

IN THE COURT OF APPEAL, FIJI AT SUVA

CRIMINAL APPEAL NO. AAU0060 OF 1999

IN THE MATTER OF AN APPLICATION for
Bail Pending Appeal from the High Court at
Suva in Criminal Case No. HAC008 of 1998

BETWEEN: MARK LAWRENCE MUTCH *Applicant*

AND: THE STATE *Respondent*

Mr Mehboob Raza & Z. Sahu Khan for the Applicant
Ms R. Olutimayin with Mr Daniel Goundar for the Respondent

DECISION

(Application for bail pending appeal)

This is an application for bail pending the hearing of an appeal against a Judgment of the High Court delivered on 11 November 1999, convicting the Applicant on two counts of Rape and four counts of Indecent Assault contrary to Sections 149 and 154(1) respectively of the Penal Code (Chapter 17).

In convicting the Applicant the Learned Judge accepted the unanimous opinion of the assessors who assisted him in the trial. The opinions were given after a fairly lengthy summing-up running into some thirty-seven typed pages.

Following upon the conviction and on 15 November 1999 the Learned Judge sentenced the Applicant to seven years imprisonment on each of the two counts of Rape and four years on each of the four counts of Indecent Assault, all sentences to be served concurrently. Effectively, the Applicant was sentenced to seven years imprisonment.

On 26 November 1999 the Applicant filed his Notice of Appeal under Section 21 of the Court of Appeal Act (Chapter 12). The Notice of Appeal purports to be an appeal from the decision of the High Court on questions of law alone, and sets out some six broadly stated and separate Grounds of Appeal, with particulars set out in some considerable detail in respect of each of those grounds.

Briefly the Notice of Appeal alleges that the Learned Trial Judge erred in not upholding a submission of no case to answer because at the end of the Prosecution

case, such evidence as it had adduced was discredited and therefore worthless. that he misdirected the assessors and himself on the issue of corroboration, that he erred in referring to certain similar fact evidence given by various witnesses as evidence amounting to corroboration or "type of corroboration" (in the Learned Judge's words), that he misdirected himself and the assessors on the question of burden and standard of proof, that he misdirected himself and the assessors "on law and facts" when referring to the sworn testimony of two of the complainants given at the Preliminary Inquiry "as the two complainants' police statement", and finally that the summing up was "bias and prejudicial" and failed to put adequately the defence case on each of the six counts, to the assessors particularly in view of the fact that there was a delay of some eight days between the final addresses of Counsel and the Summing-up.

A perusal of the Notice of Appeal and the particulars provided in respect of each of the Grounds of Appeal makes it obvious that this is not an appeal on questions of law alone, but on question of facts and of mixed questions of law and fact. This became even more obvious during argument in support and in opposition to this bail application. Learned Counsel for the Applicant spent considerable time and effort in attacking the credibility of the complainants who gave evidence in respect of each of the six counts and other witnesses called to give similar fact evidence in support of the

prosecution case.

In order to sustain an appeal on question of facts alone, or mixed questions of law and facts the Applicant needs to obtain either the leave of this Court, or the Certificate of the Judge who tried him certifying this as a fit case for appeal against his conviction. (Section 21(2) Court of Appeal Act.)

Unfortunately, the Applicant has neither obtained the Certificate of the Trial Judge nor has he obtained the leave of this Court to appeal against his conviction on questions of fact or mixed questions of law and facts. Mr Mehboob Raza who appeared in support of the application before this Court explained that he intends to apply for such leave once the record of the hearing in the High Court is made available to him.

I am therefore obliged to consider this application for bail on the basis that the appeal is restricted to questions of law alone.

The granting of bail pending an appeal is entirely discretionary. The Court will grant bail only in exceptional cases. In order to decide if bail should be granted in a

given case the Court is required to assess the Applicant's prospects of success on appeal. Bail will be granted to an Applicant in rare instances only, and only where it is apparent that the Applicant has good prospects of success and that the sentences appealed against are comparatively short.

Section 17(3) of the new Bail Act 2000, which came into effect on the 12 day of May 2000, says that when considering the granting of bail to a person who has appealed against conviction or sentence the Court must take into account three matters first, the likelihood of success in the appeal, second the likely time before the appeal hearing, and third the proportion of the original sentence which will have been served by the applicant when the appeal is heard.

In Sharda Nand v Director of Public Prosecutions FCA Bail Application No. 3 of 1979 Marsack J. A. said:-

"....it must be clear that it is not within the province of the Court on this application to give a ruling on the legal effect of the issues raised. All that is necessary on this ground is to decide whether they show, on the face of it, that the appeal has every chance of success".

It became clear during arguments before me that parts of the Learned Judge's summing-up both on the question of corroboration and similar fact evidence, may be

open to criticism, and Mr Mehboob Raza dwelt on these two issues at some length. He clearly raises arguable grounds of appeal, but that is not the same as to say that the appeal has every chance of success.

In this respect I am mindful of the fact that it is not for me, sitting as a single Judge of the Court to delve into the merits of the appeal in depth. That is the function of the full Court, which will have to make a decision after perusing the record of evidence kept by the Trial Judge, and after listening to arguments from both sides. My task at this stage is rather more limited, and that is to decide if prima facie this is an appeal that has every chance of success.

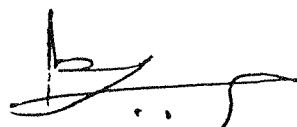
The burden of satisfying the Court that the appeal is one that has every chance of success rests with the Applicant, and after a careful consideration all the Grounds of Appeal, involving questions of law, and considering all that Mr Mehboob Raza, Learned Counsel for the Applicant, has urged upon the Court I am far from satisfied that this appeal is one that has every chance of success.

The Applicant was convicted on 11 November and sentenced on 15 November last. In the normal course of events the appeal should be heard early next year. I do

not consider the delay to be such as to justify granting of bail, and the Applicant will have served a little over a year of his seven-year sentence by early next year. In this regard it is pertinent that there is a cross appeal by the Director of Public Prosecutions against the sentence imposed by the Learned Trial Judge and who says that the sentence is inadequate given all the circumstances of the case, and is seeking its enhancement.

The application for bail is refused.

Dated at Suva this 2nd day of April 2000.



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Justice Jai Ram Reddy
President, Court of Appeal, Fiji

