

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 3 of 2014
(High Court HAC 107 of 2011)

BETWEEN : ABDUL RASHID

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P

Counsel : Ms S Vaniqi for the Appellant
Mr M Korovou for the Respondent

Date of Hearing : 30 October 2015

Date of Ruling : 27 January 2016

RULING

- [1] This is an application for bail pending appeal. The application is made pursuant to section 33(2) of the Court of Appeal Act Cap 12 (the Act) and comes before a justice of appeal pursuant to section 35(1) of the Act.

- [2] Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The discretion should be exercised in accordance with established guideline and in accordance with section 17(3) of the Bail Act 2002. The discretion must be exercised in a manner that is consistent with the requirements of the Bail Act.
- [3] The Bail Act distinguishes between a person who has not been convicted and who enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act the presumption in favour of granting bail has been displaced.
- [4] The factors that are relevant to the exercise of the discretion are to be found in the Bail Act itself and in the common law. Section 17(3) of the Bail Act 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.”*

- [5] Section 17(3) specifies the matters that must be considered by the Court. However the section does not preclude a court from taking into account any other matter that is relevant to the application. It is well settled in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In **Tora and Others -v- R** (1978) 24 FLR 28 the Court of Appeal stressed the 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.”

[6] In this case the Appellant was convicted in the High Court at Suva on two counts of rape following a trial before a judge sitting with three assessors. On 21 February 2013 he was sentenced to a term of imprisonment of 16 years on the first count and 13 years on the second count to be served concurrently with a non-parole term of 14 years. An application for an enlargement of time to file an application for leave to appeal was filed on 11 February 2014 on behalf of the Appellant. The delay in seeking leave to appeal was about 10½ months. The application was granted to enable the Appellant to appeal his conviction on ground 4 which concerned the directions given by the trial Judge to the assessors on consent without making any reference to the Appellant's defence that sexual intercourse did not take place. A further issue arose concerning the correct use of a specimen or representative charge for an allegation of multiple instances of rape in respect of the same complainant.

[7] The ground of appeal upon which leave has been granted is that:

“ ___ the Learned Judge erred in law and fact when at para.13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all, the defence being advanced by the Appellant at trial.”

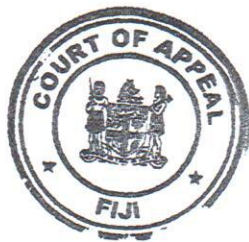
[8] It appears not to be disputed that in para.13 of his summing up the learned trial Judge did not expressly state this option as a possibility for the assessors to consider.

[9] Section 17(3) requires the Court to consider the likelihood of the appeal succeeding. On this matter the Court of Appeal observed in Seniloli and Others -v- The State (AAU 41 of 2004; 23 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 AAU 11 of 1996) is the function of the Full Court after

hearing full argument and with the advantage of having the trial record before it."

- [10] 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.
- [11] Although the ground of appeal is clearly arguable, I am not satisfied that the appeal can be said to have a very high likelihood of success. The reason for this conclusion is that even if the point were to be decided in favour of the Appellant, the application of the proviso to section 23(1) of the Act by the Full Court remains as an option with the result that the appeal would not succeed.
- [12] It is noted that leave to appeal against sentence was refused by the single judge in his Ruling delivered on 24 April 2015.
- [13] The application for bail pending appeal is dismissed.



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL