

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL NO: AAU 117 OF 2014**

**BETWEEN** : **MANOJ KHERA**  
**aka MANOJ KUMAR**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Calanchini P**

**Counsel** : **Mr Iqbal Khan for the Appellant**  
**Mr L Fotofili for the Respondent**

**Date of Hearing** : **29 December 2014**

**Date of Ruling** : **27 February 2015**

**RULING**

- [1] There are two applications before the Court. The first is an application for leave to appeal against conviction and sentence. The second is an application for bail pending

appeal. The application for leave was made within time under section 26 of the Court of Appeal Act Cap 12 (the Act).

- [2] The Appellant was convicted in the High Court on 30 July 2014 on 4 counts of obtaining by false pretences contrary to section 309 of the Penal Code Cap 17 and on 1 count of money laundering contrary to section 69(2) and (3) of the Proceeds of Crime Act 1997. On 3 October 2014 he was sentenced to a term of 4 years imprisonment in respect of all charges with a non-parole term of 3 years with effect from the date of sentencing.
- [3] The background to the appeal has been conveniently set out in the sentencing judgment of the learned trial Judge:

*“Between 1 January and 31 July 2004, the accused ran a jewellery business, importing and exporting gold, under the trade name of “Shivam Import and Exports”. He was registered under the Fiji Revenue and Customs Authority (FRCA) as a VAT collector. As such, he was entitled to claim VAT tax refund, if the VAT he paid on his business purchases were more than the VAT he collected on his sales. He lodged four VAT tax returns at the end of January, February, March and April 2004, claiming VAT tax refunds. In his applications, he declared that the informations he provided in support of his applications, were true and correct. FRCA processed his applications on trust, and paid him \$9,611.82 (January); \$8,200 (February); \$11,800 (March) and \$15,000 (April) in 2004. It came to a total of \$44,611.82.*

*All the above money was paid into his ANZ Bank account in Nausori. It was later found out that the accused provided false informations to obtain the above money. He was thus charged with four counts of obtaining money by false pretences, and convicted of the same, after trial. While the money was in his Bank Account, he laundered the same, by disposing off the same, well knowing it was proceeds of his crimes. He was charged and convicted of the same, after trial.”*

- [4] The grounds of appeal against conviction and sentence are:

- “1. **THAT** the Learned Trial Judge erred in law and in fact in failing to grant permanent stay of the proceedings.
2. **THAT** the Learned Trial Judge erred in law and in fact in that he failed and/or neglected and/or did not adequately consider the defence case.



3. *THAT the Learned Trial Judge erred in law and in fact in admitting evidence of lay witnesses as opinion evidence particularly evidence of the purported signatures on vital documents which were fundamental to the prosecution case.*
4. *THAT the Learned Trial Judge erred in law and in fact in not dealing adequately and/or properly and/or sufficiently on circumstantial evidence and in not identifying what evidence was or could be classified as circumstantial evidence.*
5. *THAT the Learned Trial Judge erred in law and in fact in misdirecting and/or not properly and/or sufficiently himself and the assessors on the standard and burden of proof.*
6. *THAT the Sentence is wrong in principle, harsh and excessive in the circumstances of the case."*

- [5] The grounds of appeal against conviction raise questions of mixed fact and law. As a result leave is required pursuant to section 21 (1) (b) of the Act. Leave is required for any appeal against sentence (section 21 (1) (c) ). Section 35(1) of the Act gives to a justice of appeal the jurisdiction to determine both applications.
- [6] Ground 1 alleges an error in law and in fact when the learned trial Judge failed to grant a permanent stay of proceedings. Although the Appellant's written submissions cover a number of matters that are not relevant to the issue of a permanent stay of proceedings, two issues are raised that are relevant to this ground. The first is delay and the second is a suggestion that the Appellant would be punished twice.
- [7] The application for stay of proceedings was made on 18 July 2014. The ruling on the application was given ex tempore by the learned trial judge with written reasons to follow. The material presently available does not include the written reasons for refusing the application for a permanent stay.
- [8] In this case the offences were alleged to have been committed on various dates in 2004. Charges were laid in 2012 following investigation by the Police on 2011. The trial took place over a six day period in July 2014 and the Appellant was sentenced on 3 October 2014.

