

**LAISENIA QARASE v FIJI INDEPENDENT COMMISSION AGAINST
CORRUPTION (AAU0066 of 2012)**

5 COURT OF APPEAL — CRIMINAL JURISDICTION

CHANDRA RJA

21 November, 5 December 2012

10 **Criminal Law — bail — bail pending appeal — likelihood of success on appeal —
unanimous verdict by assessors — whether exceptional circumstances — period of
sentence served till appeal heard — health condition — Bail Act s 17(3), 17(3)(a),
17(3)(b), 17(3)(c) — Penal Code ss 111, 109**

15 The appellant was convicted of six counts of abuse of office and three counts of
discharge of duty with respect to property in which he had a private interest. He was
sentenced to 12 months’ imprisonment. Leave to appeal against conviction was granted
and the appellant applied for bail pending appeal.

Held –

20 (1) The fact that the assessors had brought in a unanimous verdict would not
necessarily negate the likelihood of the appeal being successful. It is not an absolute rule,
but a matter that would be considered when the appeal is argued.

Simon John Macartney v The State Cr App No AAU0103 of 2008, considered.

25 (2) The grounds urged in the leave to appeal application are arguable, but do not meet
the threshold of being highly likely to succeed. It has been said that if s 17(3)(a) is not
satisfied, the grounds relating to s 17(3)(b) and (c) are otiose. The Court considered the
other grounds to see whether the application would come within exceptional
circumstances, however the matters referring to the period of the sentence likely to be
served up to the hearing of the appeal and the appellant’s health do not take the application
any further.

30 *Ratu Jope Seniloli & Others v State* (unreported criminal appeal No 41 of 2004
delivered on 23 August 2004), cited.

Application for bail pending appeal refused.

Cases referred to

35 *Matai v The State* (2008) FJCA 89; *Qurai v The State* [2012] FJCA 61, cited.

Amina Koya v State Cr App No AAU11/96; *Brian Singh v The State* Cr App AAU
0083 of 2010; *Mahendra Motibhai Patel and Tevita Peni Mau v The State* Cr App
No AAU0039; *Monika Arora v State* CR App AAU0001 of 2012, considered.

40 *T Draunidalo* for the Appellant.

V Perera for the Respondent.

[1] **Chandra RJA.** This is an application made by the Applicant/Appellant for
bail pending appeal.

45 [2] The Applicant was charged with six counts of Abuse of Office contrary to
s 111 of the Penal Code Cap 17 and with three counts of Discharge of Duty with
respect to property in which he had a private interest contrary to s 109 of the
Penal Code Cap 17.

50 [3] Following his trial on the said charges, the Applicant was found guilty of
the said charges on an unanimous verdict of the Assessors and by the learned
High Court Judge and was convicted and sentence to a period of 12 months
imprisonment.

[4] The Applicant made an application for leave to appeal against the said conviction and leave to appeal was granted on 12 November 2012.

[5] In his application for bail the Appellant has set out grounds in support of his application and the Respondent has filed a reply to the said application.

5 [6] The application for bail pending appeal was taken up for hearing on 21 November 2012 by which time written submissions had been filed by both parties, and Counsel for the Appellant as well as for the Respondent made their oral submissions.

10 [7] The Appellant has set down the following grounds in his application seeking bail:

(a) The likelihood of success on appeal;

(b) Serving of the majority of the sentence if not granted bail urgently;

(c) Continued incarceration having a detriment effect on Applicant's health and on his family;

15 (d) His not being placed in the infirmary though recommended by the Government/Prison medical board in view of his age and health status;

(e) That other persons convicted for similar offences who are of similar age and slightly better health than the Applicant have been placed in the infirmary;

20 (f) That the recent episode of prison escapees and law breaking resulting in the authorities applying tougher restrictions;

(g) That he was currently facing charges in Criminal Action No 26 of 2009 in the High Court at Suva which is a complex matter and that he should make himself available to properly instruct his lawyers and/or defend himself in the proceedings;

(h) That he has had an unblemished record and a lifelong record of service to others;

25 (i) That he has not breached any bail conditions and is ready to produce sureties, surrender his travel documents and report daily as part of bail conditions;

(j) That the sentence passed by the Trial Judge is harsh and excessive.

