IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 252 OF 2024

Sigatoka Criminal Case No: 282 of 2019

BETWEEN: **RAMIZA BANO**

Applicant

AND

STATE

Respondent

Counsel: Mr. M. Anthony with Mr. R. Bancod for Applicant

Mr. J. Nasa for Respondent

Date of Hearing: 18 November 2024
Date of Ruling: 20 November 2024

RULING ON BAIL PENDING APPEAL

1. The Applicant was charged in the Magistrates Court at Sigatoka with one count of Unlawful Possession of Illicit Drugs contrary to Section 5 (a) of the Illicit Drugs Control Act 2004.

The charge alleged that on 10 June 2019, she was found in possession of 1.407 Methamphetamine, an illicit drug.

2. On 11 September 2019, she pleaded not guilty to the charge. The matter dragged on for nearly five years. When the matter was eventually fixed for hearing on 10 September 2024 the Applicant decided to change her plea of not guilty and pleaded guilty to the charge when she was unrepresented. The Learned Magistrate was satisfied that the guilty plea was voluntary and unequivocal. On 25 September 2024, she was convicted and sentenced to a custodial term of 17 months and 3 weeks.

3. Being aggrieved by the sentence, the Applicant, on 21 October 2024, filed a timely petition of appeal on the grounds stated therein. The main ground is that, given the mitigating circumstances she submitted, the Learned Magistrate erred in imposing a custodial sentence when she deserved a suspended sentence. She argues that the sentence is harsh and excessive.

The Law Relating to Bail Pending Appeal

4. The law relating to bail pending appeal is settled in Fiji. Section 3(4) (b) of the Bail Act provides that the presumption in favour of the granting of bail is displaced where a person has been convicted. Section 17 (3) of the Bail Act deals specifically with bail pending appeal. The Section provides:

> 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.

5. In **Ratu Jope Seniloli and others v The State**[1], the High Court observed as follows:

> 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**

[1] Crim App. No. AAU0041/04S Cr. App No.002S/003 (23 August 2004).

> **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. (Emphasis added)

6. In **Amina Koya v. State**[2] the Court of Appeal observed as follows:

> I have borne in mind the fundamental difference between a bail applicant waiting for 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.

7. The Court of Appeal in **Balaggan v State**[3] 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.

8. In **Reddy v State**[4] the Court of Appeal took the same position and discussed the common law position *vis-a-vis* the scope of Section 17(3) of the Bail Act.

> 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 Applicant 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.**

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[2] Crim App AAU0011/96

[3] (2102) FJCA 100; AAU 48-2012 (3 December 2012)

[4] [2015] FJCA 48; AAU6.2014 (13 March 2015),

In Apisai Vuniyayawa Tora & Others –V- R[5] (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'scase (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.[Emphasis added]

9. In view of these authorities, the State's assertion that this Court, in determining bail in this application, should purely look at Section 17(3) of the Bail Act does not reflect the correct position of law. When exceptional circumstances are present, they may be viewed as a matter to be considered in addition to the three factors listed in Section 17(3) of the Bail Act in exercising the Court's discretion.

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[5] (1978) 24 FLR 28,

10. Bearing in mind the legal position on bail pending appeal, I now proceed to consider the three matters listed in Section 17 (3) of the Bail Act.

Analysis

[a] High Likelihood of Success

11. All the grounds of appeal filed by the Applicant in person would boil down to a single issue, namely, whether, in the context of the mitigating circumstances of the offender, a suspended sentence should have been imposed instead of a custodial sentence.

12. Section 26 of the Sentencing and Penalties Act gives the Magistrates Court the power to suspend the sentence fully or partially if it does not exceed the imprisonment term of two years. The sentence imposed by the Learned Magistrate has not exceeded two years imprisonment. Therefore, he was required to exercise his discretion and consider if a suspended sentence was warranted in the circumstances of the case. Neither under the common law nor under the Sentencing and Penalties Act is there an automatic entitlement to a suspended sentence. Whether an offender's sentence should be suspended will depend on several factors. The case law in Fiji suggests that a suspended sentence should be passed only when exceptional circumstances justifying such a sentence are present. It has been held that when a first offender pleads guilty at the first available opportunity, indicating genuine remorse, to a charge that does involve neither a serious offence nor breach of trust situation, he or she is a suitable candidate to receive a suspended sentence. At the end of the day, judicial discretion should be governed by Section 4(1) of the Sentencing and Penalties Act, which prescribes the purposes for which a sentence is imposed by a court.

13. The offence the Applicant was convicted of is considered serious in terms of the maximum sentence prescribed for the offence. However, the weight of the illicit drugs she was in possession of was a little more than one gram (1.407 grams). The offence falls under category 1 of Abourizk Sentencing Guidelines[6], attracting an imprisonment term of 2 ½ years to 4 ½ years. The guidelines do not prescribe a suspended sentence, whatever may the quantity be.

[6] Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019)

14. The sentence of the Learned Magistrate has fallen below the sentence range prescribed by the Abourizk Sentencing Guidelines. The sentencing approach of the Learned Magistrate is justified given that the guidelines are just guidelines and are not intended to take away the sentencing discretion, which a sentencer is required to exercise, having regard to the circumstance of each case. The Court of Appeal in setting the said guidelines emphasized at [145] that:

> Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for tariff in sentences for all hard/major drugs (such as Cocaine, Heroin, and Methamphetamine etc.). These guidelines may apply across all acts identified under sections 5(a) and 5(b) of the Illicit Drugs Control Act 2004 **subject to relevant provisions of law, mitigating and aggravating circumstances and sentencing discretion in individual cases** [emphasis added].

