

IN THE COURT OF APPEAL, FIJI ISLANDS

MISCELLANEOUS APPLICATION 1/2004

Between:

ABHAY KUMAR SINGH

Applicant

and

THE STATE

Respondent

R.P. Singh for the Applicant
Ms. A. Prasad for the Respondent

DECISION

On 24 July 2003 the Applicant, who is a practicing barrister and solicitor, was charged with an offence of attempting to pervert the course of justice contrary to Section 131 of the Penal Code (Cap 17).

In August 2003 the Suva Magistrates' Court granted the Applicant conditional bail.

In April 2004 the Applicant (the case against whom had by then been transferred to the High Court for trial) applied to the High Court (Winter J) for a variation of the conditions of the bail granted to him by the Magistrates' Court.

The terms of the fresh bail granted to the Applicant by the High Court on 23 April 2004 are set out in paragraph 9 of the Applicant's affidavit filed in support of this application.

On 28 April, after difficulties had been experienced in the operation of the 23 April bail conditions, the conditions were again amended. The re-amended bail conditions are set out in paragraph 12 of the supporting affidavit.

A copy of a Ruling delivered by Winter J on 6 May is also on the file. There is some discrepancy in the dates of the two applications for variation however these discrepancies do not affect the issues before me.

This is an application for a review of the conditions of the bail granted by Winter J to the Applicant either on 6 May 2004 (according to the ruling) or 28 April 2004 (according to

the affidavit) or both (according to the Notice of Motion). The application raises a number of questions regarding the operation of the Bail Act (26/02 – the Act).

Part VIII contains the appeal and review provisions of the Act.

Section 30 (3) provides that:

“the Court of Appeal may review any decision made by the High Court in relation to bail.”

Section 30 (7) however provides that:

“A Court which has power to review a bail determination may, if not satisfied that there are special facts or circumstances that justify a review refuse to hear the review”

The first question which arises is what is meant, in Sections 30 (3) and 30 (7) by the word “Court”.

The constitution and jurisdiction of the Court of Appeal is primarily dealt with in the Court of Appeal Act (Cap 12).

Under Section 6 (1) of the Court of Appeal Act the Court “for the purpose of hearing and determining appeals” shall ordinarily only be duly constituted if it consists of not less than 3 judges. Under Rule 13 (A) of the Court of Appeal (Amendment) Rules (LN 150/99) the Court will be duly constituted by only two judges where the appeal is against sentence only or where the Court is called upon to review the decision of a single justice of appeal refusing an application for bail or revoking an existing grant.

The power of a single judge to admit an applicant to bail or to cancel his bail is contained in Sections 35 (1) (d) (e) of the Court of Appeal Act.

That Section does not mention the power of review granted to the Court of Appeal by Section 30 (4) of the Bail Act and indeed the power of review is nowhere mentioned in the Court of Appeal Act at all.

In my opinion the powers of the Court of Appeal must be exercised by a full court of three judges except where provision to the contrary is specifically made. In the absence of any provisions relating to the power of review granted by Section 30 (4) I am of the view that the power can only be exercised by the full Court. Since the power of review is not mentioned in the Court of Appeal Act and the right to such review is not stated to be conditional no questions of leave or the jurisdiction or otherwise of a single judge to grant leave arise.

The second question which calls for attention is the relationship between the right to seek a review of a bail decision and the right to appeal against that same decision.

The provisions governing appeals from bail decisions are somewhat unhelpfully split between Section 31 of the Bail Act and Sections 21 (3), 23 (4) and 35 of the Court of Appeal Act.

By Section 21 (3) the right to appeal against a High Court bail decision is conditional upon leave first being granted. A single Judge may grant leave (Section 35 (1)) and if leave is refused then the application may be placed before the full Court for reconsideration (Section 35(3)).

The position therefore seems to be that while an appeal against a bail decision is conditional upon leave being granted the right of review is unconditional. Since the object to be achieved by appealing against or seeking a review of a bail decision is presumably the same, it is difficult to see what purpose is served by these two different avenues.

Neither the Bail Act nor the Court of Appeal Act offers any guidance. Unfortunately, Mr. Singh was unable to offer any assistance but Ms. Prasad referred me to Section 325 (5) of the Criminal Procedure Code (Cap 21) which provides that review by the High Court is not available at the instance of a party who could have appealed.

In the absence of any other guidance I have come to the conclusion that review is only available where, for one reason or another, the appeal procedure cannot be resorted to. This conclusion is consistent not only with Section 325 (5) (which being a provision in a separate statute is of only limited assistance) but also with Section 120 (6) of the Constitution, 1997 which keeps a revisional jurisdiction for the High Court, as it were, in reserve.

This conclusion is also consistent with the need for "special facts or circumstance that justify a review" (Section 30 (3)) which must, in my view be of a different class to those facts upon which an appeal could be based. Finally, the fact that it seems that only the full Court has jurisdiction to hear applications for review suggests that it is a procedure which can be resorted to only where an appeal is, for one reason or another, not possible.

My finding that a single judge has no jurisdiction in relation to an application brought under Section 30 (4) of the Bail Act is sufficient to dispose of this application. Before leaving the matter however it may be helpful to refer to another difficulty facing the Applicant, at least on the papers as currently presented to the Court.


As will be seen from the prayer of the Notice of Motion, paragraphs (b) and (c), the Applicant wishes to be relieved of the obligation to surrender his passport and to report to the Valelevu Police Station. In paragraph 11 of his affidavit the Applicant states:

"I verily believe that my Counsel made application for the variation of the bail conditions in respect of reporting at the police station, issue of passport involving DPP's office and residence conditions."

In his ruling delivered on 6 May Winter J made no reference at all to an application for the variation of the residence and reporting conditions. If such applications had indeed been made and refused then one would expect to find the reasons for the refusal embodied in the ruling. This is normal practice and additionally is required by Section 20 of the Bail Act.

Although the Applicant states that he believed that the applications for variation were made he does not disclose the source of his belief. It does not appear that he was present when applications were made on his behalf in the High Court. Ms. Prasad was not herself present and no record of the proceedings in front of Winter J has been made available to me. The position is not unfortunately as clear as it should be but it is not obvious to me that the variations now sought were in fact declined by the High Court. Unless they were in fact declined then there would of course be nothing to appeal against or to review.

I was informed by Ms. Prasad that the Applicant's trial has been set to commence in the High Court in September 2004. It was her case that the Applicant should apply for any variation of the conditions of his bail to the High Court. The Bail Act specifically provides for "any number" of bail applications. Given the uncertainties of the law, to some of which I have alluded, a fresh application to the High Court for the variation of the residence and reporting conditions may offer a clearer way forward. Perhaps some of the uncertainties would be removed if regulations were to be made as envisaged by Section 32 of the Bail Act. Meanwhile the present application must be dismissed.



M.D. Scott
Justice of Appeal

23 June 2004