[8] The Respondent filed objections to the affidavit filed by the Appellant to the following effect:

30 a That the Respondent denies grounds 7 (a) and (b) stated above,

b That the Respondent is unaware of what is stated in 7(c) above;

c Denying the ground set out in 7(d) above and that the annexure "D" does not support the contents set out therein.

d That the Respondent is unaware of the veracity of 7(e) and (f).

35 e With reference to 7(g) that the Appellant had not raised any issues in the High Court regarding his alleged difficulties in preparing for Case No 26 of 2009 when it was taken up and the existence of another pending case is not a ground for bail pending appeal;

f With reference to 7(h) that the Appellant has been charged for another offence in Case No 26 of 2009 prior to the conviction in the present case;

g That the matters stated in 7(i) do not constitute a ground for bail pending appeal;

40 h That as regards 7(j) that the Appellant has not appealed against his sentence.

The Respondent has objected to the granting of bail.

[9] Section 17(3) of the Bail Act 2002 provides as follows:

45 *"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;*

(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."*

50 As submitted on behalf of the Appellant as well as the Respondent, Subsection 17(3) (a) of the Bail Act, 2002 has been interpreted to mean that the appeal should be one which is "highly likely to succeed".

[10] Unlike in the case of an accused applying for bail pending trial where the general presumption of bail is applicable, an Appellant after conviction has to meet the high threshold of showing that his appeal is highly likely to succeed in appeal. I would restate this position by referring to my Ruling in *Monika Arora v State* CR App AAU0001 of 2012 where I have cited the dictum of His Lordship Sir Moti Tikaram in *Amina Koya v State* Cr App No AAU11/96:

10 *“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.”*

15 [11] In the often cited case regarding applications for bail pending appeal, *Ratu Jope Seniloli & Others v The State* Cr App No AAU0041/04S) the aspect of “likelihood of success” was interpreted as follows:

20 *“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 a single Judge on the application for bail pending appeal to delve into the actual merits of the appeal.”*

25 [12] In *Qurai v The State* [2012] FJCA 61 it was stated that:

30 *“I consider that the long standing requirement that bail pending appeal will only be granted in exceptional circumstance is the reason why “the chances of the appeal succeeding” under s 17(3) has been interpreted by the Courts so as to mean a “very high likelihood of success”.*

35 *“...The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed....”*

[13] As submitted on behalf of the Appellant Her ladyship Madam Justice Scutt in *Matai v The State* (2008) FJCA 89 has summarized the application of the law to the cases over the years. However, in that case having considered all the authorities and the grounds seeking bail, bail pending appeal was not granted to the Appellant. The submission on behalf of the Appellant that bail has been granted in several cases, which I do not wish to repeat, where charges of different types had been brought against Appellants do not necessarily mean that bail can be granted where there is an appeal. Each case has to be determined according to the circumstances of the case and in the cases cited in the written submissions filed on behalf of the Appellant, Court had been satisfied that the threshold that was required was met.

45 [14] The grounds of appeal urged in the application for leave to appeal as stated in my Ruling contain questions of mixed law and fact. A majority of them were based on the summing up of the trial Judge to the Assessors. Appellant’s Counsel has reiterated the same arguments regarding the summing up of the trial Judge to the Assessors. Those are questions which could be considered by a full court of the Court of Appeal when the appeal is heard. Justice Byrne in *Simon John Macartney v The State* Cr App No AAU0103 of 2008 in his Ruling regarding an

application for Bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial:

5 “[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for bail pending appeal should attempt even to comment on. They are matters for the Full Court”.

10 In my view the arguments of the Appellant regarding the directions to the Assessors in his summing up constitutes sufficient doubt as to justify the appeal and therefore would not be sufficient to bring the appeal within the parameters of the requirement of “highly likely to succeed”.

