IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 16 OF 2013
(High Court HAC 142 of 2011 Ltka.)

BETWEEN	**:**	**ROHIT RANJIT KUMAR**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	:	**Calanchini AP**
Counsel	**:**	**Mr I Khan for the Appellant** **Ms S Puamau with Mr S Babitu for the Respondent**
Date of Hearing	**:**	**24 May 2013**
Date of Decision	**:**	**17 June 2013**

DECISION

[1]. This is an application for bail pending appeal. The application was made by Notice of Motion dated 25 April and filed on 3 May 2013.

[2]. An affidavit sworn on 24 April 2013 by Rohit Ranjit Kumar was filed in support of the application.

[3]. The Appellant was tried in the High Court at Lautoka on the charge that between 1 and 31 March 2011 he had unlawful carnal knowledge of [name suppressed] without her consent (i.e. rape) contrary to section 207 (1) and (2) (a) of the Crimes Decree 2009.

[4]. The Appellant was found guilty by the unanimous opinion of three assessors with whom the learned trial judge agreed. As a result the Appellant was convicted and sentenced on 27 March 2013 to a term of 16 years imprisonment with a non-parole term of 15 years.

[5]. Pursuant to section 35 (1) of the Court of Appeal Act Cap 12 a single judge of the Court may exercise the power of the Court of Appeal to, amongst others, admit an appellant to bail. The power of the Court of Appeal to admit an appellant to bail is set out in section 33 (2) of the same Act which provides that:

> *"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."*

[6]. In considering an application for bail pending appeal, the Court must first direct its attention to section 17 (3) of the Bail Act 2002 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 applicant when the appeal is heard."*

[7]. This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.

[8]. The Court has also continued to apply the principle that bail pending appeal should only be granted in exceptional circumstances. As a result the mandatory considerations set out in section 17(3) of the Bail Act have been interpreted in the context of the need to establish exceptional circumstances. The position was discussed by Ward P in **Seniloli and Others –v- The State** (unreported AAU 41 of 2004; 23 August 2004):

> *"The general restriction on granting bail pending appeal as established by cases in Fiji is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. _ _ _*
>
> *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 _ _ _."*

[9]. The fact that an appellant is able to establish that one or more of his grounds of appeal raise an arguable point will be sufficient for a judge to grant leave to appeal. However that alone will not be sufficient for the court to grant bail pending appeal. To show exceptional circumstances an appellant must establish that his appeal has a very high likelihood of succeeding.

[10]. In this application the Appellant is essentially concerned with establishing that his grounds of appeal have a very high likelihood of success. In written submissions filed by Counsel for the Appellant and during the course of his oral submissions before me it was apparent that the thrust of the application related to the grounds of appeal arising under section 116 of the Criminal Procedure Decree 2009 which states:

> *"116 (1) At any stage of trial or other proceeding under this Decree any court may*
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> *(a) summon or call any person as a witness; or*
>
> *(b) examine any person in attendance though not summoned as a witness; or*

> *(c) recall and re-examine any person already examined*
>
> *and the court shall summon and examine, or recall and re-examine any such person if the evidence appears to the court to be essential to the just decision of the case.*
>
> *(2) The prosecution or the defence shall have the right to cross-examine any person giving evidence in accordance with sub-section (1) and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness."*

[11]. This provision gives statutory effect to the long recognised discretionary power vested in a judge to recall, or allow the recall of, a witness at any stage of the trial prior to the conclusion of the summing up and of putting such questions to them as the exigencies of justice require. It is a discretionary power that may be exercised by the court on its own motion or on an application by one of the parties.

[12]. In this case the application was made by Counsel for the Appellant. It was made to the trial judge before he commenced his summing up to the assessors and after Counsel had completed their closing submissions. It was an application to recall the complainant so that she could be cross-examined concerning what was alleged to be a previous conviction.

[13]. The events leading up to the making of the application according to the Appellant are set out in his supporting affidavit in the following paragraphs:

> *"20 That after the address by my Counsel and the State we received information that the Complainant had a previous conviction which was not disclosed by the State.*
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> *21 That my Counsel before the summing up _ _ _ made an application under section 116 _ _ _ to recall the Complainant in order to re-examine her regarding her previous conviction on dishonesty.*
>
> *22 - 23 _ _ _*
>
> *24 That after the submissions were made by my counsel the State Counsel objected to the recalling of the*

Complainant stating that my Counsel should have cross-examined her when the complainant was giving evidence in chief.

