NAURU COURT OF APPEAL

[CRIMINAL JURISDICTION] **Criminal Appeal No. 4 of 2018**

Between: **Samaranch Engar**

APPLICANT

And: **The Republic**

RESPONDENT

Before: **Chief Justice Filimone Jitoko**

APPEARANCES

For the Applicant: S. Valenitabua, Public Legal Defender
For the Respondent: R.Talesasa JR. Director of Public Prosecution

Date of Hearing: **3rd, 4th September 2019**
Date of Ruling: **4th September, 2019**

Ex Tempore Ruling

The applicant was convicted of murder in the Supreme Court Contrary to section 55 (a), (b) and (c) of the Crimes Act 2016, and was sentenced to a term of 19 years imprisonment on 3rd May 2018.

The applicant had duly filed his Notice of Appeal in accordance with the Nauru Court of Appeal Rules 2018. There are seven grounds of appeal set out in the Notice on question of law and/ or of mixed law and fact. No leave to appeal as required where the appeal is against conviction on a question of law or of mixed law and fact. Section 29 (1) (a) of the Nauru Court of Appeal Act 2018 states:

> ***"29 Appeals in criminal proceedings from the original jurisdiction of the Supreme Court.***
>
> *(1) where a person is convicted and sentenced for an offence in a trial held before the Supreme Court; he or she may appeal from final judgment, decision or order of the Supreme Court:*
>
> > *(a) against the conviction on a question of law or a question of mixed law and fact:*
> >
> > *(b)...*
> >
> > *(c)...*
> >
> > *(d)...*

The appeal notice having been filed the applicant then proceeded by summons's dated 24th July 2019, seeking the following orders:

> 1. The applicant be released from custody and be granted bail pending the determination of the appeal in Rules 2018 accordance with Rule 2 of the Nauru Court of Appeal.
>
> 2. A stay of the applicant's sentence pending the determination of the appeal in accordance with section 17 of the Act and Rule 21 of the Nauru Court of Appeal Rules 2018.

The Grant of Bail

The considerations of bail in Court of Appeal matters are governed by Rule 20 of the Nauru Court of Appeal Rules 2018.

It states as follows:

> *"20, Bail pending appeal or intended appeal*
>
> *(1) Where a person convicted and sentenced to a term of imprisonment appeals it seeks leave to appeal against the judgment, decision or order of the Supreme Court he or she may apply for bail pending appeal by filing and serving to the respondent:*
>
> > *(a) a summons seeking an order for bail pending appeal or intended appeal with any other appropriate ideas Form 9 in Schedule 1; and*

(b) one or more affidavits in support of the application for bail pending appeal it intended appeal.

(2) The affidavit in sub-rule (1) (b) shall include:

(a) the reasons for bail;

(b) the prospect of the success of the appeal or where an appeal is not filed, exhibit a duly completed copy of the proposed notice of appeal in Form 8 in Schedule 1;

(c) a copy of the judgment, decision or order of the Supreme Court;

(d) a copy of each of any decision or order made by the Supreme Court after the delivery of the judgment, decision or order being the subject or the appeal; and

(e) any other matters which the appellant may deem necessary

(3) For the purpose of this rule, the application shall comply with requirements of the Bail Act 2018.

(4) The court may grant an order for bail pending appeal or intended appeal or any other appropriate orders in Form 10 in Schedule 1

(5) An appellant admitted to bail shall be personally present on each occasion the appeal is listed before the court including the hearing of the interlocutory applications or the hearing and determination of the appeal, unless the presence of the appellant is excused by the court.

(6) Where the appellant fails to attend the court as required under sub-rule (5) the court may:

(a) summarily dismiss the appeal

(b) issue a warrant for his or her apprehension.

(c) adjourn the appeal; or

(d) consider the appeal in his or her absence.

This must be considered together with the guiding principles of bail under our own Bail Act 2018. The general provisions in relation to bail are set out in Part 2 of the Act and specifically sections 4 to 8.

