

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAM NO. 176 OF 2016

BETWEEN : SETAREKI NIUBASAGA

Applicant

AND : STATE

Respondent

Counsel : Applicant in person

Mr. J. Niudamu for Respondent

Date of Ruling : 18th of November, 2016

Bail Ruling

1. The Appellant files this Notice of Motion together with his affidavit in support seeking following orders, inter alia;
 - i) The Appellant be admitted to Bail Pending Appeal upon such terms and conditions as this honourable court deems just and
 - ii) The time for service of this Motion be abridged,
 - iii) Any other Orders that the court may deem fit in the circumstances,
2. The Appellant was charged in the Magistrates court of Rakiraki for one count of Obtaining a Financial Advantage by Deception, contrary to Section 318 of the

Crimes Decree. He was first produced before the Magistrates court on the 19th of July 2016. He pleaded guilty for the offence on the 3rd of August 2016. The learned Magistrate then sentenced him for a period of one (1) year and eleven (11) months and eleven (11) days of imprisonment on the 5th of August 2016. Aggrieved with the said sentence, the Appellant filed his petition on appeal at the Registry of the High Court on the 10th of August 2016.

3. According to Section 3 (4) (b) of the Bail Act the presumption in favour of bail is displaced in respect of a person who has been convicted and has appealed against the said conviction.
4. Justice Suresh Chandra JA in Arora v State [2012] FJCA 67; AAU001.2012 (16 October 2012) has discussed the applicable approach in granting bail pending appeal, where his lordship found that;

The position regarding bail regarding a person charged for a crime and awaiting trial and one who has been convicted after trial was succinctly set out by his Lordship Sir Moti Tikaram in Amina Koya v State Cr App. No.AAU))11/96 as follows:

"I have borne in mind the fundamental difference between a bail applicant waiting Trial and one who has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all, the conviction. It therefore follows that a convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal."

His Lordship Justice Ward in Ratu Jope Seniloi, Ratu Rakuita Vakalalabure, Ratu Viliame Volavola, Peceli Rinakam and Viliame Savu v The State (Crim. App. No.AAU0041/04S. High Court Cr App No.0028/003,23 August 2004) said:

“It has been a rule of practice for many years that where an accused person has been tried, convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will be released on bail during the pendency of an appeal. This is still the rule in Fiji. The mere fact an appeal is brought can never itself be such an exceptional circumstance.” (Emphasis mine)

Scutt JA in Matai v The State (2008) FJCA 89 AAU0038.2008 has set out in detail the manner in which applications for bail pending appeal have been dealt within common law jurisdictions which all deal with the high threshold that has to be met with by an Appellant seeking bail pending appeal .

It has been clearly laid down in a series of cases that bail pending appeal will be granted only rarely and that too where there are exceptional circumstances. Therefore the threshold is very high when applications for bail pending appeal are taken up for consideration by Court.

5. Section 17 (3) of the Bail Act has stipulated the main consideration that the court is required to take into account in granting bail pending appeal to a person who has been convicted and sentenced. Section 17 (3) of the Bail Act states that;

“When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account-

- i) the likelihood of success in the appeal;*

ii) the likely time before the appeal hearing;

iii) the proportion of the original sentence which will have been served by the applicant when the appeal is heard.

6. Justice Ward in **Ratu Jope Seniloli, and others v The State (Crim. App. No.AAU0041/04S. High Court Cr App No.0028/003,23 August 2004)** has outlined the scope of the Section 17 (3) of the Bail Act, where his lordship held that;

"It is clear that the terms of subsection (3) make it mandatory for a court, when considering bail pending appeal, to take into account those three matters but I cannot accept it excludes the court from taking into account any other factors it considers properly relevant"

The general restriction on granting bail pending appeal as established by cases in Fiji and many other common law jurisdictions is that it may only be granted where there are exceptional circumstances"

7. Justice Ward in **Ratu Jope Seniloli (Supra)** went further and expounded an appropriate approach for Section 17 (3) of the Bail Act, where his lordship held that;

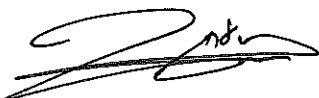
"The two remaining matters set out in Section 17(3) are only directly relevant if the court accepts there is a real likelihood of success. If the court does not, their determination becomes otiose"

8. I now draw my attention to the ground of likelihood of success in the appeal.

9. Justice Gounder JA in Dakuidreketi v Fiji Independent Commission Against Corruption [2016] FJCA 48; AAU0099.2014 (21 March 2016) held that;

"The threshold for the likelihood of success is very high. Bail is granted only if the appeal has a very high likelihood of success"

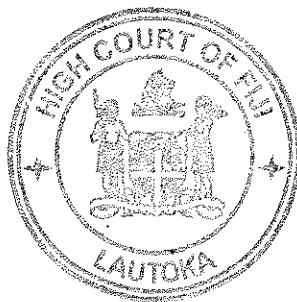
10. It is the onus of the Appellant to satisfy the court that his appeal has a high likelihood of success. However, the Appellant has failed to satisfy the above requirement. In his affidavit in support, the Appellant has merely stated that he has a strong prospect of success, but failed to elaborate it either in his submissions or in the affidavit. In the absence of any ground to satisfy the court that his appeal has a high likelihood of success, this application fails *in limine*.
11. In conclusion, I refuse this application and dismiss it accordingly.


R. D. R. Thushara Rajasinghe

Judge

At Lautoka

18th of November, 2016



Solicitors : Office of the Director of Public Prosecutions