

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO. HAM 82 OF 2017

JITENDRA PRASAD

Applicant

V

STATE

Respondent

Counsel: : Mr. I. Khan for Applicant
 : Mr. A. Singh for Respondent

Date of Hearing : 2nd May, 2017

Date of Ruling : 5th May, 2017

RULING

1. This application has been made pursuant to Section 253 (1) and (2) of the Criminal Procedure Act. Inherent jurisdiction of this Court is also invoked by the Applicant.
2. Applicant was convicted on the 28th day of February, 2017 by the learned Magistrate at Nadi of one count of Rape contrary to section 149 and 150 of the Penal Code Cap.17. The matter was stood down till 9th March 2017 for sentence.

3. Despite conviction, learned Magistrate did not rescind previous bail and, pending sentence, enlarged the applicant on same bail.
4. On the day fixed for sentencing (09.03.2017) police prosecutor made an application for a transfer of the case to High Court for sentence on the basis that the victim was a juvenile and therefore a greater punishment should be imposed than what the Magistrate had power to impose.
5. In the meantime Mr. Iqbal Khan, the Counsel for Defence sought time to file a formal application under Section 253 (1) & (2) of the Criminal Procedure Act. Time was granted.
6. Counsel for Applicant filed a formal Application under Section 253 (1) & (2) of the Criminal Procedure Act. This application was dismissed by the learned Magistrate. Having dismissed the 'stay application' learned Magistrate transferred the case to this Court under Section 190 of the Criminal Procedure Act for sentence. She also advised the defence counsel to file a fresh 'stay application' in the High Court.
7. On the 12th day of April 2017, Respondent filed a sentencing submission in this court along with a Victim Impact Statement. Instead of filing any submission in mitigation, the Counsel for Applicant filed this Notice of Motion under Sections 253 (1) and (2) of the Criminal Procedure Act. Prosecution objected to the application.

8. Objection of the respondent was that this application has been made without any valid or lawful basis in order to drag the matter on. Counsel for Respondent further submitted that this Court lacks jurisdiction to hear this application either under Sections 253 (1) and (2) of the Criminal Procedure Act or under inherent jurisdiction of this Court.
9. Counsel for Applicant contends that under Sections 253 (1) and (2) of the Criminal Procedure Act, this Court is vested with jurisdiction to stay the recording of sentence until determination of the appeal.
10. Under the heading 'Admission to Bail or Suspension of Sentence Pending Appeal' the Section 253 provides:

253 (1) Where a convicted person presents or indicates an intention of presenting a petition of appeal, the High Court or the court which convicted the person, may release the person on bail, with or without sureties.

*(2) If the person is not released on bail, the High Court or the court convicting the person, shall at the request of the person, order that the **execution** of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal.*


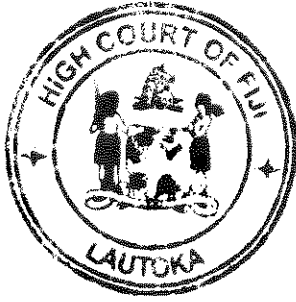
(3) Any order under this section which is made before the petition of appeal is presented and where no petition is presented within the time allowed, the order for bail or suspension shall be immediately cancelled.

(4) Where the appellant is released on bail or the sentence is suspended, the time during which the appellant is at large after being so released or during which the

sentence has been suspended, shall be excluded in computing the term of any sentence to which he or she is for the time being subject.

(5) An appellant whose sentence is suspended but who is not admitted to bail shall during the period of such suspension be treated in like manner as a prisoner awaiting trial.

11. As correctly pointed out by the learned Magistrate, this section does not apply to a situation where the convicted person is already enlarged on bail. Since the Applicant is already on previous bail, there is no valid basis for him to make this application.
12. Even if the convicted person is not released on bail, what this Court or the court convicting the person could do under this Section is to order the suspension of **execution** of the sentence against which the appeal is pending until the determination of the appeal. Nowhere does the section say that sentencing or recording of sentence could be suspended. The question of execution of the sentence arises only where a sentence has already been passed. Still this Court has not handed down a sentence.
13. It is trite law that inherent jurisdiction of this Court shall not be exercised where a statutory provision provides for the situation. There are clear provisions as to the forum to which this type of an application should be made once the sentence is passed.
14. Application is dismissed. I proceed to sentence the Applicant on 8th May, 2017 as scheduled.



Aruna Aluthge

Judge

AT LAUTOKA

5th May, 2017

Counsel: Iqbal Khan & Associates for Applicant

Director of Public Prosecution for Respondent