Section 4 sets out the general considerations that will determine whether bail should be granted or otherwise:

It states:

"4 Entitlement to bail

(1) 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.

(2) Bail maybe granted by a court or by a police officer under section 9 (2).

(3) There is a presumption in favour of granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption.

(4) The presumption in favour of the granting of bail is displaced where the accused person:

> ***(a) is charged with an offence of murder, treason, or contempt of court.***
>
> *(b) seeking bail has previously breached a bail undertaking or bail condition;*
>
> *(c) is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury, self-harm or in need of protection.*
>
> *(d) is a fugitive offender arrested under the Extradition Act 1973, Mutual Legal Assistance in Criminal Matters Act 2004 or Counter Terrorism and Transactional Crime Act 2004; or*
>
> ***(e) he has been convicted and has appealed against the conviction.***

(5) Bail should be granted to an accused person who is a minor, unless:

> *(a) he or she has a previous criminal conviction;*
>
> *(b) he or she has previously breached a bail undertaking or bail condition.*
>
> *(c) he or she is incapacitated by intoxication, injury or case of a drug, or is otherwise in danger of physical injury, self-harm or in need of protection.*
>
> ***(emphasis is mine)***

It is clear from section 4 of the Bail Act that the following propositions of law in bail applies the present applicant:

> 1. That he has a right to be released on bail unless it is not in the interest of justice;
>
> 2. There is furthermore a presumption in favour of granting of bail to the applicant.
>
> 3. The Presumption in favour of the grant of bail to applicant has been displaced because

(i) he is charged with the offence of murder;

(ii) he has been convicted of such offence, and that he is appealing the conviction.

The presumption in favour of the grant of bail to the applicant having being displaced because of the application of section 4 (4) (a) and (e) the court is left to consider and to determine bail under the general provisions for bail set out in section 17 (3) of the Act. Sub-section (3) states as follows:

> *" 17 **General provisions for bail determination***
>
> *(1) ...*
>
> *(2) ...*
>
> *(3) Where is considering the granting of bail to a person who has appealed against conviction or sentence, the court shall take into account:*
>
> *(a) the likelihood of success in the appeal;*
>
> *(b) the likely time before the appeal hearing and*
>
> *(c) the proportion of the original sentence which has been served by the applicant when the appeal is heard.*

APPLICANT'S SUBMISSIONS

Bail Pending Appeal

On the issue of bail pending appeal, counsel for the applicant first explained the law as outlined above and specifically the court's exercise of discretion in determining bail under section 17(3) of the Act.

Counsel directed the attention of the court to the Fiji Court of Appeal's decision in *Tiritiri v The State*[1] which in turn had referred to the earlier case of *Zhong v The State*[2], in which the court made the following observations as representative of the status of the law on determination of bail in Fiji. They are:

(i) Whether the bail should be granted is a matter for the exercise of the court's discretion

(ii) The discretion should be exercised in accordance with established guidelines found in earlier decisions of the court and in such other cases determining such other applications.

(iii) In addition, the discretion must be exercised in a manner that is not inconsistent with the Bail Act.

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[1] Crim Appeal AAU09 of 2011

[2] Crim Appeal 44 of 2013

(iv) When a person has been convicted and sentenced to a term of imprisonment, the presumption in his favour of the granting of bail is displaced.

(v) When the presumption of bail has been displaced, it is then necessary to consider the factors that are relevant to the exercise of the discretion.

Those factors to be considered under (v) are, in the court's view in *Tiritiri v The State*[3], those that are in section 17(3) of Fiji's Bail Act 2002. Fiji's section 17(3) is exactly the same as section 17(3) of our own Nauru Bail Act 2018.

