



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL APPEAL JURISDICTION

Criminal Case No. 3 of 2020
*In the matter of an application for bail
pending appeal pursuant to the provisions of
the Bail Act 2018*

BETWEEN

Joshua Keppa

Applicant

And:

The Republic

Respondent

Before: Khan, J
Date of Hearing: 24 September 2020
Date of Ruling: 29 September 2020

Case may be cited as: *Keppa v The Republic*

CATCHWORDS:

Where the applicant was convicted and sentenced to a term of imprisonment – Where he filed an appeal against conviction and sentence – Where the applicant made an application for bail pending appeal under the Bail Act 2018 – Where the Court is required to consider section 17(3) of the Bail Act where bail can only be granted if all three conditions set out in section 17(3) are met.

APPEARANCES:

Counsel for the Applicant: Mr D Aingimea
Counsel for the Respondent: R Talasasa- DPP

RULING

1. On 27 July 2020 the applicant was convicted of one count of intentionally causing harm contrary to section 74(a), (b), (c)(i) of the Crimes Act 2016.
2. The charge alleged that the applicant caused serious harm to the complainant who was his de facto on 15 December 2019 by hitting her with a steel bar which was used as a weapon.
3. The applicant was brought before the District Court on 16 December 2019 when he was remanded in custody until 18 December 2019. On 18 December 2019 the applicant was granted bail on condition inter alia that:
 - a) He was not to communicate directly or indirectly with the complainant;
 - b) That he was not to come within a distance of 50 metres of where the complainant resided; and
 - c) He was to reside in Ubaoe District and not to change his address without leave of the Court.
4. After the judgement was delivered the Magistrate requested for a pre-sentence report and ordered prosecution to serve the victim impact statement on the applicant.
5. After those directions were made the prosecutor, Miss Serukai, informed the Court that the accused was living with the complainant and was therefore in breach of bail conditions. The accused accepted this and the Magistrate revoked his bail condition and remanded him in custody. I would like to point out that the Magistrate was aware of the reconciliation way back on 26 May 2020 when the complainant was brought to Court under a bench warrant and she refused to testify against the applicant and advised the Magistrate that: “because we have reconciled and because also of our children and I am willing to give another chance. People can change.”¹

BAIL APPLICATION

6. After the bail was revoked the applicant through his counsel made an application for bail pending his sentence.
7. The Magistrate having heard the application for bail rejected it and sentenced the applicant on 7 August 2020 to a term of 22 months imprisonment. He ordered that after serving 10 months of the sentence he should serve the remaining 12 months on probation. A further order was made that the time spent in custody whilst awaiting the sentencing report was to be deducted from the period of 10 months. The parties agree that he spent a total of 19 days in custody.

¹ Paragraph 1 of the Judgement dated 27 July 2020

NOTICE OF APPEAL

8. The applicant filed a notice of appeal on 13 August 2020 against both the conviction and sentence. On 7 September 2020 the respondent filed a cross appeal against the sentence having stated that it was lenient.

BAIL APPLICATION PENDING APPEAL

9. On 17 September 2020 the applicant filed a Notice of Motion for Bail pending appeal. The application was heard on 24 September 2020 and is opposed by the respondent.

RELEVANT LAW

10. S.48 of the Supreme Court Act 2018 provides:
 - 1) Where after conviction and sentencing to a term of imprisonment and the appellant files and serves a notice of appeal, the Supreme Court may order that the appellant be admitted to bail pending appeal with or without sureties.
 - 2) An appellant who is not admitted to bail pending the determination of his or her appeal may, at his own request, be treated in a like manner as a prisoner awaiting trial.
 - 3) When an appellant under this part is admitted to bail pending appeal, the time during which he is at large on bail shall be disregarded in computing the term of any sentence to which he or she is for the time being subjected to.
11. S.50 of the Supreme Court Act 2018 provides that; the Registrar shall:
 - a) Enter the appeal for hearing within 42 days of the notice of appeal being filed and the record of proceedings provided by the District Court; and
 - b) Serve on the parties a notice setting out the date and time of the hearing of the appeal.

BAIL ACT 2018

12. Section 17(3) provides:
 - (3) Where a Court is considering the granting of bail to a person who has appealed against conviction or sentence, the Court shall take into account the following:
 - a) The likelihood of success in the appeal;

- b) The likely time before the appeal hearing; and
- c) The proportion of original sentence which will have been served by the applicant when the appeal is heard.

SUBMISSIONS

13. Mr Aingimea submits that the applicant is required to satisfy the conditions set out in section 17(3) of the Bail Act. He submitted that the applicant has the likelihood of success in the appeal. In support of his submission he made reference to the following grounds of appeal:
- a) Res gestae – he submitted that the Magistrate erred in applying the principle of res gestae;
 - b) That the Magistrate erred in drawing inferences on circumstantial evidence which was contradictory and was not sufficient to prove the case beyond all reasonable doubt against the applicant.
 - c) He further submitted that the sentence was wrong in principle considering that the applicant was a first offender and he had reconciled with the complainant.

