

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 87 OF 2017

BETWEEN : RITESH DAYAL

Applicant

AND : STATE

Respondent

Counsel : Ms. A. Swamy for Applicant  
Ms. S. Kiran for Respondent

Date of Hearing : 17<sup>th</sup> May, 2017

Date of Ruling : 31<sup>st</sup> May, 2017

RULING

Introduction

1. The Applicant was charged in the Magistrates Court at Lautoka with one count of Act with Intent to Cause Grievous Harm contrary to Section 224(a) of the Penal Code, Cap 17.
2. The Applicant pleaded not guilty to the charge and was convicted after a trial. On the 12<sup>th</sup> April, 2017 he was sentenced to 30 months' imprisonment.

3. Being aggrieved by the said conviction and sentence, the Applicant filed a petition of Appeal within appealable time on the grounds stated therein.
4. Having filed the appeal, the Applicant filed this Notice of Motion supported by an affidavit seeking bail pending appeal.
5. Both parties filed written submissions and in addition to that they made oral submissions. I have considered all facts and evidence placed before this Court in arriving at my decision.

### Law Relating to Bail Pending Appeal

#### **Bail Act**

6. The presumption in favour of the granting of bail is displaced where a person has been convicted. [Section 3 (4) (b)]
7. Section 17 (3) of the Bail Act deals with bail pending appeal. The Section reads as follows;

*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.*

## Case Law

8. The law relating to bail pending appeal is settled. Where an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pendency of an appeal. It is not sufficient that the appeal raises arguable points. The chances of the appeal succeeding factor in Section 17 (3) has been interpreted to mean a very 'high likelihood of success'.

9. In Ratu Jope Seniloli and others v The State (Crim App. No. AAU0041/04S. High Court Cr. App No.002S/003, 23 August 2004 said:

*"It has been a rule of practice for many years that where an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pendency of an appeal. This is still the rule in Fiji. The mere fact an appeal is brought can never of itself be such an exceptional circumstance".*

10. The fundamental difference between a person who has not been convicted and to whom the presumption of innocence still applies and a person who has been convicted and sentenced to a term of imprisonment was discussed in Amina Koya v. State (Crim App AAU0011/96) in following terms:

*"I have borne in mind the fundamental difference between a bail applicant waiting Trial and one who has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all, the conviction. It therefore follows that a*

*convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal."*

11. The Court of Appeal in *Balaggan v State* (2102) FJCA 100; AAU 48-2012 (3 December 2102) noted that even if the application is not brought through Section 17(3) of the Bail Act, there may be exceptional circumstances to justify a grant of bail pending appeal.
12. In *Reddy v State* [2015] FJCA 48; AAU6.2014 (13 March 2015), the President of the Court of Appeal, Justice Calanchini discussed the scope of Section 17(3) of the Bail Act in a comprehensive manner.

*"Once it has been accepted that under the Bill 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 & Others –V- R (1978) 24 FLR 28, the Court of Appeal emphasized 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 & Others –V- The State (Unreported Criminal Appeal No. 41 of 2004 delivered on 23rd 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."*

### **Grounds of Appeal**

13. The Applicant has filed following grounds of appeal in HAA 36 of 2017.
  - I. That the Learned Magistrate erred in law and in fact in finding the Appellant guilty when the prosecution evidence as a whole did not establish the offence beyond reasonable doubt against the Appellant.
  - II. That the Learned Magistrate erred in law and in fact by disregarding the evidence of the Appellant and defence witness,

Ritesh Dayal and Rajesh Dayal and not finding that the evidence led by the Appellant and his witnesses created a doubt in the prosecution evidence.

- III. That the Learned Magistrate erred in law and in fact in holding and finding that accused using the knife on the complainant was with the intention to harm the complainant and not in the self-defence.
- IV. That the Learned Magistrate erred in law and in fact in failing to consider the accused version of events, that he was only trying to save his father from an assault by the complainant.
- V. That the Learned Magistrate erred in law and in fact not giving weight to the evidence led by the accused.
- VI. That the Learned Magistrate erred in law and in fact in finding that the accused has act in causing such harm to the complainant was accompanied by an intent to maim, disfigure or disable by accused.
- VII. That the Learned Magistrate erred in law and in fact in failing in sentencing the Appellant for 30 months imprisonment when the sentencing and punishment was excessive in all the circumstance of the case.
- VIII. That the Appellant reserves the right to amend, alter and proffer further grounds of appeal.

## Analysis

### [a]. Likelihood of Success in the Appeal

14. As per the petition of appeal annexed to his affidavit, Applicant claims that the Prosecution was not able to prove its case beyond reasonable doubt and that the learned Magistrate failed to appreciate the fact that Prosecution failed to prove the specific intent on the part of the accused, one of the elements of the offence, beyond reasonable doubt. He also claims that the defence case was not given sufficient weight.
15. The learned trial Magistrate in his judgment has clearly outlined the evidence presented in the Prosecution case and in the defence case.
16. In his analysis, the learned Magistrate had correctly identified the issues to be decided and stated that this is a case where it all boils down to the credibility of witnesses as both sides had given different versions as to the manner in which the complainant had received injuries.
17. The learned Magistrate found the evidence presented by the witnesses of the Prosecution to be credible and gave reasons for doing so. He relied on undisputed evidence that injury was caused by a cane knife. He then considered the probability of this injury being caused as the complainant and as the accused said. Having considered the evidence adduced by both parties the learned Magistrate decided to rely on the version of the Prosecution. In coming to that decision learned Magistrate considered the exhibits that included the medical report, the cane knife exhibited and the admission accused had made to PW.2.



