

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 175 OF 2016

BETWEEN : VIJAY SINGH

Applicant

AND : STATE

Respondent

**Counsel : Mr. A. Naco for Applicant
Mr. A. Datt for Respondent**

Date of Hearing : 22nd November, 2016

Date of Ruling : 05th December, 2016

RULING

Introduction

1. The Applicant was charged in the Magistrates Court at Sigatoka with one count of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Decree 2009.
2. On 29th September, 2016, the Applicant pleaded guilty to the charge and admitted the summary of facts filed by the State.
3. On the 3rd October, 2016, the learned Magistrate sentenced the Applicant to seven months' imprisonment without a non-parole period being set.

4. Being aggrieved by the said sentence, the Applicant filed a petition of Appeal against his conviction within time on the grounds stated therein.
5. The Applicant has filed this Notice of Motion supported by an affidavit seeking bail pending appeal.
6. Both parties have filed written submissions and in addition to that they have made oral submissions. I have considered all facts and evidence placed before this Court in arriving at my decision.

Law Relating to Bail Pending Appeal

Bail Act

7. The presumption in favour of the granting of bail is displaced where a person has been convicted. [Section 3 (4) (b)]
8. Section 17 (3) of the Bail Act deals with bail pending appeal. The Section reads as follows;

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.*

Case Law

9. The law relating to bail pending appeal is settled. 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 on bail during the pendency of an appeal. It

is not sufficient that the appeal raises arguable points. The chances of the appeal succeeding factor in Section 17 (3) has been interpreted to mean a very 'high likelihood of success'.

10. In *Ratu Jope Seniloli and others v The State* (Crim App. No. AAU0041/04S. High Court Cr. App No.002S/003, 23 August 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 he 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 of itself be such an exceptional circumstance".

11. The fundamental difference between a person who has not been convicted and to whom the presumption of innocence still applies and a person who has been convicted and sentenced to a term of imprisonment was discussed in *Amina Koya v. State* (Crim App AAU0011/96) in following terms:

"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."

12. The Court of Appeal in *Balaggan v State* (2102) FJCA 100; AAU 48-2012 (3 December 2102) 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.

13. In *Reddy v State* [2015] FJCA 48; AAU6.2014 (13 March 2015), the President of the Court of Appeal Justice Calanchini discussed the scope of Section 17(3) of the Bail Act in a comprehensive manner.

"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 appellant 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.

In Apisai Vuniyayawa Tora & Others –V- R (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's case (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."

Grounds of Appeal

- a. That the Learned Magistrate erred in law when he failed to properly direct the Appellant to defer his plea pending the appearance of the Appellant's Legal Counsel.
- b. That the Learned Magistrate erred in law and in fact when he failed to await the Mitigation by the Appellants Counsel and proceeded only to hear the Appellant before passing sentence.
- c. That the Learned Magistrate erred in law and in fact when he failed to consider the medical report and the resulting mental condition of the Appellant and proceeded to allowing him to enter a Guilty Plea despite his physical condition showing his external injuries especially injuries to his head, face and eyes.
- d. That the learned Magistrate erred in law and in fact when he failed to consider the period the Appellant spent in custody from when the offence was committed to his appearing into court on the 3rd of October 2016 and its implications on the state of mind of the Appellant.
- e. That the conviction based on his early guilty plea was unsafe and unsatisfactory having regard to the entire personal and physical condition of the Appellant which was totally ignored and disregarded by the Learned Magistrate.

Analysis

14. The Counsel for Respondent submits at paragraph 3.5 that... *in order to successfully oppose the Applicant's application for bail pending trial (it should have been bail pending appeal), the Respondent needs to show that the three grounds under S. 17 (3) of the Bail Act 2002 lack merit **plus** there are no 'exceptional circumstances' in the Applicant's case"*

15. 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. Therefore, the court considering bail pending appeal is not precluded from looking beyond Section 17 (3) to see if there are other exceptional circumstances that warrant granting of bail. 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. Furthermore, if exceptional circumstances are present in favour of the applicant, then those circumstances should be viewed as factors for the Court to consider when determining the chances of success.

[a]. High Likelihood of Success in the Appeal

16. In ground 'a', the Applicant argues that the learned Magistrate failed to properly direct the Applicant to defer his plea pending the appearing of his Counsel.