25 That my Counsel could not have cross-examined the Complainant because the Prosecution did not disclose the previous conviction of the Complainant which was their duty to do so."

[14]. The Respondent's position as to the factual background is stated in paragraphs 15 and 16 of the written submissions filed on 23 May 2013:

"15 In this instant case, the State had not been aware until after the close of the Defence case that a prosecution witness (the Complainant) had had a previous conviction. The State immediately checked and upon receiving confirmation that (the Complainant) had a previous conviction, Counsel for the State immediately notified Counsel for the Defence.

16 However by the time the confirmation came in, Counsel for the State and the Defence had both delivered closing address to the Assessors. When the application for cross-examination of the witnesses was raised, the State objected and the Court ruled that it was too late in the day to raise this matter."

[15]. In a three page ex tempore ruling dated 15 March 2013 the learned trial judge recited the history of the proceedings and then reproduced section 116 of the Decree before concluding with the following observation:

"Considering the application of the defence counsel in light of the law and history of this case, I do not find that the defence application is qualified under section 116 of the Criminal Procedure Decree hence I reject the application."

[16]. It would appear that the learned Judge has based his decision on the timing of the application with the implication that there had been delay and that it was too late to make the application.

[17]. The first three grounds of appeal raise issues associated with the learned judge's ruling. The Appellant alleges that he has not received a fair trial and that there has been a miscarriage of justice as a result of (i) the failure of the Respondent to disclose

the complainant's prior conviction so that she could be cross-examined on it, (ii) the objection of the prosecution, contrary to its disclosure obligations, to the application to have the complainant recalled and (iii) the refusal of the learned judge to exercise his discretion to allow the complainant to be recalled.

[18]. It is convenient at this stage to examine the so-called "*previous conviction"* which was described by Counsel for the Appellant as a dishonesty offence and which if made known to the assessors and the subject of cross-examination, it was submitted, may have thrown doubt on the complainant's testimony as to the circumstances of the offence of rape.

[19]. The complainant was born on 15 May 1994. The alleged offence of rape occurred some time in March 2011. She was at that time still 16 years old. On 11 June 2012 being about one month after her 18th birthday, the Complainant was sentenced to be *"bound over in sum of $200.00 to keep peace and be of good behaviour for next 12 months"* for the offence of receiving stolen property. It is a lenient penalty and although described as a conviction, the penalty is more consistent with a very early plea of guilty and/or the possibility that it was imposed without a conviction and/or that the circumstances of the offence were minor.

[20]. It should be noted that the court appearance at Ba Magistrates Court occurred after the offence for which the Appellant has been convicted but before his trial. This may explain why the Respondent was not aware of the complainant's court appearance at Ba when she gave her evidence at the trial.

[21]. It is not disputed that in Fiji, as in other jurisdictions, where a witness is known to have a previous conviction it is the duty of the prosecution to inform counsel for the defence. In **Vudiniabola –v- R** (1963) 9 FLR 158 at page 159 Hammett ACJ observed:

> *"It is of course the duty of a prosecutor, if he knows that a Crown witness has a previous conviction or criminal record, to disclose that fact to the defence. It would be most reprehensible for him not to do so. The defence can then, if it wishes, attack the character and the credibility of such a Crown witness in cross-examination.*

> *On the other hand, it is not the duty of a prosecutor to make formal inquiries in every case, into the antecedents of every witness called by the Crown to ascertain whether or not he has any previous convictions, although where he knows that the whole case depends on the credibility of one particular witness, he would be well advised to do so."*

[22]. I do not consider that this is a situation where the Respondent deliberately withheld information that it was obliged to provide to the Appellant and his Counsel. I did not understand Mr Khan to be claiming that the Respondent had intentionally failed to disclose relevant information in its possession.

