IN THE FIJI COURT OF APPEAL
AT SUVA

Miscellaneous Appeal No. 001 of 2005

BETWEEN: JOSELYN DEO

Applicant

AND: THE STATE

Respondent

M Raza for appellant
Ms Prasad and Mr P. Bulamainaivalu for respondent

Hearing: 8, 12 and 13 April 2005
Ruling: 14 April 2005

RULING

The appellant was convicted on her own plea in the Magistrates' Court of 15 counts of forgery, falsification of accounts, obtaining money on a forged document and embezzlement. The total sum the appellant obtained by these offences was $15,128.00. She was sentenced to a total of 2 years imprisonment but it was suspended for 3 years.

The State appealed to the High Court against that sentence on the grounds that it was wrong in principle and was manifestly lenient in the circumstances of the case. In a ruling on 23 March 2005, the learned judge re-assessed the length of the sentence and reduced it to 18 months imprisonment but found there were no exceptional circumstances to justify suspension.

The appellant filed notice of appeal to this Court on 29 March 2005 on the grounds that the learned judge erred in law:

1. in allowing the appeal and substituting for the suspended sentence passed by the magistrates' court a term of 18 months imprisonment, without allowing the appellant to show cause as to why this should not be done;

2. when the discretion of the learned trial magistrate was over-turned.

The appellant committed the frauds over a period of five months up to December 2001 whilst she was an accounts officer with the Unit Trust of Fiji. The facts given in the Magistrates' Court showed that she was interviewed by the police in December 2001 and July 2002 and denied the offences on both occasions. It is stated she was then charged on 30 August 2001 (which should, presumably, be 2002) but the record shows her first appearance before the Magistrates' Court was not until February 2004. No explanation has been given for the delay. Initially she pleaded not guilty but, following a change of solicitor in late March 2005, she indicated, on 19 July 2004 that she would be changing her plea and did so on 25 August 2004. On 23 September 2004 her solicitor informed the court that a cheque for the full sum stolen had been paid into his trust account and she was sentenced on 6 October 2004.

The appellant is now 28 years old and counsel advised this Court today that she was employed at USP from the time she received the suspended sentence until she was taken into custody on 23 March 2005 following the High Court decision. It appears that, if granted bail, that employment should still be available to her.

As the appellant has been convicted, the presumption of bail has been displaced and the burden is on the appellant to satisfy the court that it is a proper case for the granting of bail.

By section 17(3) of the Bail Act, the court must consider the likelihood of success in the appeal, the likely time before the appeal will be heard and the proportion of the original sentence which will have been served by the time of the appeal. The latter two are dependent on the first but, in the present case, the appeal will be heard in July by which time the appellant will have served one third of her effective sentence so I do not consider those grounds advance the appellant's application.

Passing to the likelihood of success in the appeal, of the two grounds advanced by Mr Raza for the appellant, the first has no substance. It is apparent from the record that the prosecution submission was firmly based on the suggestion that suspension was wrong in

principle. It was counsel's duty on behalf of his client to deal with that submission and there is nothing to suggest he was prevented from doing so. Mr Raza explains that his second ground questions the manner in which the learned judge approached the appeal. Instead of simply reconsidering the sentence, she should have looked at the basis upon which the trial magistrate had exercised his discretion and only allowed the appeal if he had done so incorrectly. I accept that is an arguable ground of appeal but that is not sufficient in itself. The appellant must satisfy the Court that the appeal has every chance of success and I do not consider that is the case here.

It has long been the rule that the Court will only grant bail during the pendency of an appeal in exceptional circumstances which are such as will drive the Court to the conclusion that justice will only be done by the grant of bail.

At the hearing on 12 April 2005, I refused the application and stated I would give my reasons in writing. However, as I considered the case after counsel had withdrawn, I decided it was necessary to hear counsel further on the meaning and effect of section 22(1A)(b) of the Court of Appeal Act. I therefore asked the Registrar, the same day, to advise counsel that I was recalling my oral decision and would hear them further the following day, 13 April 2005. I have now done so.

Section 22 (1A) of the Court of Appeal Act provides:

> "No appeal … lies in respect of a sentence imposed by the High Court is its appellate jurisdiction unless the appeal is on the ground –
> (a) that the sentence was an unlawful one or was passed in consequence of an error of law; or
> (b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence."

Although paragraph (b) is described in the section as a ground of appeal, it is not. It simply describes a particular situation which gives a right to appeal. The bare fact that a custodial sentence has been imposed in place of a non-custodial sentence is not in itself a ground upon which, if found, the court can set the sentence aside. This is in contrast to

the two grounds in paragraph (a). If the court finds that the sentence was unlawful or was passed in consequence of an error of law, that, in itself, will allow the court to set it aside.

Once the circumstances in paragraph (b) arise, there would appear to be an unrestricted right of appeal against sentence. The restrictions in paragraph (a) do not apply so there is a right to appeal against the imposition of a custodial sentence on any proper grounds such as, presumably, that it was excessively harsh or unjustified in view of the personal circumstances of the appellant although an appeal based solely on grounds of mitigation is not otherwise permitted under the section. However, it is not for me sitting as a single judge of the court to evaluate such grounds

The inclusion of paragraph (b) appears to acknowledge that the inherent severity of such an order is sufficient to require a special right of appeal and it would seem logical that such an appeal may involve consideration of personal, mitigating circumstances. Where a non-custodial sentence is passed in the trial court, the person sentenced has an opportunity, should he wish to take it, to re-order his life and rehabilitate himself. If the suspension is then removed by an appellate court and that decision is, in turn, appealed, it will frequently only be by a consideration of matters of mitigation that the order of immediate imprisonment can be challenged. Thus, in an appeal under paragraph (b), it will be open to the Court to hear grounds of appeal based on matters of mitigation which would not be acceptable in appeals under paragraph (a).