17. The Applicant had been produced before the learned Magistrate on the 29th September, 2016. It appears from the case record that the learned Magistrate had explained the Right to Counsel. The Applicant waived his right and opted to defend himself. Right to counsel is not absolute and not something to be imposed but something to be exercised when it has been explained. If the Applicant had indicated to the learned Magistrate that he wished to retain a counsel and irrespective of that indication the learned Magistrate proceeded to take the plea, then he (the learned Magistrate) would definitely have violated the Applicant's right. Here the case is different. Since the Applicant had elected to defend himself, there was no need for the learned Magistrate to await any counsel. Therefore, there was no error on the part of the learned Magistrate. This ground hardly has a chance of success.

18. In ground 'b', the Applicant argues that the learned Magistrate failed to wait for the Applicant's Counsel to mitigate on the Applicant's behalf, and only heard Applicant's mitigation.
19. The Court record indicates that the Applicant having waived his right to Counsel had pleaded 'guilty' on 29th September 2016 and proceeded to mitigate himself. The learned Magistrate recorded what he had to say in mitigation and the matter was adjourned to 13th October, 2016 for sentencing. On the same day, the matter was called again at 11.15 am. presumably on a request by Applicant's newly retained counsel Mr. Robinson who applied for bail. Bail was granted. On the same day the matter was called again at 4 pm and his Counsel asked for time to file mitigation. The Court re-fixed the matter for 3rd October, 2016 for sentencing and asked the Counsel to file additional mitigation by 1 pm on 30th September, 2016.
20. The learned Magistrate had given adequate time to Defence Counsel to file mitigation. If the time given by Court was inadequate, Defence Counsel could have asked for more time. When the case was first called for sentencing in the morning his Counsel was not present and the Applicant, having filed additional documents in mitigation, informed Court that he could proceed without his Counsel. Nevertheless, the Court stood down the matter till 11.15 am. When the sentence was pronounced on 3rd October, 2016 the Defence Counsel was present but he had not asked for an extension of time.
21. When an accused decides to proceed without his Counsel, the Court would not interfere with his election. There is no evidence that the Applicant had wanted his Counsel to be present for further mitigation and the Court passively coerced the Applicant to proceed without his Counsel. Therefore, there was no error on the part of the Magistrate. This ground does not have a chance of success.
22. In ground "c", the Applicant argues that the learned Magistrate failed to consider the visible physical injuries on him, the medical report and the resulting mental condition when the learned Magistrate allowed the Applicant to take the plea.

23. It does not appear that the Applicant had any visible injuries on his face or head at the time he was produced before the Magistrate. If the Applicant was having blurry vision and a headache and as a result of which he was not mentally or physically fit, he could have informed the Magistrate to defer his plea on medical grounds. The Applicant was not a stranger to the Court system. According to the list of previous convictions and his own admission, he had been frequenting courts on previous occasions and was supposed to be familiar with Court procedures. His Counsel Mr. Robinson appeared at. 11.30 am., but there was no complaint of the Applicant's medical condition or that he had been unfit to take the plea and therefore his client be allowed to withdraw his plea.
24. The medical reports (V1) were not available to the Magistrate when the plea was taken on 29th September, 2016. Both medical reports had been prepared on 4th October, 2016 after he was sentenced on the 3rd of October 2016. After the plea was taken on 29th, the Applicant was granted bail. Therefore, the possibility of visible injuries coming into being after the Applicant was granted bail cannot be ruled out.
25. Furthermore, Applicant's conduct does not suggest that he was disoriented, disillusioned or not in a right state of mind at the time of the plea. He expressed his willingness to defend himself. Having listened to the charge read over to him, he pleaded guilty and admitted the summery of facts. He admitted seven previous convictions and mitigated for himself. He vividly remembered his personal information such as age and address. Therefore, his conduct appears to be consistent with that of a person having right state of mind to take a plea. Hence this ground is not one having high likelihood of success.
26. In ground 'd', the Applicant asserts that the learned Magistrate failed to consider the time the Applicant spent in custody from the time of the offending and his appearing in Court on the 3rd of October for sentencing and, its implications on the state of mind of the Applicant.
27. In 'further submissions' filed by the Counsel for Applicant, it is stated (in paragraph 5 and 6) that the Applicant would have been four days in police custody before being

produced before Court on 29th September 2016 and he was never taken for medical examination whilst in police custody.