15 [15] Counsel for the Appellant has also taken up the position regarding the time that has been taken for the charges to have been framed against the Appellant and the period during which the events relating to the charges had occurred, which in my view would all be relevant in the arguments that would be placed before the full court when the appeal is heard.

20 [16] Counsel for the Respondent in his arguments took up the position that since the Assessors had brought in a unanimous verdict against the Appellant, it would negate the likelihood of the appeal being successful. It is my view that it is not an absolute rule but a matter that would be considered when the appeal is argued before the Full Court. Justice Byrne in his Ruling in *Simon John Macartney v The State* (supra) pending appeal commenting on the question of a unanimous verdict of the Assessors stated:

25 “That of course is not a decisive factor in itself but it illustrates one of the difficulties the Appellant faces in his attempt to persuade this Court that it should show him indulgence in granting him bail pending his appeal”

30 [17] The grounds urged in the leave to appeal application certainly are arguable but in my view they do not meet the threshold of being highly likely to succeed. If they do not meet that threshold which is thus not satisfying S.17(3)(a) the question arises as to whether the other grounds urged by the Appellant regarding the period of the sentence served by the time the appeal is heard and conditions regarding his health should be considered.

35 [18] In Ratu Jope Seniloli’s case (supra) it was stated that if s 17(3)(a) is not satisfied the grounds relating to s 17(b) and (c) are otiose. However, I wish to consider the other grounds set out in the application for bail of the Appellant to see whether the application of the Appellant would come within exceptional circumstances.

40 [19] The period of the sentence served by the time the appeal is heard has been considered in similar cases before this Court. In the Ruling in *Mahendra Motibhai Patel and Tevita Peni Mau v The State* Cr App No AAU0039 and Cr App No AAU040, the Appellants had been sentenced to 12 months and 9 months respectively, and it was likely that about half that period would have been served by the Appellant when their appeals were likely to be heard. Justice Marshall’s ruling stated that it was not a case where the chances of success were high and that taking into account s 17(3) (a), (b) and (c) that his decision was that there should not be bail pending appeal.

45 [20] The Appellant is 72 years old and has a health condition as seen from the medical reports filed with his application which reveal that he has Hypertension, Diabetes, gout and coronary artery issues. As stated by Justice Marshall in *Brian Singh v The State* Cr App AAU 0083 of 2010 health does not fall to be dealt with differently in the consideration of bail applications pending appeal than in

sentencing and that the Appellant's predicament regarding health matters did not impinge on his decision in refusing bail pending appeal.

5 [21] In the present instance as I have taken the view that the appeal though arguable does not reach the threshold of being highly likely to succeed, the matters referring to the period of the sentence likely to be served up to the hearing of the appeal and the conditions of health of the Appellant do not take the application any further.

10 [22] The other matters urged on behalf of the Appellant regarding the treatment meted out to him in the prison relate to administrative issues and the Prison Authorities should seriously consider the age of the Appellant and his health condition in placing him in a suitable environment while he is serving his sentence.

15 [23] The matters urged in relation to the Appellant not being able to instruct his Lawyers regarding the other case that is pending against him in the High Court, should be brought to the notice of the particular High Court by the Appellant to make suitable arrangements.

20 [24] Counsel for the Respondent brought it to the notice of Court that the Appellant had filed additional grounds of appeal subsequently of which he had not had adequate notice and objected to such grounds being considered when the appeal is heard. Since it is in the interests of justice to afford an opportunity to an Appellant who is convicted to adduce grounds of appeal which are open to him, I would leave it to the full court to consider accepting such additional grounds if they deserve any merit.

25 [25] In the above circumstances my ruling is that the Appellant's application for bail pending appeal is refused. I think it appropriate to take the necessary steps to have the Appellant's appeal heard at the next session of the Court of Appeal which I believe will be in February 2013.

30 **Orders of Court**

[26] The application of the Appellant seeking bail pending appeal is refused.

[27] The Appeal to be taken up for hearing at the next session of the Court Appeal in February 2013.

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Application refused.

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