

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAA NO. 30 OF 2015

BETWEEN : KESHWAN

Applicant

AND : STATE

Respondent

Counsel : Mr. Samuel Ram for Applicant
Mr. A. Datt for Respondent

Date of Hearing: 4th of August, 2015

Date of Ruling: 13th of August, 2015

BAIL RULING

1. The Applicant files this Summons seeking an order for bail pending his appeal against his conviction and sentence dated 3rd of June 2015 and 1st of July 2015 respectively by the learned Magistrate in Rakiraki.
2. The Summons is being supported by an affidavit of the Appellant, stating his grounds for this bail pending application. The Applicant has stated that his family and his elderly mother need him as he is the sole breadwinner of the family. He further stated that he was the one who was assisting and supporting his elderly mother in her medical requirements that she needs regularly. The Applicant deposed that he is a carpenter and has undertaken a building contract in Suva, which he needs to complete.
3. The Respondent objected for this application. However, the Respondent did not file any objection in affidavit, but reserved their rights to make

submissions at the hearing. Accordingly the hearing of this application was set down on 4th of August 2015. The learned counsel for the Applicant and the Respondent made their respective arguments and the submissions during the course of the hearing. Having carefully considered the Summons, affidavit and respective submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

4. The Applicant was found guilty for one count of Theft contrary to Section 291 of the Crimes Decree by the learned Magistrate in Rakiraki Magistrate's court and was convicted accordingly. The Applicant was then sentenced for 18 months of imprisonment, out of which 9 months to be served immediately and remaining 9 months have been suspended for a period of 2 years. The Applicant appeal against the said conviction and sentence on the grounds as stated in his petition of appeal.

The Law

5. Section 17 (3) of the Bail Act has stipulated the main grounds that the court must take into account in order to grant bail to a person who has appealed against conviction or sentence. They are that;
 - i. The likelihood of success in the appeal,
 - ii. The likely time before the appeal hearing,
 - iii. The proportion of the original sentence which will have been served by the applicant when the appeal is heard,
6. Justice Calanchini, the Hon President of the Fiji Court of Appeal in **Reddy v State [2015] FJCA 48; AAU6.2014 (13 March 2015)** has discussed the scope of the three grounds stipulated under Section 17 (3) and its application in a comprehensive manner. His Lordship held that;

"Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is

necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act 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 appellant when the appeal is heard."*

Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that **bail pending appeal** should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of **bail pending appeal**. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.

This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others –v- The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:

*"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 and it is not for the single judge on an application for **bail pending appeal** to delve into the actual merits of the appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

*It follows that the long standing requirement that **bail pending appeal** will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success".*

7. Having considered the applicable law for an application of this nature, I now turn onto this instant case.
8. The main contention of the applicant is that the charge for which he is convicted is defective, wherefore his conviction is void. The learned counsel for the applicant submitted that the particulars of the offence as stated in the charge sheet do not constitute an offence under the Crime Decree. His submission is founded on the ground that the word "stole" as stated in the particulars of offence is not an element of the offence of "Theft" under Section 291 of the Crimes Decree.
9. The learned counsel for the applicant further stated that the learned magistrate has erroneously considered the elements of the offence of "Theft" in his judgment.
10. In response, the learned counsel for the respondent submitted that the particulars of the offence must be stated in a simple language in order to inform the accused about the nature of the charge.

11. Having considered the submissions of the learned counsel of the applicant and the respondent, it appears that the two main grounds advanced by the applicant are actually arguable issues. Accordingly, I do not find any high likelihood of success of this appeal as stated in Reddy v State [2015] FJCA 48; AAU6.2014 (Supra).
12. The hearing of this appeal has already set down for the 13th of August 2015.
13. Upon consideration of the reasons set out above, I refuse and dismiss this application of bail pending appeal.




R. D. R. Thushara Rajasinghe
Judge

At Lautoka

13th of August 2015

Solicitors : Samuel K Ram Lawyers for Applicant
Office of the Director of Public Prosecutions