

MONIKA ARORA v STATE (AAU0001 of 2012)

COURT OF APPEAL — APPELLATE JURISDICTION

5 CHANDRA JA

2, 16 October 2012

10 **Criminal law — bail — application for bail pending appeal — whether appeal had very high likelihood of success — time before appeal heard — time served before appeal heard — Bail Act ss 3, 17(3) — Court of Appeal Act s 35(1)(d) — Penal Code s 376(b) — Proceeds of Crime Act s 69(2)(a).**

15 The appellant was convicted of money laundering and corrupt practices and sentenced to seven years' imprisonment with a non-parole period of six years. The appellant applied for leave to appeal against those convictions. This case involves the appellant's application for bail pending that appeal.

Held —

(1) The threshold for applications for bail pending appeal is very high. Bail pending appeal will be granted only rarely, and only where there are exceptional circumstances.

20 *Amina Kova v State* Cr App No AAU 11/96 cons; *Ratu Jope Senilo, Taru Rakuita Vakalalabure, Ratu Viliame Colavola, Peceli Rinakam and Viliame Savu v The State* Crim App No AAU0041/04S, High Court Cr App 002S/003, 23 August 2004 cons

25 (2) The questions of whether the basis of money laundering had been established and whether the trial judge had erred in overturning the verdict of the Assessors were highly arguable matters. However, they did not, on the face of them, meet the threshold of this being an appeal with a very high likelihood of success.

(3) The period between the appellant's sentencing and the likely hearing of the appeal is not such a period of time that it would be considered an exceptional circumstance. As for the portion of time served before the appeal will be heard, s 17(3)(c) of the *Bail Act 2002* would apply to situations where there is a short sentence. The seven year sentence in the present case cannot be considered to be a short sentence.

30 Application for bail pending appeal refused

Cases referred to

The State v Ratu Inoke Takiveikata (No 5) Court of Appeal Appellate Jurisdiction [2004] FJHC 265 cons, considered.

35 *R Chaudhry* with *T Ravuniwa* for the Appellant

M Korovou for the Respondent

Chandra JA.

40 **RULING UPON APPLICATION FOR BAIL PENDING APPEAL**

[1] This is an application by the Appellant for bail pending appeal.

[2] The Appellant was charged with Money Laundering contrary to s 69(2)(a) of the Proceeds of Crimes Act 1997 and Corrupt Practices contrary to s 376(b) of the Penal Code Cap 17.

45 [3] The trial judge overturned the unanimous verdict of not guilty of the assessors and convicted the appellant on both counts on 14th December 2011 and was sentenced on 17th February 2012 to a total of 7 years imprisonment with a non-parole period of 6 years.

50 [4] The Appellant filed an application for leave to appeal against conviction on the 11th of January 2012 and after the sentence was imposed filed a notice of motion on 6th March 2012 seeking bail pending the hearing of her appeal.

[5] In the said notice of motion seeking bail pending appeal, the Appellant has stated that she has a breast feeding baby and that she had not been allowed to have the baby with her. However, that position has changed as she has been allowed to keep the baby with her subsequently.

5 [6] The Appellant has set out the following grounds in seeking bail pending appeal:

- (a) The likelihood of success on appeal.
- (b) Clear and cogent reasons.
- (c) The sentence.
- 10 (d) The likely time before appeal hearing.
- (e) The proportion of sentence which will have been served.

[7] When this case was taken up on 2nd of October 2012 before me, Counsel for the Appellant and the Respondent made their submissions before me in addition to the written submission already filed.

[8] The State in their submissions has taken up the position that the Appellant has not filed any Petition of Appeal but has only by way of summons and affidavit urged the Court to grant leave to appeal both conviction and sentence, that the sentence be suspended and that bail pending appeal be granted, that the Appellant
20 has not complied with s 35 of the Court of Appeal Act & Rules, Cap 12.

[9] The present application is one relating to bail pending appeal and therefore I do not intend to deal with the maintainability of the appeal filed by the Appellant at this stage.

25 [10] The provision relating to the granting of bail to convicted persons is found in s 17(3) of the Bail Act 2002 and provides as follows:

“17(3) 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;*
- 30 (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.”*

[11] A judge of the Court of Appeal is empowered in terms of s 35(1) (d) of the Court of Appeal Act & Rules (Cap 12) to admit an appellant on bail.

35 [12] In the present case, the Appellant had faced a trial which lasted nine days on the two charges against her and the learned trial judge had overturned the unanimous verdict of not guilty of the Assessors and convicted and sentenced her on the two charges.

40 [13] Section 3(1) of the Bail Act of 2002 provides that:

“Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should not be granted.