[23]. The Appellant's complaint is that the Respondent should not have opposed the application to recall the complainant. In further reliance of that submission Counsel referred me to a document prepared by the Director of Public Prosecutions with the title *"Uniform Guidelines on Disclosure of Prosecution Evidence."* Although undated it is stated that its requirements are to apply from 1 August 1995. In paragraph 7 it is stated that the guidelines are in addition to the common law duty of all prosecutors to advise the Defence of, inter alia, any previous convictions of witnesses and the accused.

[24]. It was submitted that consistent with that obligation it was improper for the Respondent to oppose the application by the Defence to recall the complainant to be cross-examined on her previous court appearance. It was submitted that this could have been done during the course of cross-examination at the trial had the Appellant been aware of the previous court appearance which should have been known to the Respondent.

[25]. Counsel for the Appellant also submitted that the decision of the learned trial judge was wrong. It would appear that the decision to refuse the application was based on the issue of the delay in making the application. The learned judge appeared to be saying that the application was made too late in the trial process. As already noted, the application was made by the Appellant as soon as its existence became known. It was a matter that the Respondent was obliged to disclose in sufficient time for the

Appellant to consider when cross-examining the complainant. That this did not happen was no fault of the Appellant.

[26]. More significantly, section 116 (1) states that the court was required to recall the complainant if it appeared to the court that her evidence was essential to the just decision of the case. Therefore the only issue for the court was to determine whether the complainant's evidence was essential to the just decision of the case. If the court was so satisfied then it was required to recall the complainant. The learned trial judge has not considered this factor and he has based his decision on the issue of delay which first of all did not apply because of the circumstances and secondly appears to be the wrong test for determining the application. As a result it is argued that the discretion given to the learned judge has been wrongly exercised. However an appellate will not interfere with the exercise of the discretion by the learned judge unless it appears that an injustice has thereby resulted (**R v McKenna** (1956) 40 Cr. App. R. 65).

[27]. It appears that the grounds raised by the Appellant are arguable. But that is not sufficient for an application for bail pending appeal. The Appellant must establish exceptional circumstances in the form of a very high likelihood of the appeal succeeding. To that end the Appellant relies on the purpose of the obligation that is imposed on the prosecution in criminal trials to disclose the prior convictions of witness,

[28]. The purpose of allowing cross-examination of a witness as to a previous conviction is to enable the defence to attack the character and the credibility of that witness with a view to, discrediting the witness thereby rendering his or her evidence as being less reliable or less believable. No doubt this is even more an appropriate and necessary tool available to the defence when that witness is the only witness for the prosecution and where corroboration is not required by law.

[29]. It is true that the fact that a witness has a previous criminal conviction may have a material bearing on the credibility of that witness. However the fact that the previous conviction of a witness has not been disclosed at trial and has not been the subject of cross-examination does not automatically mean that an appeal against conviction will

be upheld. In **R v Matthews** (1975) 60 Cr. App. R 292 the Court of Appeal affirmed a conviction on the basis that the line of defence adopted on behalf of the appellant meant that there must have been a verdict of guilty whether or not the criminal records of the witnesses had been disclosed.

[30]. In my opinion the approach that should be adopted is that which was stated by Dixon J in **Bugg –v- Day** (1949) 79 CLR 442 at page 467:

> *"Scanty as is the material to form a conclusion, I think the better view is that at common law a conviction of a witness for an offence could not be used for the purpose of discrediting him if the offence was not of such a nature as to tend to weaken confidence in the credit of the witness, that is to say on his character or trustworthiness as a witness of truth. Traffic offences cannot often fulfil this condition."*

[31]. Whilst it may be arguable that the complainant's previous court appearance for receiving stolen property implies dishonesty, albeit for a young offender who was no older than 17 at the time, it does not follow that it was sufficient to weaken the confidence of the assessors in her as the complainant and the only witness for the prosecution in a trial where the accused is charged with rape. The issue is arguable but it is not a point which in my judgment satisfies the standard of a very high likelihood of success and as a result does not amount to exceptional circumstances.

[32]. The other grounds of appeal were not argued by Counsel in the bail hearing before me. In my opinion they do not when considered either individually or collectively establish exceptional circumstances.

[33]. As a result the application for bail pending appeal is dismissed.

HON. MR JUSTICE W.D. CALANCHINI
ACTING PRESIDENT