IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Bail Application No. 8 of 1982

Between :

1. APIMELEKI HADRAITABUA
2. TANIELE TUKAI — Appellants

- and -

DIRECTOR OF PUBLIC PROSECUTIONS — Respondent

Iqbal Khan for the Appellants.
V. J. Subrawal for the Respondent.

J U D G M E N T

This is an application for bail pending the hearing of an appeal against the judgment of the Supreme Court delivered on 25th of May, 1982 convicting each appellant of rape and sentencing him to 6 years' imprisonment. The grounds argued for both appellants were :

1. As the appeal cannot be heard before November next each appellant would have served a substantial portion of his sentence before that hearing;

2. That there was every likelihood that the appeal would succeed.

A further ground was submitted on behalf of second appellant to the effect that the learned trial Judge had misdirected the assessors as to the probative value of the appellant's interview statement to the police.

The first ground cannot succeed. As is pointed out in Watton (1979) 68 Cr. App. R. 293 :

> " The only ground for the granting of bail on an appeal to the Court of Appeal.....is the existence of special circumstances, i.e. where it appears, prima facie, that the appeal is likely to be successful, or where there is a risk that the sentence will be served by the time the appeal is heard. "

Counsel for appellants cited a number of judgments granting bail to convicted persons because of delay in the hearing of the appeal, when not the whole sentence would have been served before the appeal was dealt with, but where a substantial portion of the sentence would have been served. I have carefully perused the authorities quoted in support of this argument but they all refer to sentences very much shorter than the 6 years to which the appellants were sentenced. As was said in Selkirk v. R. 18 Cr. App. R. 172 :

> " In the case of a short sentence, where an appeal cannot be speedily heard, the Court may grant bail".

It cannot be said that a delay of five months can be considered a substantial portion of the sentence imposed. It is to be noted that in two of the cases quoted, where bail was granted, Newbury v. R. 23 Cr. App. R. 66 and Charavanmuttu 21 Cr. App. R. 184, the Director of Public Prosecutions did not oppose the granting of bail. Here the DPP does oppose it.

Accordingly, the first ground falls.

The second ground put forward is that the appeal has an excellent chance of success. In support of this contention it was submitted that the learned trial Judge in his direction to the assessors failed to explain the necessity for "proof

of the mental element", which was the basis on which this Court of Appeal had quashed the conviction in Ilaitia Korocirl v. R., Appeal No. 43 of 1979, on which counsel relied. In that case the learned trial Judge had said

> " If you are satisfied beyond reasonable doubt that on the night in question he had carnal knowledge of Alumita without her consent that is rape and your verdict will be guilty. "

In his judgment Henry J.A. pointed out that there must be a clear direction on the mental element, that is to say before an accused can be convicted of rape it must be proved that he knew the complainant had not consented and intended to have sexual connection with her notwithstanding her objection. But in this present case the learned trial Judge in the course of his summing up directed the assessors in these terms :

> "The burden of proving rape rests upon the Prosecution who have to show that sexual intercourse took place, that the complainant did not consent, and that each accused knew that she objected but still had connections with her. "

It is clear that in the present case there was a definite direction on the mental element. It has therefore not been shown that the appeal may well succeed on this point.

The argument for the second appellant consisted of all that had been urged on behalf of the first appellant, with one additional ground : that the learned trial Judge was in error in directing the assessors that second appellant's statement to the police could be corroboration of the complainant's allegation of rape; when in effect second appellant had denied committing the offence. Actually what the learned trial Judge said was :

" The accused 2, Taniele, when formally charged on 17.11.81 allegedly made the statement no. 9 in which he denied having sex with Lowata. "

The fact of his denial was thus made clear to the assessors.

Counsel argued a number of other points which in his submission tended to show that the learned trial Judge had made errors or omissions in his summing up. It should be made clear that it is not within the province of the Court on this application to give a ruling on the effect of the issues raised. All that is necessary on this application is to decide whether they show on the face of it that the appeal has every chance of success. In this respect reference may be made to Davidson 20 Cr. App. R. 66 where the Court of Criminal Appeal stated in the course of its judgment at p.67 :

" This Court has repeatedly laid it down that it will not grant bail to a prospective appellant except in very special circumstances.....we are not aware of any special circumstances in this case. "

Yet in that case the appeal was allowed and the conviction quashed because of what is referred to as "a lapse into inadequacy" in the summing-up.

The points made by counsel for the appellants have been very carefully considered, and the authorities cited by counsel have all been studied. Full consideration of the argument and of the cases quoted, has not in my opinion established that, prima facie, the appeal is likely to succeed. That being so, the very exceptional circumstances necessary to justify an order granting bail pending appeal

cannot be said to exist.

Accordingly the application is dismissed.

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Judge of Appeal

Suva,

17 June, 1982.