

**SOLOMONI QURAI v STATE (AAU0036 of 2007)**

COURT OF APPEAL — CRIMINAL JURISDICTION

5 CALANCHINI AP

21 August, 1 October 2012

10 **Criminal Law — bail — bail pending appeal — abnormal delay in re-hearing appeal — whether any common law requirement applies — exceptional circumstances — likelihood of success of appeal — whether unusual circumstances leading to delay in appeal constitutes exceptional circumstances — Bail Act ss 3(4), 17(3) — Court of Appeal Act ss 33(2), 35(1).**

15 The applicant sought bail pending appeal. The applicant had been granted leave to appeal his convictions for murder and robbery with violence. The appeal was heard by the Court of Appeal and, nearly 17 months later, the judgment had not yet been delivered. None of the judges who heard the appeal are currently sitting on the Court of Appeal, so the appeal will need to be re-heard.

20 **Held –**

(1) After the matters listed in s 17(3) of the Bail Act have been considered, it would appear that the Court is to consider whether the applicant has established exceptional circumstances. Exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under s 17(3). Exceptional circumstances are also relevant when considering each of the matters listed in s 17(3).

25 *Seniloli and Others v State* (unreported criminal appeal AAU 41/04), followed.

(2) The material does not disclose what is required by way of a very high likelihood of the appeal succeeding.

30 (3) Neither the delay in this case nor the fact that the applicant has been given leave to appeal on the basis that he demonstrated an arguable point, as distinct from a very high likelihood of success, is sufficient to satisfy the requirements of s 17(3).

*Apisai Vuniyayawa Tora & Ors v Reginam* [1978] 24 FLR 28, followed.

35 Application for bail pending appeal dismissed.

*P Katia* with B Nanius for the Applicant.

*M Korovou* for the Respondent.

40 **Calanchini AP.** This is an application for bail pending appeal filed by the Applicant (the Second Appellant in the proceedings) on 31 May 2012. The application was made by motion supported by an affidavit sworn on 25 May 2012 by the Applicant. The Respondent filed an answering affidavit sworn by Pauline Madanavosa on 24 July 2012.

45 Pursuant to s 33 (2) of the Court of Appeal Act Cap 12 the Court of Appeal may, if it sees fit, admit an appellant to bail pending the determination of his appeal. Under s 35 (1) of the Act a judge of the Court of Appeal may exercise certain powers of the Court including (d) the power to admit an appellant to bail. Hence the present application came on for hearing before me on 21 August 2012.

50 The background to the application may be stated briefly. On 12 March 2007 the Applicant (together with the First Appellant in these proceedings) was convicted and sentenced to life imprisonment for murder, to three years

imprisonment for robbery with violence and to 12 months imprisonment for larceny from a person. The sentences were to be served concurrently. At the time this application was made the Applicant had served out the sentences for robbery and larceny.

5 On 20 March 2007 the Applicant wrote a letter (signed by both Appellants) to the Chief Registrar appealing the conviction for murder. On 26 March 2007 the Applicant with the First Appellant lodged a formal petition of appeal. An undated letter from the Applicant which appears to be attached to the petition indicated that the Applicant was appealing the conviction for murder and the conviction for  
10 robbery.

On 17 March 2009 the Applicant was granted leave to appeal against conviction. The appeal was heard by the Court of Appeal on 16 May 2011 and to date the judgment has not been delivered.

In paragraph 3 of his affidavit in support the Applicant states that his  
15 application should be regarded as an application for bail pending judgment. It is now nearly 17 months since the hearing of the appeal. The appeal was heard before the Court consisting of Marshall, Khan and Goundar JJA. The file indicates that judgment was on notice. The position is that none of the judges are currently sitting on the Court of Appeal. This means, unfortunately, that the  
20 appeal will need to be re-heard before the Court of Appeal duly constituted by three judges. So, in effect, the application is one for bail pending appeal albeit in unusual circumstances.

I must now turn to the law relating to an application for bail pending appeal. The starting point is the relevant provisions of the Bail Act 2002. Under s 3 (4)  
25 the presumption in favour of the granting of bail is displaced where the applicant has been convicted and has appealed against his conviction. Then the Court must turn its attention to s 17 (3) of the Bail Act which provides that:

*“When a court is considering the granting of bail to a person who has appealed  
30 against conviction or sentence the court must 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 will have been served by the applicant when the appeal was heard.”*

Before considering these matters in the context of the present application, it is  
35 appropriate to examine briefly how this Court has interpreted and applied s 17(3). It is also necessary to determine whether the Court continues to apply any common law requirement when considering an application for bail pending appeal.

The approach to be adopted by the Court in an application such as that  
40 presently before me was comprehensively discussed by Ward P in *Seniloli and Others v The State* (unreported criminal appeal AAU 41 of 2004 delivered 23 August 2004).

