

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0089 OF 2018
(High Court HAC 44 of 2018 at Suva)

BETWEEN : JOELI CAMA

Appellant

AND : THE STATE

Respondent

Coram : Calanchini, President
Chandra, JA
Rajasinghe, JA

Counsel : Ms. S. Nasedra for the Appellant
Mr. R. Kumar for the Respondent

Date of Hearing : 21 November 2018

Date of Judgment : 1 February 2019

J U D G M E N T

Calanchini, P

[1] I have read the draft judgment of Rajasinghe JA and agree that the appeal should be dismissed.

Chandra, JA

[2] I agree with the reasons and conclusions in the draft judgment of Rajasinghe JA.

Rajasinghe, JA

Introduction

[3] The Appellant together with two others have been charged in the High Court in Suva with one count of Aggravated Robbery, contrary to Section 311 (a) of the Crimes Act. He was first produced in the Magistrates' Court on the 19th of January, 2018 and the matter was then transferred to High Court. Subsequent to the filing of information, the Appellant and the two co-accused pleaded not guilty. The Appellant then filed an application for bail in person on the 2nd of February 2018, which he later withdrew as he had made a written admission to this offence in the said application. Subsequently, the Appellant had filed another bail application which was heard on the 7th of June 2018. The learned Judge in his ruling dated 25th of June 2018, refused the bail on the ground of protection of the community. Aggrieved with the said ruling, the Appellant filed this notice of motion seeking following orders, *inter alia*:

- i) *An extension of time within which to appeal be granted to the Applicant,*
- ii) *Leave to appeal be granted to the Applicant to appeal against his bail ruling,*
- iii) *Bail be granted to the Applicant pending trial on conditions set by the honorable court,*
- iv) *Any other orders the court deems just in the circumstances of this application,*

[4] The Application is filed out of time by one month and twenty seven days. The notice of motion is being supported by an affidavit of the Appellant, explaining the reasons for the delay and grounds for this application. Moreover, the Appellant filed a notice of appeal together with this notice of motion, stating the grounds for the appeal as follows:

- i. *The learned judge erred in law and in fact when he considered the previous conviction of the co-accused in the alleged offence as a factor in refusing bail to the Applicant,*
- ii. *The learned judge erred in law and in fact when refusing bail due to the Applicant being a flight risk when there was no such evidence on the same before the court,*
- iii. *The learned judge erred in law and in fact when he considered irrelevant matters against the Applicant and failing to consider the relevant matters in favor of the Applicant's bail application,*

The Law

- [5] Section 21 (3) of the Court of Appeal Act has stipulated the jurisdiction to hear an appeal derives from the High Court in respect of orders of granting or refusing of bail. Section 21 (3) of the Court of Appeal Act states that:

"The Court of Appeal may, if it gives leave, entertain as appeal from the High Court against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, upon the application either of the person granted or refused bail or of the Director of Public Prosecutions."

- [6] The scope of the jurisdiction to hear an appeal pertaining to bail has been stated in Section 23 (4) of the Court of Appeal Act, where it states that:

"On an appeal against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, the Court of Appeal may confirm, reverse or vary the decision of the High Court."

- [7] The Fiji Court of Appeal in Artika v State [2012] FJCA 14; AAU33B.2011 (21 March 2012) has discussed the scope of the jurisdiction given under Sections 21 (3) and 23 (4) of the Court of Appeal Act, where Calanchini P held that:

“Whether it is the State or the accused who brings the application, there are three essential components to the jurisdiction. First, the proceedings are appeal proceedings. These proceedings do not constitute an application for bail. That has already happened in the court below. Secondly, it is the Court of Appeal that determines the appeal. Pursuant to section 6 of the Act, the Court of Appeal is ordinarily duly constituted if it consists of not less than three judges. A single judge cannot determine an appeal that is brought before the Court of Appeal under section 21. Thirdly, leave is required. The jurisdiction to grant leave is given to the Court of Appeal under section 21 (3). However, pursuant to section 35 of the Act, a single judge of the Court of Appeal may exercise certain specified powers of the Court of Appeal including the power to give leave to appeal.”

- [8] In this matter, the court has to determine, firstly, whether to grant leave to file this notice of appeal out of time, and then whether leave should be granted before it proceeds to determine the substantive appeal. The learned counsel for the Appellant and the Respondent consented to have all of these hearings simultaneously.
- [9] The learned counsel for the Respondent in his oral submissions conceded that the delay of one month and twenty seven days is not a substantial delay. Accordingly, the Respondent has no objection for granting leave to extend the time to file this notice of appeal.

Ground 1

- [10] The first ground of appeal is founded on the contention that the learned Judge has erroneously taken into consideration the previous conviction of the co-accused as a factor in refusing bail to the Appellant.

