IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 135 OF 2017

BETWEEN	:	ASISH AMIT NAND
		Applicant
AND	:	STATE
		Respondent
Counsel	:	Mr. Iqbal Khan for Applicant
		Ms. S. Kiran for Respondent
Date of Hearing	:	17th August, 2017
Date of Ruling	:	21st August, 2017

RULING

Introduction

1. The Applicant was charged in the Magistrates Court at Nadi with one count of Obtaining a Financial Advantage by Deception contrary to Section 318 of the Crimes Act 2009.

2. The Applicant pleaded guilty to the charge on his own free will. On the 3rd July, 2017 he was sentenced to 24 months' imprisonment with immediate effect and and the balance imprisonment of 12 months was suspended for three years.

3. Being aggrieved by the said sentence, the Applicant filed a petition of Appeal within appealable time on the grounds stated therein.

4. Having filed the appeal, the Applicant filed this Notice of Motion supported by an affidavit seeking bail pending appeal.

5. Both parties filed written submissions and, in addition to that, they made oral submissions. I have considered all submissions made before this Court in arriving at my decision.

Law Relating to Bail Pending Appeal

Bail Act

6. The presumption in favour of the granting of bail is displaced where a person has been convicted. [Section 3 (4) (b)]

7. 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

8. 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'.

9. 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".*

10. 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."

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

12. 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'scase (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."

Analysis

The High Likelihood of Success in Appeal

13. The Applicant filed following grounds of appeal in case No HAA 74 of 2017.

a. That the Learned trial Magistrate erred in law and fact in ordering a sentence of 24 months imprisonment which is manifestly excessive and failed to consider that the facts of the case were not so grave as to amount to a harsh and severe penalty.

b. That the Learned trial Magistrate erred in law and fact in considering legal authorities which were not applicable/relevant to the charges before the Court and/or could have been distinguished to the facts before the Court and hence misdirected himself in taking into consideration the said legal authorities.

c. That the Learned trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

d. That the Learned trial Magistrate erred in law and in fact in not taking into adequate consideration the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.

14. In his appeal, the Applicant has taken up the position that the learned Magistrate fell into error when he was sentenced to 24 months' imprisonment.

15. The learned Magistrate suspended 12 months of the sentence for a period of 3 years. There can be no doubt that the 12 months' custodial sentence imposed on the Applicant is within the tariff range and quite lenient when considered the sophisticated nature of his offending.

16. The maximum sentence for the offence under Section 318 of the Crimes Act is 10 years' imprisonment.

17. Under the old Penal Code, the maximum sentence for the offence was a term of 5 years and the tariff was between 18 months to 3 years. In ***State v Miller*** [2014] FJHC 16; Criminal Appeal 29.2013 (31 January 2014), Madigan J set the new tariff for the offence under the Crimes Act proportionate to the higher maximum sentence. His Lordship observed:

> *"As this Court stated in **Atil Sharma** HAC122.2010, given that the penalty has doubled, a new tariff should be set as being between 2 years and 5 years with the minimum being reserved for minor spontaneous cases with little deception.....*
> *From two years to five years then is the new tariff band for these two offences (financial advantage and property) and any well planned and sophisticated deception will attract the higher point of the band or even more if that court gives good reason. It will of course be a serious aggravating feature if the person being defrauded is unsophisticated, naive or in any other way socially disadvantaged"*

18. The Applicant argues that the learned Magistrate misdirected himself as to the application of Section 4(2) (j) of the Sentencing and Penalties Act 2009 in failing to suspend the whole sentence.

19. In the mitigation submission filed before the learned Magistrate, Applicant's Counsel sought a non-custodial sentence on the basis that he is the sole breadwinner of the family and that the full restitution was done.

20. Shameem J followed Gates J (as he then was) in ***State v Mahendra Prasad*** [2003] FJHC 320; HAC0009T.2002S (30 October 2003) where Her Ladyship observed;

"Where there is an earnest and sincere wish to effect reparation to the victim and there is prompt an expression of remorse, a suspended sentence is not wrong in principle.

21. The learned Magistrate in his sentencing Ruling has considered if the Applicant's sentence could be suspended in light of above principle. However, he found Applicant not worthy of being given a suspended sentence in light of his previous criminal record and lack of genuine remorse.

22. At paragraph 15 and 16 of the Ruling, the learned Magistrate observed:

"The non- custodial sentence is not wrong in principle if there is full restitution. The accused paid the total amount at the registry. However, making payment only will not make any accused person entitled for the non-custodial sentence. The very purpose of imposing non-custodial sentence is to give another chance to an accused to reform himself. The accused is already on a non- custodial sentence for above two convictions which are within the 10 years period. It seems therefore, the purpose of non-custodial sentence is lost as the accused committed this sophisticated offence within three years. If the accused was really remorseful, he could have paid the total amount immediately in 2012 when he was charged and taken progressive approach. However, he pleaded not guilty and dragged the matter for long. …. "

…"I am of the view that, the court should strike a balance between the conflicting interests of the ;personal mitigation of the accused and need for punishment and the deterrence both special and general"

23. The Applicant first appeared in the Magistrates Court on 2nd July, 2012 and pleaded not guilty to the charge. He withdrew his 'not guilty' plea and pleaded guilty to the charge after nearly 4 years on 8th August, 2016. It was on that day he

deposited money in court. Therefore, learned Magistrate's' doubt as to genuineness of Applicant's remorse is not unreasonable.

24. The Fiji Court of Appeal in ***Sharma v State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) stated that even if there has been an error in the exercise of the sentencing discretion, the appellate court will still dismiss the appeal if in the exercise of its own discretion the court considers that the sentence actually imposed falls within the permissible range.

Exceptional Circumstances

25. Applicant is 34-year-old, married with two children and the sole breadwinner of the family. He has submitted his family circumstances as his 'exceptional circumstances'.

26. Applicant's wife has filed a Statutory Declaration wherein she has stated that her two children had undergone open heart surgeries at CWM Hospital and she herself had recently undergone tonsillitis operation at the same hospital. To support their medical condition, four documents issued by the hospital have been annexed to the affidavit filed by the Applicant.

27. According to Discharge Summaries, Applicant's children had been discharged from hospital long time ago in 2009 and 2011. They are currently being looked after by the mother. The medical reports filed do not suggest a serious medical condition although his son Abhinev is still under medication.

28. Applicant's wife has been discharged from CWM hospital on 2nd June, 2017. It appears that her medical condition is not that serious so as to have an unfavorable impact on her children's wellbeing.

29. According to AAN 3, the Applicant has recently entered into a three year contract with the Ministry of Justice for the position of Clerical Officer. It is highly unlikely that he can secure this position in light of the conviction recorded in this case on his own volition.

30. Therefore, I would not consider these situations to be exceptional circumstances.

31. The threshold for the likelihood of success in the appeal of Section 17 (3) (a) of the Bail Act 2002 is quite high. The test is "whether the appeal has a very high likelihood of success." Applying this test to the present case, the Applicant's grounds of appeal are not sufficient to meet that threshold. The grounds may be arguable but it is not sufficient to allow him to be on bail pending appeal.

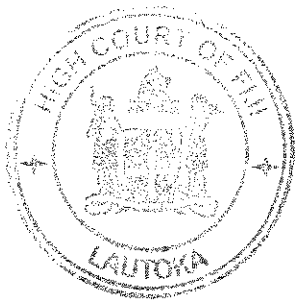
The likely time before the appeal hearing

32. The Applicant was sentenced on 3rd July, 2017. He filed his petition of Appeal on 21st July, 2017. The appeal hearing can be taken up soon after filing the submissions. Since this Court has already considered the grounds of appeal for the purpose of this application, the Appeal could be disposed off within one to two weeks thereafter.

Proportion of original sentence served when appeal is heard

33. If both parties co-operate, the appeal could be heard within the time frame already discussed. The Applicant would roughly serve only less than 1/3 of his custodial sentence by the time the substantive matter is heard and therefore, no prejudice will be caused to the Applicant.

34. For the above reasons, the application for bail pending appeal is dismissed.



Aruna Aluthge
Judge

AT LAUTOKA
21st August, 2107

Counsel: Iqbal Khan Associates for Applicant
Office of the Director of Public Prosecution for Respondent