Counsel further referred to the court's observation on the extent of the exercise of its discretion and cited as follows:

> *"Although section 17(3) imposes an obligation on the court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established in the cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances."*

Furthermore, counsel argued that exceptional circumstances can be brought about by the nature including the grounds of appeal, which would make probable the chances of the appeal succeeding. The Fiji courts have interpreted the term "likelihood of success in the appeal" as contained in section 17(3) to mean *"a high likelihood of success."*

Counsel argued that given that our section 17(3) of the Bail Act is similar if not the same with section 17(3) of the Fiji's Bail Act, that we should consider favourably following the Fiji courts cases and interpretation of the provisions.

GROUNDS FOR APPEAL

The grounds of appeal as set out by the applicant can be very briefly summarised as follows:

1. Grounds 1 and 2.
   These grounds relate to the opening address of the prosecution which by convention outline the facts which it will establish or prove in the evidence to follow. The prosecution in its opening address stated that the death by strangulation of the deceased happened inside a vehicle parked in an identified place. The court in its finding concluded that the killing of the deceased took place elsewhere, not at the place identified by the prosecution. The appeal grounds are based on question of law.
   In support of these grounds the defence referred to the following authorities:
   (i) *King v The Queen*[4]
   (ii) *R v Tangye*[5]

[3] Supra
[4] (1986) 161 CLR 423 pp 47 - 58
[5] (1997) 92 A Crim R 545 at p 556

(iii) *Clyne v NSW Bar Association*[6]
(iv) *R v Gitoa*[7]
(v) *The Queen v Green*[8]

2. Ground 3
This ground relates to the trial court granting upon the second application, after the first had been refused, of the calling of the same pathologist, to offer evidentiary opinion on the post- mortem report of the deceased. The objection is based on the principle of *functus officio* and the doctrine of *res judicata.* The appeal ground is based on question of law.
In support of this ground the defence cited the following authorities:
(i) *Jovanovic v The Queen*[9]
(ii) *The Queen v GAM(No.2)*[10]
(iii) *Henderson v Henderson*[11]
(iv) *Talbot v Berkshire County Council (CA)*[12]
3. Ground 4
This is based on what seems to be the discrepancy on the time and place of death as found by the court versus the approximate time of death given in the testimony of the senior medical officer at the Nauru Hospital. The ground is based on a mixed question of law and fact.
4. Ground 5
This is based on the ground discrepancies and inconsistencies of medical expert evidence that created uncertainty of the time of death and in turn raised reasonable doubt in favour of the applicant. The ground is based on a mixed question of fact and law.
5. Ground 6
This is based on the conclusion drawn by the court as a result of uncertainty of time of death resulting from conflicting expert medical evidence. The ground is based on a mixed question of fact and law.
6. Ground 7
This is based on the trial court's invitation to the defence for an *alternate hypothesis* on time of death and which would have shifted the onus to the defence, and the imputation to be made thereto. This ground is based on a question of law.
The defence cited the following case in support of this ground of appeal:
Shepherd v R[13]

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[6] (1960)104 CLR 186
[7] [2013]SBHC 202
[8] [2002] VCSA34
[9] 106 A Crim R 548 at 551
[10] [2004] VSCA 117
[11] [1843] Eng R917;[1843-60]All ER 378 at 381
[12] [1994] QB 290 at 296
[13] (1990) 170 CLR 575

STAY OF SENTENCE

Counsel cited the New Zealand Court of Appeal *Anne De La Poer Power v Auckland Society for the Prevention of Cruelty to Animals*[14], as authority for the proposition that suspension of sentence is treated in the same way as an application of bail pending appeal.

The test is whether there is a likelihood of success of the appeal, and in the defence's submission there is a very high likelihood of the success of the appeal and therefore the appellant's sentence be stayed.