SENTENCE

14. On sentence Mr Aingimea submitted that out of 10 months sentence, the applicant would get one-third remission leaving a sentence of approximately 6 months and out of which a term of 19 days is to be deducted.
15. He further submitted that by the time the Court goes in recess for legal vacation in December 2020 the sentence would have been served.
16. Mr Talasasa in response submitted that under section 17(3)(a) it is not correct for the Court to take into account the likelihood of success in the appeal. He relied on the case of *Jojo Agege v The Republic*² where it is stated at [6] as follows:

[6] Here it is not palpably obvious that the grounds particularized in the notice of appeal will be established and will necessarily be such as to lead to the quashing of the conviction. The appeal substantially criticised the determination by the Magistrate of the evidence.

Clearly is undesirable for the court to comment on the issues arising in the pending appeal where much will turn on the evidence given at the trial. The court may accept that the appellant has an arguable case on merits intended to be advanced on appeal but can still conclude that none of them points overwhelmingly to the ultimate success of the appeal.

² NRSC 15 Criminal Case No. 8 of 2019 Vaai J dated 25 May 2019

17. In relation to the grounds of appeal Mr Talasasa submitted that the Magistrate was correct in applying the principles of *res gestae* in the circumstantial evidence. He submitted that in any event the appellant does not have a likelihood of success in the appeal.
18. In relation to the sentence he submitted that the respondent has filed a cross appeal and therefore urged the Court to grant an early date for the hearing of the appeal. He submitted that if the sentence is increased after the appeal is heard, then the applicant should serve all the sentence now, rather than be granted bail and then the sentence be increased subsequently.
19. He further submitted that the delay in hearing of the appeal does not mean that bail should be granted pending appeal.

CONSIDERATION

20. I will deal with Vaai J's observation at [6] of his judgement in *Jojo Agege v The Republic* where he states: "...the Court may accept that the appellant has an arguable case on merit intended to be advanced on appeal but can still conclude that none of them points overwhelmingly to the ultimate success of the appeal".
21. With respect I do not agree with J observation as section 17(3)(a) clearly states that the Court shall take into account: "the likelihood of success in the appeal".
22. I refer to the case of *El-Hilli and Melville v R*³ where it was stated by Court of Criminal Appeal at [25], [26], [27], [34] and [35] as follows:
 - [25] The comment made by the single Judge may have been based on a misunderstanding of a submission made in the Crown's bail chronology in which the observations made by Hunt CJ at CL in *R v Wilson* were set out. As the Court pointed out in *R v Antoun*, those observations did not reflect the majority position. Kirby P (with whom Sheller JA agreed) in *R v Wilson* did not adopt the proposition that the appeals success must be "virtually inevitable". His Honour referred to the need for there to be "something more than an arguable point" and suggested that the appeal "**must be most likely to succeed**". (emphasis added mine)
 - [26] In a case where the applicant relies exclusively on the strength of the appeal, the observations of Barr AJ in *Petroulious v R* and Kirby P in *R v Wilson* may apply and it may be necessary to establish that the appeal is "most likely" to succeed. When the merit of the appeal is relevant as part of a combination of factors, the preponderance of authorities suggest that the question is whether the proposed grounds of appeal are arguable or enjoy reasonable prospects of success: see *Peters v The Queen* at 310-311; *Marotta v The Queen* at 266; *R v Velovski* at [24]-[25].

³ [2015] NSWCCA 146 15 June 2015

[27] This approach also accords with the language of s 18(1)(j) of the Bail Act 2013 which provides:

“18 (1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:

(j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success.”

AN ASSESSMENT OF THE MERIT OF THE PROPOSED APPEAL

[34] The submissions for both applicants on the release application rely predominantly on the asserted strength of their appeals against conviction. They rely on the written submissions that have already been filed. It is difficult to make an assessment of the strength of the appeal on the limited evidence available. Nevertheless, an assessment, however imperfect, must be made in order properly to deal with the release applications.

[35] Ground 1 contends that the verdict is unreasonable and unable to be supported by the evidence. The merit of this ground is impossible to assess without recourse to the full record of the trial. However, on the basis of North DCJ’s judgment, there appears to have been ample evidence upon which it was open (in the relevant sense) to find the offences proved.

23. Vaai J also stated at [13] in *Jojo Agege v R* as follows:

[13] The principal concern in considering bail pending appeal has always been the overall interest of justice which requires that bail be granted in exceptional circumstances. The matters listed in section 17(3) Bail Act are some of the matters the Court takes into account, so that the court can go beyond and consider other matters which may amount to exceptional circumstances.

24. Again, with respect I disagree with His Honour’s observations as section 17(3) is very clear. It clearly states that the matters that the Court shall take into account are set out in section 17(3)(a), (b) and (c).

