

IN THE COURT OF APPEAL, FIJI ISLANDS  
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0014 OF 2007

BETWEEN : ORISI TAMANI Appellant

AND : THE STATE Respondent

BEFORE THE HON. JUDGE OF APPEAL MR JUSTICE JOHN E.  
BYRNE

Counsel : S. Valenitabua for the Appellant  
: Ms A. Prasad for the Respondent

Date of Hearing: 15<sup>th</sup> November 2007

Date of Ruling : 22<sup>nd</sup> November 2007

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**R U L I N G**

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[1] The Appellant is currently a prisoner at the Naboro Minimum Security Prison having been imprisoned there for a term of 5 years with effect from the 28<sup>th</sup> of November 2006.

[2] He was charged with two counts of "**Robbery With Violence**" and was tried and convicted in the High Court in Lautoka (Govind J.) in relation to the events.

[3] During his trial he had given oral evidence that:

- a) *He and others were taken from the Namaka Police Station to the Nadi Magistrate's Court on the 7<sup>th</sup> of February 2003;*
- b) *Before the Magistrate's Court he complained of various assaults on him by police officers at the Namaka Police Station;*
- c) *The Magistrate ordered that he be remanded at the Lautoka Prison and that he be medically examined before being taken on remand;*
- d) *Instead of the police officers taking him to be medically examined they took him directly to the Lautoka Prison;*
- e) *The police officers were Manoa Raqio, Senitiki Talebula, Ilai Waqanidrola and Delai;*
- f) *He was taken from the Nadi Magistrate's Court to the Natabua Prison for remand with his co-Accused Rodney Silikula;*

*g) At the Lautoka Prison Rodney Silikula was admitted while the Appellant was refused admission;*

*h) He claims this was because he had not been medically examined; the prison officers also allegedly saw injuries on him.*

- [4] The Police witnesses at the trial denied this and Govind J. accepted their denial and their version of the events.
- [5] In the last few months the Appellant's solicitor has obtained possession of a copy of a Memorandum from the Officer-in-Charge of the Minimum Security Prison at Naboro. The Appellant annexes this document to an Affidavit which he has sworn on 1<sup>st</sup> November 2007 in support of his application for bail pending hearing of his appeal.
- [6] The Memorandum states that the Appellant was "*refused admission by the gatekeeper officer in Lautoka Prison on 7/2/03 because of physical injuries sustained that appeared on their bodies*". The Appellant states that the Memorandum is a confirmation of the evidence which he had adduced in the High Court as to why he was refused admission to the Lautoka Prison. He says it is fresh

evidence of communication between the two Officer-in-Charge of the Naboro and the Lautoka prisons respectively. He says this evidence could not have been obtained prior to the trial because the Memorandum had not existed at the time.

- [7] He says he believes that had the Memorandum been available prior to the trial, it could have had a substantial influence on the result of his trial within-trial let alone his substantive trial in the High Court.
- [8] He also believes that the Memorandum is apparently credible in that it is a communication between two superior officers of the two prisons. He therefore argues that the Memorandum should be included in the record of the High Court of Fiji for the purposes of his appeal.
- [9] He has been informed by his solicitor, correctly in my view, that whether he should be granted bail as a convicted and sentenced person who is appealing against the conviction and sentence requires this Court to 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 would have been served by the time his appeal is eventually heard.*

[10] The Appellant believes that he has a very high likelihood of success in his appeal because in the Court below on the trial and Voir Dire he testified:

- a) *That he did not take part in the robbery at the Tanoa Hotel in Nadi;*
- b) *That he only made the purported confession to the Police during his caution interview after he was abused and assaulted by police officers;*
- c) *He has suffered injuries as a result of the assaults;*
- d) *The prison officers at Lautoka Prison saw his injuries and refused to admit him to that prison.*

[11] He alleges that the above evidence constitutes sufficient grounds for excluding his caution interview as evidence in his trial in that his statement was given involuntarily.

[12] I was told by his counsel that the reason why Govind J. admitted his confession was that nobody who was not at the scene of the crime could have given such a detailed description of the crime. I do not have the trial Judge's Summing Up before me nor his reasons for refusing to disallow the confession but at this stage, and for present purposes, I am prepared to accept what counsel says is true. Certainly counsel for the Respondent did not contest this claim.