Counsel also pointed to Rule 21(1) of the Nauru Court of Appeal Rules 2018, which allows a convicted person appealing a prison sentence, to also apply for the stay of the sentence.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent emphasised, in opposing bail, the law as stated under section 4(4) of Nauru's Bail Act, in that the presumption in favour of the appellant in granting of bail has been displaced or taken away after he had been convicted and appeal against the conviction. This position was restated in the recent Supreme Court of Nauru case of *Jojo Agege v The Republic*[15], where the court, per Va'ai J, in adopting the provision of section 4(4) of the Bail Act said at paragraph 11:

> *"Admission for bail pending appeal is unusual and is only to be granted in exceptional circumstances. The starting point is that the appellant has been found guilty and sentenced."*

and again, at paragraph 13:

> *"The principal concern in considering bail pending appeal has been the overall interest of justice which required that the bail be granted only in exceptional circumstances. The matters listed in section 17(3) Bail Act are some of the matters the court takes into account, so that the court can go beyond and consider other matters which may amount to exceptional circumstances."*

Prosecution also found support in the Solomon Islands High Court case of *Tamana v Reginam*[16], in which the court said:

> *"It must be pointed out however, that the principles to be considered in an application for bail after conviction cannot be treated as the same in an application for bail before conviction. The presumption of innocence which is a*

[14] [2016]NZCA 232
[15] Criminal Appeal Case No. 8 of 2019
[16] SBHC41; HC-CRC 15 of 1995

guiding legal principle in criminal cases no longer exist after a person has been found guilty by a competent court. By the same note, the right of appeal does not revive the pre-conviction presumption of innocence."

The prosecution also canvassed the position in Papua New Guinea on the issue of bail pending appeal. The matter was discussed thoroughly by its Supreme Court in *Rakatani Mataio v State*[17] and after carefully analysing the English and Australian authorities, as well as its own, opined as follows:

> *"Courts in Papua New Guinea, England and Australia have upheld and maintained the principle that bail is not readily granted to an applicant who has been convicted of a criminal offence; has appealed and is awaiting the prosecution of his appeal. That has been the law in this jurisdiction until Kapi DCJ (as he then was) in 1997, sitting as a single judge of the Supreme Court ruled otherwise in Major Walter Enuma & Ors v The State(1997), unreported, SC 538, 30 December 1997; and subsequently followed by Jalina J in Robin Warren& Ors v The State (2003), unreported, SC725, 17 December 2003"*

On the issue of whether the likelihood of the success of the appeal as ground for grant of bail, the court in *Mataio*[18]said old English Criminal Court of Appeal cases that decided to grant bail pending appeal, but not the grounds of good prospect of success in their respective appeals, adding:

> *"We have observed that in those cases that the courts had granted bail in a restrictive manner and the approach taken by the English courts in those cases was not because those appeals had any prospect of success."*

On the issue of exceptional circumstances, Respondent also relied on the propositions in *Mataio* firstly, the general rule as is the case in Australia and England, that the court will "not grant bail to a convicted prisoner who has filed an appeal and is awaiting the hearing of his appeal unless exceptional circumstances were shown." The court added:

> *"We must therefore emphasise that once a person charged with an indictable offence has been convicted, his constitutional right to bail no longer exists. As the authorities have shown, if he desires bail after his conviction and following an appeal, he must demonstrate to the Court that there are exceptional circumstances warranting his release on bail."*

On whether the likely chance of success of the appeal amounted to an exceptional circumstance, the Respondent counsel again turned to *Mataio* in support for the proposition that it is not.

The court in *Mataio* summarised the position in Paua New Guinea since independence and the emergence of two opposing interpretations. On the one hand are the Rulings

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[17] [2007] PGSC 22; SC 865(8 June 2007)
[18] (supra)

of Kapi ACJ in *Major Walter Enuma & Ors v The State*[19], and Jalina J in *Robin Warren & Ors v The State(2003)* [20], that found that the prospect of success of the appeal amounted to an exceptional circumstance. On the other hand, the court pointed to Australian and English authorities as well as Papua New Guinea cases principally to Amet DCJ's observation in *Bola Renagi & Ors v The State*[21], where the court held that the likelihood of success of the appeal is not of itself an exceptional circumstance.