- [11] Section 19 (1) of the Bail Act states that:

- a) *An accused person must be granted bail unless in the opinion of the police officer or the court, as the case may be-*
- b) *the accused person is unlikely to surrender to custody and appear in court to answer the charges laid;*
- c) *the interests of the accused person will not be served through the granting of bail; or*
- d) *granting bail to the accused person would endanger the public interest or make the protection of the community more difficult.*

[12] In this matter, the learned Judge has refused the bail on the ground of protection of the community pursuant to Section 19 (1) (c) of the Bail Act.

[13] Section 19 (2) of the Bail Act has further provided factors that can be taken into consideration when the court forms the opinion to grant or refuse bail, where it states that:

- 2) *In forming the opinion required by subsection (1) a police officer or court must have regard to all the relevant circumstances and in particular-*
 - a) *as regards the likelihood of surrender to custody-*
 - i) *the accused person's background and community ties (including residence, employment, family situation, previous criminal history);*
 - ii) *any previous failure by the person to surrender to custody or to observe bail conditions;*
 - iii) *the circumstances, nature and seriousness of the offence;*
 - iv) *the strength of the prosecution case;*

- v) *the severity of the likely penalty if the person is found guilty;*
- vi) *any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);*

b) *as regards the interests of the accused person-*

- i) *the length of time the person is likely to have to remain in custody before the case is heard;*
- ii) *the conditions of that custody;*
- iii) *the need for the person to obtain legal advice and to prepare a defence;*
- iv) *the need for the person to beat liberty for other lawful purposes (such as employment, education, care of dependants)*
- v) *whether the person is under the age of 18 years (in which case section 3(5) applies);*
- vi) *whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;*

c) *as regards the public interest and the protection of the community-*

- i) *any previous failure by the accused person to surrender to custody or to observe bail conditions;*
- ii) *the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person;*

iii) *the likelihood of the accused person committing an arrestable offence while on bail.*

[14] Accordingly, the court is required to take into consideration all the relevant circumstances of the matter and such consideration should not be limited only to the factors as stipulated in Section 19 (2) (a) (b) and (c).

[15] In paragraph six of his ruling, the learned Judge has acknowledged that the Appellant has no previous convictions. However, the learned Judge has taken into consideration the nature of his social networking and community ties, where the learned Judge found that the Appellant had been in company with a person who has had a previous conviction. Accordingly, it appears that the learned Judge has taken into consideration the social networking and community ties of the Appellant in paragraph six and not the previous conviction of the co-accused as a factor to determine the bail.

[16] In view of the reasons discussed above, I do not find any merit in the first ground of appeal.

Ground II

[17] The second ground of appeal is founded on the contention that the learned Judge has erroneously concluded that the Appellant is a flight risk when there is no evidence to substantiate it.

[18] It appears that in paragraph five of the ruling, the learned Judge had considered whether the Appellant would surrender to custody, if he is granted bail. In doing that, the learned Judge has taken into consideration the changes of position of the Appellant in respect of his plea during the proceedings and also the serious nature of the offence and the likely punishment if he is found guilty. The learned Judge has taken into consideration all the relevant factors in order to reach his conclusion that the Appellant is a flight risk. Therefore, I do not find any merit in the second ground of appeal as well.

Ground III

[19] The third ground of appeal is based upon the contention that the learned Judge has failed to take into consideration in his ruling, the relevant matters that are favorable to the Appellant. The learned counsel for the Appellant in her written submissions submitted that the learned Judge has failed to take into consideration the principle of presumption of innocence and presumption in favor of bail as stipulated under section 3 of the Bail Act.

[20] Section 9 (1) (e) of the Constitution states that:

(9) A person must not be deprived of personal liberty except;

(e) if the person is reasonably suspected of having committed an offence,

[21] Accordingly, remand in custody pending the hearing, is not a deprivation of personal liberty of a person.

[22] Section 13 (1) (h) of the Constitution stipulates that every detainee or arrested person has a right to be released on reasonable terms and condition pending the trial, unless the interest of justice otherwise requires.

[23] Section 3 (1) of the Bail Act states that:

"Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted"


[24] The Bail Act has provided the procedure and the laws pertaining to bail. In his ruling, the learned Judge has correctly taken into consideration all the relevant laws pursuant to provisions of the Bail Act and the facts in order to reach his conclusion. Therefore, I find that the third ground of appeal also has no merit.

[25] I would grant leave but dismiss the appeal.


[26] *The orders of the court are:*

1. *The leave is granted to file the notice of appeal out of time.*
2. *Leave is granted.*
3. *The appeal is dismissed.*




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


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Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL


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Hon. Mr. Justice T. Rajasinghe
JUSTICE OF APPEAL