Exceptional circumstances sufficient to justify the granting of bail pending appeal are rarely found but, where they are, they frequently arise from or relate to the appellant's personal circumstances. The question the court must ask itself is whether they can be sufficient to merit the grant of bail even if the appellant has not satisfied the court that his appeal has every chance of success. I accept that where there is, at the highest, only a remote chance of success, the granting of bail would certainly not be in the interests of justice. On the other hand, if the appeal is one with arguable grounds of appeal, the personal circumstance of the appellant may be sufficiently exceptional that justice will only be served by the grant of bail.

Where the appellant has, on receiving the opportunity of a suspended sentence, grasped it by taking steps, before he has knowledge of the prosecution appeal, to attempt rehabilitation, the removal by an appellate court of that opportunity might amount to an exceptional circumstance. Should the appeal to this Court restore the non-custodial sentence, a refusal of bail pending that appeal will, in itself, have negated the effect of a possible ground of appeal relating to the personal circumstances of the appellant. That is a consequence which will only apply in cases under paragraph (b).

This is not to say that every such appellant should therefore be granted bail pending appeal. The test will be whether, in the particular circumstances of the case before the Court, the appellant has satisfied the Court that the steps he has taken to order his life are genuine and aimed at rehabilitation to such an extent that the justice of the case requires the court to allow them to stay in place until the final determination of any appeal which may have been filed in this Court.

Mr Raza urges the Court to consider there are such circumstances here. The unexplained delay of 18 months in bringing the case to court resulted in the appellant having to live with the spectre of a likely custodial sentence. She had, of course, lost her job as a result of these offences but the uncertainty of her situation was such that it would be very hard to live a normal life. Once the magistrate had passed a suspended sentence, the uncertainty had been removed and she was able to take a job. The result of the appeal by the prosecution has placed that in peril and Mr Raza cites the recent High Court appeal of *Raymond Roberts v State* in which the same learned judge, in dismissing the prosecution's appeal against sentence, stated:

> "Further, the offences were committed in 2001 and he has suffered the consequences of his offending (both financially and socially) while his case was pending in the Magistrates' Court. To impose a custodial sentence now, when he has begun to pick up the pieces of his life would lead to injustice."

The facts, of course, differ from one case to the next and comparisons are of limited value. The exceptional facts of Robert's case were sufficiently compelling for the judge to accept that he had undoubtedly shown genuine remorse and contrition. However, Mr Raza suggests that there are similarities and similar comments could undoubtedly be applied to the present case in relation to the consequences of an immediate custodial sentence on the appellant's attempts to rehabilitate herself.

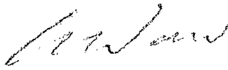
The imposition of a suspended sentence removed the uncertainly under which the appellant had lived for nearly 3 years since the offences and gave her the opportunity to try and pick up the pieces of her life – an opportunity she immediately took by taking employment. Is the retention of such employment, counsel asks, such a circumstance that justice will only be done if bail is granted?

Ms Prasad for the respondent has pointed out that the loss of employment is a consequence suffered by most prisoners and it should not be raised to the status of an exceptional circumstance here. She is clearly correct but, with respect, that is a different point. Whilst the direct effect of the imposition of an immediate custodial sentence is the loss of the employment as it would be in many cases, the issue here is the consequences which flow directly from the nature of a case under paragraph (b). As such an appeal may be based on mitigation, the consequences of the custodial sentence will be to prevent that ground being advanced. Where the employment has been obtained as a step to rebuild the appellant's life because the magistrate's order gave the appellant hope that she could do so, justice may require her to be able to maintain that situation until her rights of appeal have been exhausted. It is only in an appeal under paragraph (b) that grounds based purely on mitigation can be advanced and so it is a factor which can only be relevant in an appeal under this particular provision.

It is not for a single judge to consider the merits of the ground itself. That is for the Court. I need only consider it sufficiently to determine whether there is material in this case which could lead to a conclusion that justice can only be served by the grant of bail.

I have found that the appellant has an arguable ground of appeal but not such that there is every chance of success. I do not know the extent to which there may be additional grounds based on the appellant's personal circumstances but that is a likely result of this ruling. However, the material before me satisfies me that, following a very long delay before the first court appearance, the appellant has taken an important step to rehabilitate herself and did so as a result of the magistrate's order. If her appeal to this Court should be successful, refusal of bail at this stage will mean that she will have lost the benefit of that step. On the facts in this case, I consider that amounts to an exceptional circumstance which drives me to conclude that, should the appeal be successful, the refusal of bail at this stage will have been unjust. That can only be avoided by the grant of bail.

I grant the application. The appellant will be bailed to the first day of the July session and I shall hear counsel on the appropriate terms.



[GORDON WARD]
PRESIDENT
FIJI COURT OF APPEAL

14th APRIL, 2005