In *Mataio,* the court supported the likelihood of appeal success does not amount to an exceptional circumstance and it adopted the decision of the Supreme Court of Victoria in *Re Kularie [1978] VR 276* where Young CJ said:

> *"Bail will be granted after conviction and pending appeal only in* very *exceptional circumstances."*

and at page 4 of the judgment, added:

> *"I too do not consider that to simply argue that certain proposed grounds are likely to succeed necessarily of itself constitute an "exceptional circumstance" favourable to the applicant to merit grant of bail. I am also of the opinion that it is not for me to make up my mind at this point about the chances of appeal, it would be* wrong *of me to do so in the absence of full argument."*

Another Papua New Guinea National Court decision in *Arthur Gilbert Smedley v The State*[22] is cited by the Respondent. In that case, the appellant was convicted of offences of "fraudulent false accounting" and "false claim by officials" and sentenced to two terms of imprisonment, one for one year and nine months and the other for twelve months (to be served concurrently). The counsel for the applicant applied for bail pending appeal arguing that prima facie, the grounds of appeal are an arguable nature, meaning that there was a good chance of the success of the appeal. These include the need to instruct new counsel, personal circumstances involving care of his family and the likely delay due to the legal vacation.

The court per Wilson J in *Smedley*[23] said that the personal circumstances, including the fact that the legal vacation was imminent which would delay the appeal being heard for several months did not amount even cumulatively as "special circumstances" or exceptional circumstances". He added:

> *"Assuming* ***arguendo*** *that, prima facie, the grounds of appeal in this case are of such a nature, I am not persuaded by the authority of Ilett's case (supra) nor by any other authority that that of itself constitutes an 'exceptional circumstance."*

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[19] (1997) unreported SC 538 30 December 1997
[20] unreported SC 7, 25 17 December 2003
[21] (2000) unreported SC 649 1 August, 2000
[22] [1978] PGNC 45
[23] (supra)

Two Australian cases of *Mario Giordano* [24] *and Alice Lynne Chamberlain*[25] cited in *Mataio* were relied upon by the respondent.

Chamberlain[26] was the famous Australian case often referred to as the dingo and the missing daughter case, and in this instance, the application for bail was made pending appeal for conviction for murder and sentence of life imprisonment. The Federal Court held *inter alia:*

> *"As a general principle bail is not granted pending the hearing of an appeal against conviction and sentence imprisonment unless exceptional circumstances existed. What constitutes exceptional circumstances depends upon the facts of each case."*

The South Australian Court of Appeal pronouncement in the case of *Mario Giordano*[27] was quoted extensively by the Papua New Guinea *Mataio* case especially in its assessment of what constitutes an exceptional circumstance.

The Respondent further referred to several Solomon Islands decisions that were approved by the court in *Mark Kemakeza v Regina*[28]. The court restated the Solomon Islands law on bail after conviction (paragraph 9 of the Ruling) as follows:

> *"...the person has been convicted of the offence and therefore the constitutional presumption of innocence no longer exists. Hence in order for the person to be granted bail, the burden is on him to convince the court that the circumstances of the case are such that he should be released on bail despite his conviction and sentence. Unless the person so convinces the court, he is not entitled to bail and the fact that he has appealed against the conviction and/or the sentence is no reason for granting him bail."*

It is the Respondent's submission that this court should follow the Papua New Guinea Supreme Court decision in *Rakatani Mataio case*[29] which in turn relied on the other Australian and English authorities, and for the court to also consider the Solomon Islands cases, all of which support the propositions firstly, that bail should not be granted pending appeal unless there are exceptional circumstances and second, that the prospect of the success of the appeal is not an exceptional circumstance *per se*.