28. According to the charge sheet, the offence was committed on 25th September, 2016. Nowhere in the affidavit is it stated that the Applicant was arrested on the day of the offending. There is no evidence that the Applicant was in the police custody for four days before being produced in the Magistrates Court. This Court can't speculate as to the date of arrest. If the Applicant was in police custody for four days without medical treatments he could have informed the Magistrate when he was produced in Court. Hence this ground is not one having high likelihood of success.
29. In final ground 'e', the Applicant argues that the conviction based on his early guilty plea was unsafe and unsatisfactory having regard to the entire personal and physical condition of the Appellant which was totally ignored by the learned Magistrate.
30. It appears that ground 'e' is nothing but a summing up of ground 'c' and 'd' and the position of this court *vis a` vis* those grounds has already been made clear.

[b] The likely time before the appeal hearing

31. The Applicant was sentenced on 3rd October, 2016. He filed his petition of Appeal on 12th October, 2016. The filing of submissions is already fixed for 5th December, 2016 and the hearing can be taken up soon after filing the submissions. Since this Court has already superficially considered the grounds of appeal for the purpose of this application, the Appeal could be disposed of within one to two weeks thereafter.

[c] Proportion of original sentence served when appeal is heard

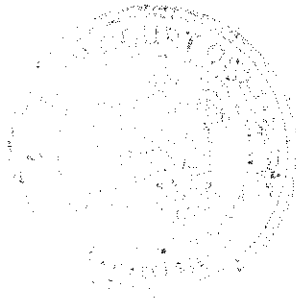
32. If both parties co-operate, the appeal could be heard within the time frame already discussed in paragraph 31. The Applicant would roughly serve only less than 1/3 of his

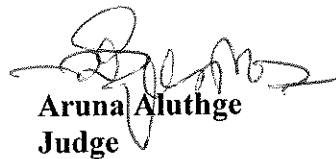
sentence by the time the substantive matter is heard and therefore, no prejudice will be caused to the Applicant.

[d] Exceptional Circumstances

33. Even if an applicant does not bring his application within Section 17 (3) of the Bail Act, there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal.
34. If exceptional circumstances are present, they should be viewed as factors for the Court to consider when determining the chances of success. In the process of determining the Applicant's chances of success within the scope of Section 17 (3) of the Bail Act, this Court already considered Applicant's alleged medical condition to see if it would have adversely affected Applicant's free will and equivocality of the guilty plea.
35. I will now look beyond the scope of Section 17(3) to consider whether there are exceptional circumstances that would warrant granting of bail to the Applicant.
36. The Applicant submits that he had facial injuries and a headache at the time of the plea. The medical report (V1) is relevant to those injuries. However, there is no evidence, medical or otherwise, that he is still suffering from any medical condition justifying his early release from the correction centre. The word 'exceptional' should be narrowly interpreted only to attract situations that are exceptional. Even if he had a medical condition and that medical condition could be attended to at the Correctional Centre itself, such a circumstance could not be considered as exceptional.
37. The medical report regarding Applicant's eyes has referred to the need for review after two weeks. It doesn't say that inward treatment is needed. If the OC of the Natabua Correctional Centre neglected a request made by the Applicant for medical treatment, he could be directed by this Court to facilitate medical treatment.

38. The Applicant further submits that he was looking after his eight year son who is an asthmatic patient in the absence of his wife who was away in the USA looking after the Applicant's mother-in-law who had suffered a stroke.
39. There is no medical report filed to substantiate the claim that Applicant's son is a chronic asthmatic patient. Furthermore, no medical evidence has been adduced to establish a nexus between the so called medical condition of his son and Applicant's absence from home.
40. The Applicant's contention that he has to work and meet his financial commitments is not considered by this court as an exceptional circumstance.
41. The Respondent has not filed an affidavit in response to Applicant's affidavit. However, the Respondent is relying on the facts contained in the case record of the Magistrates court of which judicial notice could be taken to ascertain the merit of this application. Therefore, the argument that the failure to file an affidavit in rebuttal should be deemed to constitute admission on the part of the Respondent does not hold water.
42. The Applicant has not effectually raised any personal matter that may have amounted to exceptional circumstances.
43. For the above reasons, the application for bail pending appeal is dismissed.




Aruna Aluthge
Judge

AT LAUTOKA
5th December, 2016

Counsel: Messrs Naco Chambers for Applicant
Office of the Director of Public Prosecution for Respondent