Section 3(3) provides that:

45 *There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption.”*

Section 3(4) provides that:

“The presumption in favour of granting bail is displaced where-

- (a) *The person seeking bail has previously breached a bail undertaking or bail condition;*
- 50 *Or*
- (b) *The person has been convicted and has appealed against the conviction.”*

[14] The position regarding bail regarding a person charged for a crime and awaiting trial and one who has been convicted after trial was succinctly set out by his Lordship Sir Moti Tikaram in *Amina Koya v State* Cr App No AAU))11/96 as follows:

5 *"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*
10 *a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal."*

[15] His Lordship Justice Ward in *Ratu Jope Seniloi, Ratu Rakuita Vakalalabure, Ratu Viliame Volavola, Peceli Rinakam and Viliame Savu v The State* (Crim App No AAU0041/04S. High Court Cr App No 002S/003,23 August
15 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 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 itself be such
20 *an exceptional circumstance."* (Emphasis mine)

[16] Scutt JA in *Matai v The State* (2008) FJCA 89 AAU0038.2008 has set out in detail the manner in which applications for bail pending appeal have been dealt with in common law jurisdictions which all deal with the high threshold that has
25 to be met with by an Appellant seeking bail pending appeal.

[17] It has been clearly laid down in a series of cases that bail pending appeal will be granted only rarely and that too where there are exceptional circumstances. Therefore the threshold is very high when applications for bail pending appeal are taken up for consideration by Court.

30 [18] In the present case, the Appellant is relying on the grounds set out in paragraph 10 above. I shall deal with these grounds to see whether the Appellant meets that high threshold in applications relating to bail pending appeal.

[19] As regards, the ground as to "the likelihood of success in appeal" it is
35 relevant to consider how the Courts have dealt with same.

[20] In *Ratu Jope Seniloli and Ors v The State* (Supra) the Court of Appeal said:

"The first question is the likelihood of success in the appeal...The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and s 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.
40 *That as was pointed in Koya's case, is the function of the Full court after hearing full argument and with the advantage of having the trial record before it ..."*
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[21] Where an application for bail pending appeal is made before a single Judge, the grounds of appeal cannot be dealt with in depth as they are required to be by the Full Court at the hearing of the appeal. Counsel for the Appellant was
50 at great pains when making his submissions to show that there is a strong likelihood of success. He was relying mainly on the fact that the basis of the

offence of money laundering had not been established in this case and that after the summing up by the trial Judge, the Assessors had brought in a unanimous verdict of not guilty which was overturned by the learned trial Judge. It was also his submission that the learned trial Judge was in error in overturning the verdict
5 of the Assessors.

[22] In *Matai v State* (Supra) Scutt JA stated that:

“In Fiji, the finality is of the finding by a judge, not a jury. The judge sits with assessors and must have regard to their opinions, however he is entitled to bring in a verdict not consistent with the assessors’ opinions.”

10 In *The State v Ratu Inoke Takiveikata* (No 5) [2004] FJHC 265; HAC005/ 2004; 24 November 2004) His Lordship Justice Gates (as he then was) set out the principles governing criminal trials by judge and assessors, observing that it is the judge who give the judgment, having received the opinion of the assessors, ‘but in doing so shall not be bound to conform to the opinions of the assessors’.

15 In the present case the trial Judge has in his judgment explained his reasons for rejecting the unanimous verdict of the assessors. He made a finding on credibility and accepted the evidence of the prosecution witnesses and rejected the evidence of the Appellant.

[23] The submissions were also as regards the deficiencies in the summing up
20 of the trial Judge regarding certain aspects of the offence of money laundering in relation to the facts which were revealed by the evidence that was placed before Court. Counsel has also submitted that the Appellant was not charged with falsification of the employer’s books of accounts or that the Appellant had fraudulently prepared payment vouchers and cheques. Further, that there was no
25 cogent evidence that the Appellant disposed of any monies that was derived from some form of criminal activity, that the personal property of the Appellant had been purchased with cheques from her employer as cashed by her, that there was no trail of the alleged cheques as cashed by the Appellant for her benefit or that of others.

30 [24] It was also submitted that the finding of the assessors was not perverse and that having overturned their verdict the trial Judge had assumed the role of the assessors and tried to determine the truth of the matter.

[25] The matters set out above as submitted by Counsel with much vigour,
35 when one considers the appeal of the Appellant are highly arguable matters in the appeal but do not on the face of them establish that the appeal has the likelihood of success in the appeal as required by s 17(3)(a) of the Bail Act, as that would be a matter that could be considered by a full court rather than by a single judge in the present application.

40 [26] The other grounds relied upon by the Appellant in her application are in relation to the “Time before the appeal is heard” and “Time served before appeal is heard”.

[27] The Appellant has been sentenced to 7 years imprisonment and was sentenced in February 2012. Even if the appeal is taken up in 2013 as
45 contemplated by the Appellant in her submissions, would not be such a period of time as to make it a ground which would be an exceptional circumstance on which bail could be granted.

[28] As for the position of time served before the appeal is heard, it would appear that S17(3)(c) would attract situations where there is a short sentence and
50 would not apply to a sentence such as the one in the present case which is seven years which cannot be considered as a short sentence.

[29] In *Ratu Jope Seniloli & Ors v The State* (Supra) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in s 17(3) of the Bail Act namely “the likely time before the appeal hearing” and “the proportion of the original sentence which will have been served by the applicant when the appeal is heard” are directly relevant ‘only if the Court accepts there is a real likelihood of success’ otherwise, those latter matters ‘are otiose’.

[30] Having considered the submissions made before me, I am of the view that though the appeal of the Appellant is highly arguable, it does not meet the threshold of being one where there is a very high likelihood of success.

[31] In the above circumstances the application of the Appellant for bail pending appeal is refused.

Application refused.

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