[24] [1983] 6 A Crim R 397
[25] [1982] 6 A Crim R 385
[26] (supra)
[27] (supra)
[28] [2012] SBHC 40
[29] (supra)

STAY OF EXECUTION

In opposing the stay until the appeal is determined, the Respondent referred to the High Court of Australia's decision in *Chamberlain v R (No 1)*[30] in which the court inter alia, stated:

> *"To suspend or defer the sentence before an appeal is heard in such a case is to invest the verdict of a jury with a provisional quality, as though it should take effect only after the channels of appeal have been exhausted. But the jury is the tribunal constituted to determine whether the accused should be convicted or acquitted, and its verdict takes effect."*

CONSIDERATION

First, it is clearly understood that the Applicant does not need the leave of this court to appeal. He has the statutory and therefore legal right to appeal his conviction without the sanction of this court. This right is guaranteed under section 29(1)(a) of the Nauru Court of Appeal Act 2018.

Second, the legal parameters within which the determination by the court of whether to grant bail to the applicant is not in issue. Both counsels agree:

1. That the presumption in favour of the granting of bail to the applicant has been displaced because:

   (i) he was charged with murder;
   (ii) he has been convicted of the offence but is appealing the conviction

2. That the court is required to consider the determination of bail, in the absence of the presumption, under the general provisions for bail set out in section 17 of the Bail Act 2018.

3. That the court is not necessarily limited by the primary considerations in section 17(3) but may, in exercise of its discretionary powers, take into account any other matter(s) relevant to the application.

The court's consideration and determining of whether bail should be granted pending appeal are governed by section 17(3) of the Bail Act 2018 and Rule 20 of the Nauru Court of Appeal Rules 2018.

Sub-section (3) of section 17 cannot be any clearer. It states that in a situation where the court is *"considering the grant of bail to a person who has appealed against conviction or sentence,* ***the court shall take into account:***

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[30] [1983] HCA13; [1983] 153 CLR 514

*(a) **the likelihood of success in the appeal;***
(b) the likely time before the appeal hearing and
*(c) the proportion or the original sentence which has been served by the applicant when the appeal is heard." **(emphasis is mine)***

Rule 20 is headed "***Bail pending appeal or intended appeal***" and the provisions that follow deal with the process and the documents that need to be filed by the appellant into court and included in the bundle an affidavit that is to include at sub-Rule 2:

(a) the reasons for bail;
(b) the prospect of success of the appeal...."

It is clear from these provisions that bail is available and can and will be granted by the court in exercise of its discretion in any situation including to a convicted person who has appealed or intends to appeal, if the circumstance is appropriate and it is in the interest of justice.

It is equally clear just from the plain reading of section 17(3) that **the court**, in considering whether to grant bail pending appeal, **shall take into account, the likelihood of success in the appeal.**

It is incumbent on this court therefore to assess the prospect of the success or otherwise of the appeal, by looking, even if it is a cursory one, at the grounds of appeal. Having said that, I must add, that it is not for this court to analyse in any greater details the merits of each of the grounds advanced in support of the appeal; that is for the Full Court to do. It is enough at this stage in my view, that the court is satisfied that in its overall assessment, the grounds of appeal are valid and arguable.

The court endorses the general statement of the law on bail pending appeal as pertains in other jurisdictions that have been referred to by counsel for both parties. The statement of the law is as stated in the *Chamberlain* case as follows:

> *" As a general principle bail is not granted pending the hearing of an appeal against conviction and sentence of imprisonment unless exceptional circumstances exist. What constitutes exceptional circumstances depends upon the facts of each case."*

What constitutes an exceptional circumstance is for each of the case to show and prove and for the court to be satisfied that a certain threshold is reached, where it would be appropriate and in the interest of justice for the applicant to be released on bail while waiting for the appeal to be heard.

Respondent had referred this court to numerous cases from both the Papua New Guinea and Australian courts examples including R v Kulari[31]; R v Hopkins [32]; R v

[31] [1978] Vic Rp 29
[32] [1924] Vic Law Rp

Manning[33]; *Yaki v The State*[34]; *John Jaminen v The State*[35] and *Rakatani Mataio v The State*[36] where "extraordinary circumstances" such as no previous convictions, not likely to abscond, seriously ill family member, business skill required in family business, very young children to look after, and legal vacation, were proposed to the court and dismissed.