18. The learned Magistrate rejected the version of the Defence which he found to be implausible. He gave reasons why he was not inclined to believe what witnesses called by Defence said. He highlighted inconsistencies and improbabilities in their evidence. Specifically, he did not believe the evidence that accused was punched several times by the complainant while accused was still holding a cane knife. Considering the above, the learned Magistrate gave no weight to the defence case and rejected the defence of self defence.
19. There was no error in fact or law on the part of the learned Magistrate in rejecting the evidence of the Defence and accepting that of the Prosecution.
20. In his appeal, the Applicant heavily relies on the ground that specific intent was not proved by the Prosecution. I am not convinced that this ground has a good chance of success. Applicant had used a cane knife and hammered it at the complainant several times. There is no evidence that the accused had used the blunt side of the cane knife as was claimed by the Counsel for Applicant. Even if he had used the blunt side the learned Magistrate who had the opportunity to observe the cane knife and serious injury as evidenced by the medical report would have been able to come to the conclusion he reached as to the specific intent of the accused.
21. In his appeal, the Applicant has taken up the position that the learned Magistrate fell into error when he was sentenced to 30 months' imprisonment.
22. Sentencing approach taken by the learned Magistrate cannot be described as unprincipled. Case law discussed below shows that a sentence of 30 months' imprisonment has not exceeded the tariff range prescribed for this offence.

23. In *State v Dikidikilati* HAC 246 of 2012, Temo J quoted Shameem in *State v Mokubula* [2003] FJHC 164; HAA0052].2003S (23 December 2003) and stated that tariff in such cases is 6 months to 5 years and in cases where a weapon is used starting point should be picked between 2 years and 5 years. In *State v Emosi Tuigulagula* [2002] FJHC 237 it was held that imposition of 2 ½ years' imprisonment is not excessive where there has been serious injury and weapon used.
24. In *Ramji Lal Sharma* Crim. App. No. 55 of 1983 a man struck the victim with a cane knife severing her left forearm. The cause of the dispute was land, and there was some evidence of provocation. The sentences of 4 years and 2 years imprisonment on the two counts of act with intent to cause grievous harm were upheld.
25. In *Rajesh Kumar -v- State* Crim. App. No. HAA0032 of 1998L, the Lautoka High Court considered an appeal against a sentence of 3½ years imprisonment for a section 224 offence under the Penal Code. The accused had struck his wife with a cane knife because he thought she was having an affair with another man. The attack caused serious injuries leading to hospitalization.
26. The sentence of 30 months to the applicant is within the tariff range. The Fiji Court of Appeal in *Sharma v State* [2015] FJCA 178; AAU48.2011 (3 December 2015) stated that even if there has been an error in the exercise of the sentencing discretion, the appellate court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range.

27. The threshold for the likelihood of success in the appeal of Section 17 (3) (a) of the Bail Act 2002 is quite stringent. The test is “whether the appeal has a very high likelihood of success.” Applying this test to the present case, the applicant’s grounds of appeal are not sufficient to meet threshold. The grounds may be arguable but it is not sufficient to allow him on bail pending appeal.

**[b] The likely time before the appeal hearing**

28. The Applicant was sentenced on 12<sup>th</sup> April, 2017. He filed his petition of Appeal on 19<sup>th</sup> April, 2017. The filing of submissions is already fixed for today, (31<sup>st</sup> May, 2017) and the hearing can be taken up soon after filing the submissions. Since this Court has already superficially considered the grounds of appeal for the purpose of this application, the Appeal could be disposed of within one to two weeks thereafter.

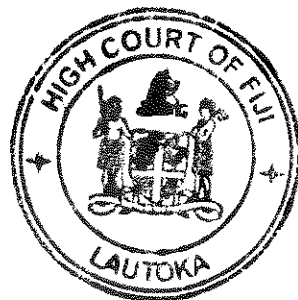
**[c] Proportion of original sentence served when appeal is heard**

29. If both parties co-operate, the appeal could be heard within the time frame already discussed in paragraph 31. The Applicant would roughly serve only less than 1/3 of his sentence by the time the substantive matter is heard and therefore, no prejudice will be caused to the Applicant.

**[d] Exceptional Circumstances**

30. Even if an applicant does not bring his application within Section 17 (3) of the Bail Act, there may be exceptional circumstances justifying a grant of bail pending appeal.

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31. The Applicant, as per his affidavit wants to be on bail so that he can have proper access to legal representation to prepare for his appeal. This appears to be the 'exceptional circumstance' he is relying upon.
32. This ground cannot be considered as an exceptional circumstance. The word 'exceptional' should be narrowly interpreted only to attract situations that are exceptional. Applicant is not the only person who is incarcerated during his appeal. If this application is allowed, all the convicted prisoners will want to file appeals and seek bail to prepare for their appeals.
33. Applicant can easily consult and instruct his counsel from prison like all other convicted persons.
34. For the above reasons, the application for bail pending appeal is dismissed.



Aruna Aluthge  
Judge

AT LAUTOKA  
31<sup>st</sup> May, 2107

**Counsel:** Messrs Patel & Sharma for Applicant  
Office of the Director of Public Prosecution for Respondent