25. I have dealt with section 17(3) in great detail in *Kepae v The Republic*⁴ where I stated at [14], [15], [16] and [17] as follows:

[14] In dealing with the bail application under s.17(3) of the Bail Act the Court is required to take into account the following:

“s.17(3) The Court **shall take into account**” (emphasis added mine)

The matters to be taken into account are:

⁴ NRSC 37 Criminal Appeal 14 of 2019 dated 20 September 2019 Khan, J

- a) The likelihood of success in the appeal;
- b) The likely time before the appeal hearing; and
- c) The proportion of the original sentence which will have been served by the applicant when the appeal is heard.

[15] In s.3(b) the word 'and' appears at the end, and consequently all paragraphs (a), (b) and (c) are cumulative which means that all the conditions have to be fulfilled. I refer to Statutory Interpretation in Australia⁵ where at page 14 it is stated as:

“(i) *The implied conjunction.* Where a series of paragraphs within a section are either all cumulative or alternatives, the conjunction ‘and’ ‘or’ is included only at the end of the penultimate paragraph. Thus, the form

- a) ...
- b) ...;
- c) ...; or
- d) ...

means that the word ‘or’ is to be read at the end of each paragraph. Likewise, if paragraph (c) concluded with ‘and’, the conjunction shall be read as if it appeared at the end of each paragraph. A failure to understand this form of drafting led to much difficulty of interpretation of s.46(3) of the Income Tax Assessment Act 1936-1968 (Cth) that was finally resolved by the High Court in *Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106; see particularly Windyer J at 133.”

[16] At page 133 of *Finance Facilities Pty Ltd v FCT* Windyer J stated as follows:

“The words of s.46(3) are relevant in this case as follows:

“Subject to the succeeding provisions of this section, the Commissioner may allow a private company ... a further rebate in its assessment” - amounting another half, calculated as in s.46(2) of the Private Company dividends received-

‘if the commissioner is satisfied that –

- (a) a shareholder has not paid, and will not pay a dividend during the period commencing at the beginning of the year of income tax of the shareholder and ending at the expiration of ten months after that year of income to another private company;
- (b) [not relevant in the present matter]; or
- (c) having regard to all the circumstances, it would be reasonable to allow further rebate.’

⁵ DC Pearce and RS Geddes 3rd Edition

The several matters thus specified of which the Commissioner must be satisfied if he is to allow a further rebate are separate and alternative. The word 'or' establishes that. I emphasize this because I have seen several conditions set out in a textbook as if they must all be fulfilled. And it seems that the Commissioner may have taken the third, (c), as an overriding requirement: as if to allow the further rebate he had to be satisfied of (a) or (b) and (c). That is not so."

- [17] So, under s.17(3) of the Bail Act 2018 the Court shall take into account all the matters set out (a), (b) and (c) because the word 'and' appears at the end of (b). In practical terms if a Court is satisfied of condition (a) (likelihood of success – that there is good likelihood of success) then that alone will not entitle an applicant to bail. The Court is required to consider (b) (the time before appeal can be heard) and then move on to (c) (as to the proportion of the original sentence which will be served when appeal is heard). If the Court comes to the conclusion that the applicant will only serve a small portion of the sentence, then bail pending appeal will be refused.

WHETHER THE APPELLANT HAS LIKELIHOOD OF SUCCESS IN APPEAL

26. The Magistrate in his judgement at [18] discussed the principles of *res gestae* where the complainant stated to her sister (PW2) that accused assaulted her – which was hearsay evidence. For this statement to be admissible in evidence it has to be 'sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion'. The alleged incidence took place between 6-7pm⁶; police arrived between 7.30-8pm and the police officer observed her to be crying and she told her that her arm hurt; the police officer did not see any bleeding. Whereas the complainant's sister (PW2) stated that 'she looked like she was dead. She was bleeding from her body and she was being assisted when she got off by my mother who was holding her from the side'⁷. She met the complainant between 8-9pm. The issue on appeal would be whether the statement was made sufficiently spontaneously and sufficiently contemporaneously.
27. The Magistrate also made a finding of circumstantial evidence and rose numerous inferences which is tied up to the *res gestae* principle.
28. I am satisfied that the grounds of appeal discussed above has merit and the applicant has the likelihood of success in the appeal.
29. Unfortunately, because of the COVID 19 pandemic the whole Court system has been disrupted. The other judge is not able to travel into Nauru and I am the only judge on the island and it will not be possible to hear this appeal before the legal vacation in December 2020 by which time the appellant would have served his entire sentence.

⁶ [8] of the judgement dated 27 July 2020

⁷ [12] of the judgement dated 27 July 2020

30. In the circumstances the applicant is released on bail in the sum of \$1,000 in own recognizance to attend Court when required to do so and to surrender his passport into court.

DATED this 29 day of September 2020



Mohammed Shafiullah Khan
Judge

