direct that no part of the said time, or such part thereof as the court thinks fit (whether shorter or longer than six weeks) shall be disregarded as aforesaid.

(5) Subject to the foregoing provisions of this section, the term of any sentence passed by the Court of Appeal under this Part in substitution for a sentence passed on the appellant in the proceedings from which the appeal is brought shall, unless the court otherwise directs, begin to run from the time when it would have begun to run if passed in those proceedings, and references in this section to any sentence to which an appellant is for the time being subject shall be construed accordingly."

Contrary to Mr Raza's written and oral submissions Section 33 does not purport to confer on a prisoner awaiting trial from the High Court a right of appeal either to the Court of Appeal or to a single judge thereof.

Subsection (1) of Section 33 gives an appellant who is not admitted to bail the right to request that he be treated as a prisoner awaiting trial. If the request is granted the Applicant becomes subject to subsection 4 for the purpose of computing his sentence.

Subsection (3) deals with computation of sentence when an appellant is admitted to bail. These subsections presuppose that there is a conviction, that there is an appellant and that at the time of application(s) the appellant is under sentence or at least is in custody.

Section 33 must, in my view, be read in the light of the provisions of Section 21 of the Court of Appeal Act to which I will make reference later.

A single judge's general jurisdiction and powers arise by virtue of Section 35 of the Fiji Court of Appeal Act. This Section reads as follows:

"35. The powers of the Court of Appeal under this Part to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act."

It will be noticed that one of the powers of the Court that a single judge can exercise is "to admit an appellant to bail".

It is open to me to dismiss this application on the simple ground that the Applicant cannot seek any interim relief from a

single judge when there is no appeal pending and the applicant is neither an appellant nor an intended appellant.

But there is a more fundamental issue involved and this requires to be addressed for future guidance.

Were I to relax the Rules and treat the application before me as a request to a single judge to grant bail for the interim period pending determination by the Court of an appeal or an intended appeal against the decision of the High Court to refuse bail I would need to be satisfied that the Court of Appeal has jurisdiction to hear such an appeal. For a single judge cannot exercise any power which the Court of Appeal itself does not possess. The fundamental issue, therefore, is the question of jurisdiction - "Does the Court of Appeal have jurisdiction to entertain an appeal against refusal by the High Court to grant bail to an accused person awaiting trial in the High Court?"

The Court of Appeal draws its jurisdiction from the Constitution via the Court of Appeal. The Court of Appeal can, therefore, hear an appeal only in those instances where jurisdiction has been conferred on the Court. If there is no right of appeal to the Court of Appeal there can be no question of granting bail to the applicant pending appeal. (See Helmut Paul Kasper Rutten v State, FCA Criminal Appeal No. 1 of 1992.)

Section 115 of the 1970 Fiji Constitution is relevant. It reads -

"115.-(1) An appeal to the Fiji Court of Appeal shall lie from decisions of the High Court in the following cases, that is to say -

- (a) as of right from final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;*
- (b) as of right from final decisions given in exercise of the original jurisdiction conferred on the High Court by section 19 and III of this Constitution;*
- (c) as of right from final decisions given in exercise of jurisdiction conferred on the High Court in pursuance of section 9(1) of this Constitution; and*
- (d) in such other cases as may be prescribed.*

(2) In this section the reference to final decisions of the High Court do not include any determination thereof that any application made thereto is merely frivolous or vexatious.

(3) Subject to special leave of the Supreme Court of Fiji, an appeal shall lie from any decision of the Fiji Court of Appeal made in pursuance of subsection (1) of this section."

The only part of Section 115 of the Constitution relevant for present purposes is 1(d) - "in such other cases as may be prescribed". We must, therefore, look to the provisions of the Fiji Court of Appeal Act, Cap. 12 which prescribes appeals in civil and criminal cases.

Section 12(1) of the Court of appeal Act makes provision for appeals from the High Court to the Court of Appeal "in any cause or matter, not being a criminal proceeding,...."

Since this is a criminal matter it is, therefore, necessary to look at Section 21 of the Court of Appeal Act which deals with the right of appeal in criminal cases. Section 21 says -

"A person convicted on a trial held before the Supreme Court may appeal under this Part to the Court of Appeal -

- (a) against his conviction on any ground of appeal which involves a question of law alone;*
- (b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and*
- (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law."*

I agree with the following written submissions made by the Respondent except to note (a) that Section 308 of the Criminal Procedure Code is a general section dealing with appeals from the magistrates' court and so any approach to the High Court under this Section must be by way of an appeal and (b) that the High Court in the present case dealt with an original chamber application and not an appeal -

"The Appellant is not appealing against conviction or sentence as he has not been convicted at a trial. He has been remanded in custody and is awaiting trial. The Appellant is therefore not applying for bail pending appeal but for bail pending trial.

Section 33 of the Court of Appeal Act, Cap. 12 relates to a convicted person applying for bail pending the determination of his appeal.

Section 315 of the Criminal Procedure Code, Cap. 21 also refers to "a convicted person." The case quoted by the Appellant: Isad Ali v. Regina (1958-1959) Fiji Law Reports page 1, refers to a convicted person.

Section 308 of the Criminal Procedure Code, Cap. 21 gives a person the right to apply for bail in the High Court if the Magistrates Court has refused bail.

However, a similar right to apply for bail to the Court of Appeal following a refusal of bail by the High Court to a person awaiting trial, is not expressly given in Section 21 of the Court of Appeal Act, Cap. 21. There is therefore a distinction between Section 308 of the Criminal Procedure Code, Cap. 21 and Section 21 of the Court of Appeal Act, Cap. 12.

In the present case the Applicant is not a convicted person aggrieved by his conviction or his sentence. Nor is he an appellant or an intended appellant to the Court of Appeal from the decision of the High Court.

I am, therefore, of the view that a person awaiting trial in the High Court has no right of appeal to the Court of Appeal against the High Court's decision to refuse bail in the present circumstances. This means that the Court of Appeal has no jurisdiction to entertain an appeal from such a person. It therefore follows that a single judge has no power to grant bail in these circumstances.

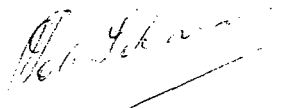
In view of the conclusion I have reached it is not necessary for me to deal with this application on the merits.

What then is the avenue open to an Applicant to seek further redress if he feels aggrieved about his continued detention awaiting trial. In my view he can make successive applications to the High Court if circumstances justify them, e.g. there is

undue delay in the hearing of the murder trial or if certain new matters favourable to the Applicant have come to light. Of course these would be matters for the High Court to decide on merits.

I have no option but to dismiss this application for want of jurisdiction.

Application dismissed.



Sir Moti Tikaram
President, Fiji Court of Appeal