[13] The Applicant states in his Affidavit that he was advised by the prison officers that he has been granted a remission of 20 months from his sentence and that therefore he needs to serve only 3 years 4 months in prison. With respect I think that in all probability, the prison officers qualified their statement to him by saying that a remission of 20 months was not automatic but was conditional on his being of good behaviour during his incarceration.

[14] It is possible that this appeal could be heard in the February 2008 sittings of this Court by which time the Appellant would have served 1 year and 2 months of his sentence. If, as I think is more likely, his appeal will not be heard until the April session of the Court beginning on the 1<sup>st</sup> of April, the Appellant would have served 1 year

and 4 months of his sentence. Because of this the Appellant argues that if the Court of Appeal accept the Memorandum then he has a very high prospect of success in his appeal and therefore it should not be necessary to keep him in prison pending his appeal.

[15] With respect I think this ignores the grounds on which bail is granted to a convicted person pending an appeal. In my Ruling on the 4<sup>th</sup> of October 2007 in Criminal Appeal No. AAU0045 of 2007, **Saula Lalagavesi v. The State**, I reviewed some of the authorities on the question of when bail should be granted pending an appeal against sentence.

[16] I referred particularly to the Decision of Ward P. in Criminal Appeal No. AAU0041 of 2004, **Ratu Jope Seniloli & Ors. v. The State**, given on the 23<sup>rd</sup> of August 2004. It is always important to remember the terms of Section 3 and Section 17 of the Bail Act, particularly Section 3(4)(b) and Section 17(3)(a).

[17] Section 3(4)(b) states that the presumption in favour of the granting of bail is displaced where the person seeking bail has been convicted and has appealed against the conviction.

[18] Section 17(3)(a) states that when a Court is considering the granting of bail to a person who has appealed against a conviction or sentence the Court must take into account

- a) *The likelihood of success in appeal;*
- b) *The likely time before the appeal hearing;*
- c) *The proportion of the original sentence which would have been served by the Applicant when the appeal is heard.*

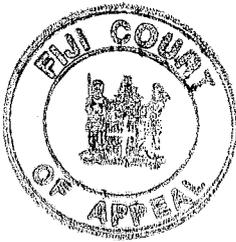
[19] In his Ruling in Ratu Jope Seniloli Ward P. referred to several of the relevant authorities but before doing so said that it was clear from the terms of sub-section 3 of the Bail Act that it is mandatory for a Court, when considering bail pending appeal, to take into account those three matters but also any other matters which it considered were properly relevant. He said, and I agree, that the general restriction on granting bail pending appeal as established by the case law of Fiji and many other common law jurisdictions means that it may only be granted where there are exceptional circumstances. Some of these would be the Applicant's personal circumstances such as extreme age and frailty or some serious medical condition.

[20] The President then referred to three cases, the Decision of Gould V.P. in Apisai Tora v. The Queen V.R. [1978] 24 FLR 28, the Decision of Tikaram P. in Koya v. State [1996] AAUOO11/96 and Reddy P. in Mutch v. State [2000] AAUOO60/99.

[21] It is clear from the authorities that the Courts in Fiji have long required a very high likelihood of success in the appeal. It is not sufficient that the appeal raises arguable points and it is not for a single Judge on an application for bail pending appeal to delve into the actual merits of the appeal.

[22] Certainly I think the Appellant has what is perhaps a strong arguable point of law but that in itself is not sufficient. Were there to be a delay of some months later than the April 2008 session of the Court I would be inclined to look with some favour on the Appellant's application and perhaps grant bail subject to certain rigorous conditions, such as frequent reporting to a Police Station. But I express no considered opinion on this because it is quite possible that I will be a member of the Court hearing this appeal and my judicial colleagues may not share what I offer only as a tentative opinion.

[23] Another factor which, with those I have already mentioned, leads me to conclude that I should refuse bail here is that the question of further evidence, namely whether the memorandum of the 10<sup>th</sup> of July 2007 should be admitted by the Full Court, has yet to be decided. In short, I am not satisfied that the Appellant has shown exceptional circumstances as to why he should be released on bail at this time and I so rule.



*John E. Byrne*  
.....  
[ John E. Byrne ]  
**JUDGE OF APPEAL**

At Suva

22<sup>nd</sup> November 2007