

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO. 89 of 2014.

BETWEEN:

MAHENDRA PAL CHAUDHRY

Applicant

AND:

STATE

Respondent

BEFORE THE HON. JUSTICE P. MADIGAN

Counsel: Mr. Anand K. Singh for the Applicant
Mr. M. Korovou for the State

Dare of hearing: 15 May 2014

Date of Ruling: 19 May 2014

RULING

1. The Applicant moves this Court, by way of Notice of Motion and accompanying Affidavit, for an order either staying the sentence

passed on him following trial for breaches of the Exchange Control Act ("ECA") or alternatively for a suspension of the sentence pursuant to section 253(3) of the Criminal Procedure Decree 2009. The sentence was passed on the 2nd May 2014, which sentence included a fine of 20,000 penalty units with 15 months imprisonment in default and an order to repatriate all foreign exchange he holds abroad.

2. In addressing me orally on the Application, Counsel for the Applicant sought to rely heavily on section 3 (3) of the Fifth Schedule to the ECA, which he says provides him with the implied right to have the sentence stayed until the appeal is heard.
3. Section 3(3) of the Fifth Schedule reads:

"(3) For the purposes of this paragraph, any proceedings shall be deemed not to have been finally determined so long as there is pending any appeal in the matter of the proceedings, and an appeal in that matter shall be deemed to be pending during the ordinary time within which an appeal may be lodged, and, if such an appeal is duly lodged, the appeal shall be deemed to be pending until it is decided or withdrawn. "

4. The "paragraph" referred to concerns articles which may or may not be evidence of the commission of an offence under the Act. The offences which the Applicant has been found guilty of do not concern articles thought to be evidence coming into the possession of an executive authority and therefore the section he seeks to rely on (which commences **"for the purposes of this paragraph"**) does not apply to this application.

5. In any event, the terms of paragraph 3(3) are general appeal provisions relating to any matter going to appeal. It is very difficult to see, even if the section were applicable, how they would imply a right to have any sentence stayed until the appeal is determined. It is not an automatic right.
6. The reliance on section 3(3) is misconceived and the submission that it implies a right to stay of sentence pending appeal is unexplained and without merit.
7. The applicant refers to decisions of the Court of Appeal where stay of proceedings had been granted pending further appeal. All of the examples cited are civil cases and none of them is a stay of sentence in a criminal case pending appeal. Provision is made in the Court of Appeal Rules for the stay of civil proceedings, but no such legislative provisions exist for criminal cases.
8. Stay in criminal cases at common law can only be granted in cases of delay or abuse of process and even then only rarely and where extraordinary considerations apply. (**Connelly v DPP** [1964] A.C. 1254) . While the Fiji courts have been following the principles laid down by **Connelly**, there is no precedent in common law for a criminal court to stay a sentence pending appeal.
9. In the present case there has been no complaint of abuse of authority or illegality in the sentence process and the sentence is not wrong in law. Should the applicant think that there has been an error made in the application of sentencing principles, then that will be a matter for the Court of Appeal.

10. The case of **Paek Keyong Yeopl v State**, HAM 0035 of 2003, decided by Shameem J. on 1 October 1993 was an application to stay an order for forfeiture of a ship, the order having been made by her earlier as part of a sentence. The learned Judge decided that she did indeed have power to suspend a sentence under the Court's inherent jurisdiction. Shameem J. was aware of and said that there were no legislative powers to so act and as a consequence the use of any inherent power "should be exercised sparingly and they must not offend the general statutory purpose of the appellate Act." The Judge then went on to refuse the application. She said "The relevant principles are that there must be exceptional circumstances justifying stay, that there are prospects of success (of the appeal) and whether on a balance of convenience a stay out to be granted."
11. In this application the applicant submits that if his sentence is not stayed then his appeal will be rendered nugatory. Mr. Singh was unable to explain how this would be, given that the fine that the applicant must pay will be returned to him if his appeal succeeds. He further adds that if he has to bring his overseas funds into Fiji, as ordered to do in the sentence, then he will incur large banking fees for the transfers and then with the possibility of the appeal succeeding he will be unable to send the funds back abroad for investment.
12. That audacious submission is entirely without merit. Although the order to repatriate the funds was part of the sentence, it is not a penalty as such. It is but an order for the applicant to comply with the law and that law is that he is not permitted to have foreign funds in Australia for investment without the permission of the Governor of the Reserve Bank.