Ilett,Re[37] is an exception where the Papua New Guinea court granted bail for the applicant after conviction and pending the hearing of appeal, where fresh evidence to be put before the court to show that the effect of prison sentence on the person and business were deemed to constitute "special circumstances".

It should also be pointed out that in the case referred to by the respondent of *Tamana v Reginam*[38] the Solomon Islands High Court, while refusing to grant bail on appeal on the ground that the female applicant had a very young child to feed at home, and that the court ruled, did not constituted exceptional circumstance, the court nevertheless did hear the appeal the next day and varied the imprisonment penalty to one of suspended sentence to allow the prisoner to go home to care for the family.

The likelihood of the success of the appeal as an exceptional circumstance that should allow bail pending the hearing is at the heart of this case.

The respondent has, in its submissions pointed to numerous authorities from throughout the region that supports the argument that the likely chance of success of the appeal does not constitute an exceptional circumstance. It does however constitute a factor to be considered by the court as evident by section 17(3) of the Bail Act. This position is accepted by both sides.

Wilson J in the *Smedley* case[39]that is cited by the respondent in support of its case said:

> "*It is true that the favourable prospect of success of the appeal which in reported cases has weighed in with judges granting bail, generally, I think, with one or more other factor. I am not in a position to express any opinion as to the applicant's chances of success upon his appeal against his conviction but I am in a position to say that insufficient material has been placed before me upon which I can say that success on appeal was either inevitable or highly probable.*"

The important Australian case of *Chamberlain* relied upon by the respondent and cited extensively in the Papua New Guinea's leading authority of *Mataio* and which refused

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[33] [1936] Vic Law Rp11
[34] [1990] PNGLR 513
[35] [1983] PNGLR 122
[36] (supra)
[37] [1974] PNGSC 15
[38] [1995] HC 41 -CRC 15 of 1995
[39] (supra)

bail pending appeal on conviction of murder and life sentence, is distinguished on the ground that leave to appeal had first been refused by the Federal Circuit Court of Northern Territories, and that special leave was being sought for appeal to the Federal Court and in *Chamberlain v R (No.2)*[40], leave was actually granted and the full court at the same time heard and dismiss the appeal.

The Solomon Islands authority of *Kemakeza v Regina*[41] also relied upon by the Respondent for the proposition that likelihood of success of the appeal amounts to exceptional circumstance, is in fact, in my humble view, ambivalent on the issue. The court outlined what it deemed exceptional circumstances and added, at paragraph 25:

> *"Such circumstances would include a real possibility that the conviction will be quashed or the sentence of imprisonment will be set aside entirely or where the sentence is likely to be served completely before the appeal is heard."*

At paragraph 27, the court continued:

> *"However, for my part, I do not agree that bail should be granted simply because the appeal has raised arguable points. That is not an exceptional circumstance. Present authorities favour the position that bail pending appeal should be granted only where the appeal has a real likelihood of success, not where the appeal raises arguable points."*

Then there are the Papua New Guinea decisions of Kapi DCJ in *Major Walter Eruma & Ors v The* State[42] and *Robin Warren & Ors v The State*[43] that decided that the good prospect of the appellant succeeding in the appeal, in the circumstances of those cases, were adequate to satisfy the exceptional circumstances requirements and court granted them bail pending the hearing of their appeals.

The laws of Nauru on the determination of bail pending appeal are correctly summarised by our own Supreme Court decision in *Jojo Agege v The Republic*[44]. The balance lies in the interpretation to be accorded to section 17(3) and the other relevant factors that the court may take into account to determine bail.

The Applicant counsel has correctly pointed out that the other jurisdictions of the region from which the respondent had relied on for his case authorities in the consideration of the important factor of what constitutes an exceptional circumstance, do not have a section 17(3) equivalent and specifically the statutory requirement for the court, in considering bail pending appeal, ***"shall take into account the likelihood of success in the appeal".*** As such it remains only as part of a bundle of general considerations that the court may include in its assessment and determination of whether bail should be granted. It is therefore likely, although highly improbable, that

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[40] *[1984] HCA 7*
[41] *[2012] SBHC 40*
[42] (supra)
[43] (supra)
[44] (supra)

a court in the exercise of its discretion, may not include the likelihood of success of the appeal in its consideration of granting bail.