15. The sentencing guidelines do not supersede the statuary provision in Section 26 of the Sentencing and Penalties Act, which gives the Magistrates Court the power to suspend the sentence fully or partially if the sentence does not exceed the imprisonment term of two years. Therefore, the crucial issue at the substantive appeal hearing would be whether the Learned Magistrate committed a sentencing error in imposing a custodial sentence on the Applicant.

16. In the present case, the Applicant is a first offender. She pleaded guilty to the charge albeit not at the first available opportunity. According to the charge, the offence was committed way back on 10 June 2019, and the matter dragged on for nearly five years when it was finally taken up for hearing on 10 September 2024. The case record shows that the matter was listed on several occasions for *voir dire* disclosures and *voir dire* hearings. When the matter was eventually called for a *voir dire* hearing on 7 June 2023, the Prosecution informed the court that there were no admissions in the caution interview, rendering the *voir dire* hearing being done away with.

17. Upon being convicted, the Applicant being unrepresented at the Magistrates Court submitted the following in mitigation:

> *27 years; married but baby passed away, and I feel I've been punished and now residing in Nadi; unemployed; seeking forgiveness for wasting time and scared of being jailed; guilty plea; promise not to reoffend; I have changed myself and have begun a new life.*

18. The Learned Magistrate in his Sentence Ruling provided the following justification for custodial sentence:

> *I do not see any special circumstance to suspend this sentence as being in possession of hard drugs such as methamphetamine continues to be on the rise in our communities and so there needs to be a message of deterrence to would be offenders.*

19. The Applicant, in her affidavit in support deposed that:

> *the Learned Magistrate had not considered one of my mitigating factors that I was undergoing depression due to the loss of my baby daughter who died during childbirth due to pregnancy complications. She has annexed the Medical Cause of Death certificate of Rahi Singh. She further deposes in paragraph (7): That on the day of my sentencing, I sought to inform the Court of my special circumstances that I recently found that I was pregnant again but the Resident magistrate refused to accept my medical from my doctor; that I had also attempted to change my plea to not guilty on the day of the sentencing but the Magistrate refused my application. (paragraph 9). To substantiate that the Applicant is pregnant, a medical certificate dated 18 September 2024, which has recommended a follow-up scan in 3-4 weeks time to confirm/ exclude fatal viability, is attached to the affidavit.*

20. The Magistrates Court Copy Record does not indicate that the Learned Magistrate refused to accept the Applicant's medical from her doctor or he refused the application of the Applicant to change her plea to not guilty on the day of the sentencing. Those allegations are matters to be considered at the appeal hearing. But, if those allegations are true, they have a strong possibility of the appeal being decided in the Applicant's favour.

21. The facts remain that the Applicant had had a recent child death due to pregnancy complications, that she was again pregnant at the time of the sentence, and that she

maintained a not guilty plea for a long time and finally decided to change her plea after five years, expecting a non-custodial sentence. The Applicant was unrepresented at the time of her guilty plea. When she submitted in mitigation, she did not specifically mention that she was in depression after child's mortality. According to the summary of facts, she has had a syringe and inhaling equipment in her possession at the time of the arrest, suggesting that she was a drug user rather than a drug dealer. She may not have been able to make an effective mitigation submission to convince the Court that a custodial sentence would not only be detrimental to her health but, given the history of her previous child's death at birth, also to that of the unborn child.

22. The State submitted that there have been serving women inmates who have been in the same situation as the Applicant and that the Corrections Facility have historically afforded adequate medical care and facilities to ensure women requiring medical care are properly assisted and attended to by medical professionals.

23. The statistics show that the child mortality rate at birth and maternal mortality rate are comparatively high in Fiji despite the availability of a free health system in government hospitals. I doubt that the Applicant, who is already under medical supervision to verify the fatal viability, could be provided the medical care and attention at the correction facility that she badly needed.

24. In his Ruling, the Learned Magistrate did not consider the Applicant had had recent child mortality. He of course has had no opportunity to consider the full impact of a custodial sentence on the pregnant Applicant and the unborn child in sentencing the Applicant because she was unrepresented. In my opinion, this is a classic case filled with exceptional circumstances when it comes to deciding bail pending appeal. Therefore, the Applicant has a strong ground that is likely to be successful in her 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.

25. Considering the Applicant's health condition, the matter was expedited, and the Court instructed the parties to file their respective written submissions by 20 November 2024. However, the State is not ready with their submissions. They asked for more time because the file was still in the process of being allocated to a counsel. Therefore, I doubt if the appeal could be disposed of before the December Court Vacation. Considering the length of the imprisonment term, even a delay of two months is substantial.

26. The Applicant has already served approximately two months. Because of the high likelihood of success in her appeal, the likely time she will have to be in incarceration is not justified.

27. For the above reasons, the application for bail pending appeal should be allowed.

28. The Applicant is released on bail pending appeal on the following bail conditions:

    (i). Surety bail bond of FJD 500 with two sureties.

    (iii). Not to re-offend whilst on bail.

Aruna Aluthge

Judge

At Lautoka

20 November 2024

Counsel: Millbrook Hills Law Partners for Applicant

Office of the Director of Public Prosecution for Respondent