As Ward P noted, s 33(2) of the Court of Appeal Act gives the Court (and hence a single judge) a discretion to admit an appellant to bail pending appeal. That  
45 discretion is to be exercised judicially in accordance with established guidelines. The discretion is now subject to the mandatory considerations set out in s 17 (3) of the Bail Act. However the guidelines established by earlier court decisions remain relevant to the exercise of the discretion.

As Ward P also noted the matters listed in s 17(3) of the Bail Act are some of  
50 the matters taken into account by the Court prior to the passing of the Bail Act when considering an application for bail pending appeal. Furthermore, Ward P

rejected the submission that s 17(3) precluded a court from considering other matters representing exceptional circumstances. In doing so Ward P concluded that, apart from the matters set out in s 17(3), an applicant must also establish exceptional circumstances. He stated the position thus:

5       *“The general restriction on granting bail pending appeal as established by cases by*  
10       *Fiji \_\_\_ is that it may only be granted where there are exceptional circumstances. That*  
15       *is still the position and I do not accept that, in considering whether such circumstances*  
20       *exist, the Court cannot consider the applicant’s character, personal circumstances and*  
25       *any other matters relevant to the determination. I also note that, in many of the cases*  
30       *where exceptional circumstances have been found to exist, they arose solely or*  
35       *principally from the applicant’s personal circumstances such as extreme age and frailty*  
40       *or serious medical condition.”*

It would appear that exceptional circumstances is a matter that is considered after the matters listed in s 17(3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under s 17(3).

On the other hand exceptional circumstances is also relevant when considering each of the matters listed in s 17(3). This is well demonstrated by the observations of Ward P (supra):

20       *“The likelihood of success has always been a factor the court has considered in*  
25       *applications for bail pending appeal and s 17(3) now enacts that requirement. However*  
30       *it gives no indication that there has been any change in the manner in which the court*  
35       *determines the question and the courts in Fiji have long required a very high likelihood*  
40       *of success. It is not sufficient that the appeal raises arguable points \_ \_ \_.”*

I consider that the long standing requirement that bail pending appeal will only be granted in exceptional circumstances is the reason why *“the chances of the appeal succeeding”* under s 17(3) has been interpreted by the Courts so as to mean a very high likelihood of success.

In written submissions handed to the Court by Counsel for the Applicant on the day of the hearing, reference is made to the likelihood of success in the appeal but, apart from delay, there is no substantive submission on the point. In oral submissions Counsel referred to the issue of joint enterprise, the evidence in respect thereof and the summing up to the assessors on the issue.

Having read the transcript of the Summing up by the learned trial judge to the assessors and although leave to appeal has long ago been granted to the Applicant, I am not satisfied that the material discloses what is required by way of very high likelihood of the appeal succeeding. The issues raised by the Applicant require a consideration of the complete record by the Court of Appeal. The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed. The oral submissions made by Counsel for the Applicant did not establish that to be the case.

On the question of whether the unusual circumstances leading to the delay in the appeal constitute exceptional circumstance, I consider that the observations of this Court in *Apisai Vuniyayawa Tora & Ors v Reginam* [1978] 24 FLR 28 provide some guidance on the issue:

45       *“Abnormal delay not attributable to the appellant may be taken into account by a*  
50       *Court in considering whether or not to grant bail. There are some cases of what we*  
55       *think of as normal delay, particularly where a short sentence has been passed which*  
60       *may result in injustice if bail is withheld. The sentence may have been completely or*

5 *very substantially served, only to be quashed on appeal. We would contrast such cases with those in which a long term of imprisonment has been imposed, in two ways. First, the longer sentence indicates conviction of a more serious offence and, second, the risk of injustice to a man who has served only a small proportion of his sentence is less by comparison with one who may have served the whole or substantially the whole of the term which his offence was considered to merit.”*

I accept that the delay in re-hearing the appeal may be described as abnormal in view of the length of time since the appeal papers were filed. I also accept that the delay appears not to be attributable to the Applicant. However the conviction  
10 was for murder which is a serious offence carrying a long sentence. Although sentenced about five years ago there is remaining still a substantial amount of the term to be served. Neither the delay in this case nor the fact that the Applicant has been given leave to appeal on the basis that he demonstrated an arguable point or arguable points as distinct from a very high likelihood of success is  
15 sufficient to satisfy the requirements of s 17(3). Furthermore there are no personal matters raised by the Applicant that would constitute exceptional circumstances.

For all of the above reasons the application for bail pending appeal is dismissed. The registry shall shortly advise the Appellant of a date for the call-over of the appeal for the purpose of fixing a date for the appeal to be  
20 re-heard.

*Application dismissed.*

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