The only jurisdiction in the region that carries a similar provision of our section 17(3) is Fiji and by coincidence, it is also section 17(3) of their Bail Act 2002. The Fiji Court of Appeal cases that counsel for the Applicant referred to, attempted to contextualize the interpretation of the likelihood of success of an appeal in the court's consideration of bail. In Fiji cases, both those cases cited and in other previous cases, the term ***"likelihood of success"*** has through time been redefined and refined to mean the term ***"real likelihood of success".***

In my view, the refinement of the term "likelihood of success" to mean the "real likelihood of success" imports a new dimension to the substance of the consideration of the relevant facts that need to be taken into account by the court in the determination of bail on appeal. While the Fiji courts continue to follow the general proposition that, unless there are exceptional circumstances, bail will not be granted after conviction and appeal, there is an inference that the court may be amenable to grant bail where upon a superficial appraisal of the case, indicate that the there is some prospect of success. In other words, the prospects are obvious.

I find comfort in this observation by the court in *Mario Giordano*[45] which the Respondent's counsel had referred to, as follows:

> *"It is unnecessary and would be unwise, to attempt to compile a list of circumstances which would be regarded as exceptional. The totality of the circumstances must be looked at. Some relevant factors are indicated by the cases. Reference has been made in the cases to the prospect of success of the appeal. I do not think, however, that the court which considers application for bail can be expected to assess the prospects of the success of the appeal,* ***unless those prospects are obvious. There are cases, I suppose, in which a perusal of the grounds of appeal and a mere superficial appraisal of the case indicate that the appeal has little prospect of success."*** *(emphasis in mine).*

A mere superficial appraisal of the grounds and the facts of the case would be enough for a court hearing bail to discern whether the prospect of success is obvious or has little chance of success.

It is my opinion that there is merit in the appeal and a good prospect of success.

In this case, the seven (7) grounds of appeal set out by the Applicant are ones based purely on law or of mixed facts and law. Several grounds touch on the cornerstones of the rule of evidence and criminal law and while these matters remains rightly to be addressed by the Full Court at its next sitting, the primary consideration of the next appeal sitting while the status quo is maintained are relevant matters in this court's appraisal of the existence and application of exceptional circumstances that

[45] (supra)

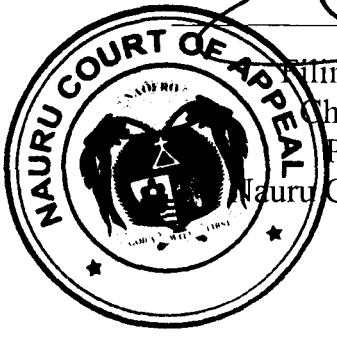
cumulatively with the real likelihood of success, allows the court, in my view to determine bail. In other words, it appears, given that there is no date yet fixed for the next sitting of the court to hear this matter, and an agreed date may very well extend into 2020, it would be in the interest of justice that bail be granted to the applicant in the meantime, but with very strict conditions.

On the stay of sentence, I adopt the view of the New Zealand Court of Appeal in *Anne De La Poer Power (supra)*. The view of the High Court of Australia in the matter in *Chamberlain v R (No. 1)*[46] is distinguished on the ground that the court was dealing with special leave to appeal after leave to the Federal Court had been dismissed by the Federal Circuit Court and that the court was dealing with the extraordinary jurisdiction to grant bail.

ORDERS

In the end, having carefully considered the submissions by counsel bail is granted to the applicant with conditions attached, and there be a stay of the sentence.

Dated this 4th day of September 2019.



Kilimone Jitoko
Chief Justice
President
Nauru Court of Appeal

[46] (supra)