

POH CHIN SHIU v STATE (AAU0033 of 2011S)

COURT OF APPEAL — CRIMINAL JURISDICTION

5 MADIGAN JA

25, 31 October 2012

10 **Criminal law — bail — application for grant of bail pending appeal — strength of ground of appeal — likelihood of success in appeal — exceptional circumstances — time served by appellant — Bail Act ss 7, 17(3)**

15 The applicant applied for bail pending appeal having being convicted and sentenced on two counts of possession of a forged document and uttering a false document. He argued that the trial judge erred in law in not directing the assessors in respect of separate counts and separate accused persons, thereby creating a substantial miscarriage of justice.

Held –

20 (1) In considering the matter of bail pending appeal, regard must be had to the three factors stated in s 17(3) of the Bail Act. The matters set out in s 17(3)(ii) and (iii) are only directly relevant if the Court accepts there is a real likelihood of success.

Cama AAU 0061 of 2011; *Seniloli* AAU0041/03, followed.

25 (2) In the present case the ground of appeal is arguable with a chance of success, but it cannot be said there is every likelihood of success. That being the case, regard must be had to whether there were exceptional circumstances that would lead to the award of bail. The fact that the appellant was due to serve his full term of imprisonment does not create an exceptional circumstance to justify bail pending appeal.

Pita Matai AAU 0038 of 2008, followed.

30 Bail application refused.

F. Vosarogo for the Applicant.

M. Korovou for the State.

35 [1] **Madigan JA.** The applicant applies for bail pending appeal having been convicted and sentenced by the High Court on the 10th March 2011 for two counts of possession of a forged document and uttering a false document. He was acquitted of a third count of demanding property on a forged document.

40 [2] The applicant filed a timely notice of appeal on the 7th April 2011 in which he set out one ground of appeal against conviction. That ground prayed that the learned trial judge erred in law in not directing the assessors in respect of separate counts and separate accused persons, thereby creating a ‘substantial miscarriage of justice.’ That ground being a matter of law only does not require leave and is with the Court of Appeal Registry for the matter to be listed before the Full Court.

45 [3] That brief background is necessarily stated as the strength of the ground of appeal is a paramount consideration in the determination of bail pending appeal. As it was said recently in *Cama AAU0061 of 2011*, when considering the matter of bail pending appeal regard must be had to the three factors stated in s 17(3) of the Bail Act which states:

50 ‘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:-

- (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 appellant when the appeal is heard.'

5 The Court went on to add that the two facts in (ii) and (iii) need only to be considered if the Appellant overcomes the first factor, and 'it has been well established by cases decided in Fiji and in other common law jurisdictions that bail pending appeal should only be granted where there are exceptional circumstances.'

[4] So it now befalls me to decide on the likelihood of success of the appeal without delving into the appeal itself, which is not my role as the single Judge. To decide likelihood of success must a fortiori entail at the very least a cursory assessment of the ground without making an authoritative pronouncement on it, which, if crossing the boundaries of 'delving'; so be it.

[5] The appellant's ground of appeal is at the very least arguable. Where there are several counts and several accused, it is only fair that the assessors be told to look at each count and each accused separately because the evidence will not necessarily be the same for each count or against each accused. Mr Vosarogo argues that this omission by the trial Judge is fatal to the conviction; Mr Korovou in return argues that the intention of the summing up is to distinguish the evidence on each count and between each accused and therefore a specific direction was not necessary. He adds that the fact that this accused was found not guilty of the third count means that the assessors did look at each accused separately.

[6] While it can be seen that the appeal is likely to succeed it cannot be that there is 'every chance of success.' It might be that the State's argument wins the day. That first high standard not being reached, then it is unnecessary for me to go on to consider the other two limbs of s 7 of the Bail Act. As Ward P said in *Seniloli* AAU0041/03, 'the two remaining matters set out in s 17(3) are only directly relevant if the Court accepts there is a real likelihood of success. If the Court does not, their determination becomes otiose.'

[7] The applicant is due to be released from his term of imprisonment on 9 July 2013. His appeal will not be heard until at least April or May of 2013. Although he would have served most of his sentence by the time his appeal is heard, it was stated by this Court (single Judge) in *Pita Matai* AAU0038 of 2008, that the fact that the appellant is due to serve his full term of imprisonment does not create an exceptional circumstance to justify bail pending appeal. Scutt J said:

40 'If the chance of an appeal's success were 'slim' or 'low' or the grounds simply 'arguable' then again it does not appear to me that 'time' could override this so as to warrant the grant of bail render the 'exceptional or special circumstances' rule.'

[8] The ground of appeal is arguable with a chance of success but it cannot be said there is every likelihood of success. That being the case regard must be had to whether there are 'exceptional circumstances' that would lead to the award of bail. None such exist (not even bulk of the sentence served) with the result that 45 the application is refused.

Application refused.