13. If the applicant does not comply with the Court Order to repatriate his funds, then he will be liable to further prosecution and should he be convicted a second time, a term of imprisonment would be inevitable.
14. If Shameem J. is correct in that some inherent power of this court would allow an application to stay a sentence pending appeal, there exists at least three impediments to the exercise of that power:
 - (i) it is unprecedented for a sentence following a criminal trial to be stayed
 - (ii) to stay a sentence, it must be shown that there has been an appeal lodged, and furthermore that that appeal is based on grounds that are very likely to succeed
 - (iii) there must be shown to be special and extraordinary grounds existing to warrant a stay.
15. I have dealt with the first of these matters (supra).
16. In looking at the grounds of appeal, and in recognition of the fact that it is not for me to delve into those grounds to decide their merit, it can be seen that they are for the most part a rehearsal of arguments raised in this court by way of interlocutory applications before trial. All of those applications were dismissed as being either not sustainable in law or without merit. To now place them before me again as grounds of appeal which the applicant has to say for the purposes of stay that they are grounds that are almost certain to succeed in the Court of

Appeal is an untenable position. At best the grounds may be arguable, but that is not enough to warrant a stay.

17. There has been nothing placed before me as representing exceptional or extraordinary grounds that would lead the Court to stay the sentence pending appeal.
18. The application for stay of sentence pending appeal is dismissed.

Part II

19. The applicant applies in the alternative by way of his notice of motion to have the sentence suspended pursuant to section 253(3) of the Criminal Procedure Decree 2009.
20. That section reads:

Admission to bail or suspension of sentence pending appeal.

"253(1) Where a convicted person presents or indicates an intention of presenting a petition of appeal , the High Court or the court which convicted the person, may release the person on bail, with or without sureties

(2) If the person is not released on bail, the High Court or the court convicting the person shall at the request of the person , order that the execution of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal.

(3) Any order under this section which is made before the petition of appeal is presented and where no

petition is presented within the time allowed, the order for bail or suspension is immediately cancelled.

(4)(irrelevant).

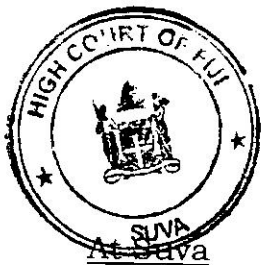
(5).....(irrelevant).

21. It can be seen immediately that section 253(3) as prayed by the applicant is completely inapplicable. Subsection (3) gives no power to a court to do anything.
22. It is to be presumed, but Mr Singh did not address me on this, that the applicant intended to apply for suspension of the sentence under subsection (2) which allows for a suspension of the sentence pending appeal.
23. Mr Chaudhry has not been released on bail and he is facing a term of imprisonment only in default if he does not pay the penalty fine ordered against him. It is quite clear from the wording of the sections of s.253 that it provides for the suspension of a term of imprisonment pending appeal and not suspension of a fine. Should a petitioner be serving a term of imprisonment then his successful appeal cannot restore to him the liberty that he was deprived of and it is for that very reason that a legislative right to stay of a term of imprisonment is provided for.
24. In the case of **Hayat Mohammed v R** 9 FLR 53, MacDuff C.J. said when talking of an identical provision in the old Criminal Procedure Code:

“it is clear from the wording of the section that an order that the execution of the sentence or order against which an

appeal is pending be suspended has no application in the case of a sentence of a fine or of an order of disqualification under the Traffic Ordinance.

25. This case was followed by Shameem J. in **Rajendra Narayan v State** [2004]HAM 28 of 2004 when the learned judge said that the provision applied only to custodial sentences.
26. In the present case the sentence is a large fine, an order to which the section has no application. Should the applicant not pay his fine and be then on the doorstep of the prison to serve his sentence in default, it is then that an application under section 253 might perhaps be appropriate, depending on the circumstances of his non-payment of the fine.
27. The application under section 253 for suspension of sentence is dismissed.
28. Both applications made in the alternative are shown to have no bases in law and they are refused.



19 May 2014

**P.K. Madigan
Judge**