- [9] In Mohammed Shanif Sahim –v- The State (unreported Misc. Action No. 17 of 2007; 25 March 2008) the Court of Appeal summarised the law on stay on the ground of delay as:

*“The correct approach of the courts must therefore be two-pronged. Firstly, is there unreasonable delay and a breach of section 29(3) of the Constitution (now section 15(3) of the Constitution)? In answering this question, prejudice is relevant but not necessary where the delay is found to be otherwise oppressive in all the circumstances. The second question is, if there is a breach, what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence.”*

- [10] In his oral submissions before me Counsel for the Appellant did not address this ground and indicated that the application for leave was based in the main on ground 3.
- [11] On the material before the Court, it is apparent that the application for a permanent stay was made at the last moment. The application was made on 18 July 2014. The trial commenced on 22 July 2014. The trial dates had been determined in 2013. There was no explanation in the written submissions for the delay in making the application. During the period between the dates of the alleged offences in 2004 and the date on which the matters were reported to the Police in 2011 the Appellant and the complainant were engaged in discussions about issues that were related to the charges. The Appellant was well aware that the discussions were on-going. He could not claim to have been caught by surprise or in any prejudiced when charges were laid. The post charge delay between 2012 and 2014 was not unreasonable and there was no risk that the Appellant would not have been afforded a fair trial. The ground is not arguable on this issue. Furthermore, there was no complaint at the trial that the Appellant had already been punished for the offences by the imposition of penalties by the complainant. If relevant at all, the issue may have been considered at the sentencing stage. This issue is also not arguable and leave is refused on ground 1.



- [12] Ground 2 relates to the directions given by the learned trial Judge to the assessors concerning the defence case. The allegation is that the Judge did not put fairly the defence case to the assessors. The words used in the ground are “*failed to*”, “*neglected to*” and “*did not adequately*” put the defence case.
- [13] Although Counsel did not address this ground in his oral submissions, it is submitted in the written submissions that the thrust of the defence case was that the signatures on the forms submitted to the complainant (FRCA) were not his signatures. In order to prove that they were the Appellant’s signatures the Respondent called evidence (albeit not an expert) to give an opinion on the matter which is the basis of ground 3. The point is that the signatures were in issue.
- [14] In paragraphs 23 – 28 and 32 – 34 of his summing up the learned trial Judge discussed the defence case. In particular he refers to various claims by the Appellant. He refers to the assertion that the Appellant did not “*fill in the above VAT returns.*” The Judge also pointed out that the Appellant claimed that he did not know that cheques had been deposited into his account and also claimed that he did know that funds had been withdrawn from his account. The Judge also pointed out that the Appellant indicated that his cousin may have been responsible for the offences. Although the Judge did not specifically refer to the word “*signature*”, it is quite apparent that the Judge has adequately put the defence case that the Appellant did not complete or sign the VAT returns. Leave is refused on this ground.
- [15] It is conceded by the Respondent that ground 3 is arguable. The ground relates to the admissibility of evidence given by an investigating officer as to whether the signature on the VAT returns was the Appellant’s signature. Whether such evidence should have been given by a qualified witness is an arguable ground and leave is granted.
- [16] Ground 4 relates to the directions given by the learned trial Judge on the circumstantial evidence upon which the Respondent relied to prove the case beyond reasonable doubt. There was no requirement for the learned trial Judge to give a text book technical definition of circumstantial evidence. His explanation as to the nature of circumstantial evidence and his exposition of the circumstantial evidence adduced

by the Respondent were appropriately tailored to the facts. Leave is refused on this ground.

- [17] In respect of ground 5 challenging the directions given by the learned trial Judge on the burden and standard of proof, there has been no error or misdirection on these issues in the summing up. Leave is refused on this ground.
- [18] The test for leave to appeal against sentence is whether the Appellant can show an arguable error in the exercise of the sentencing discretion by the learned Judge.
- [19] The Appellant claims in his notice of appeal that the sentence is wrong in principle, harsh and excessive in the circumstances of the case. The Appellant's written submissions do not address the application for leave to appeal against sentence. The Respondent's written submissions argue that if anything the sentence was lenient and that the Appellant should be warned by the Full Court that if the appeal proceeds the Respondent will request the Court to consider a different but longer sentence.
- [20] Fortunately for the Appellant both Counsel provided some assistance to the Court at the leave hearing. Counsel for the Appellant argued that since the money involved had been repaid to the complainant, credit should have been given to the Appellant by way of mitigation. Counsel for the Respondent accepted that \$44,000.00 plus penalties had been paid back to the complainant in 2011 well before charges were laid in 2012.
- [21] There is no reference to this fact in the sentencing judgment. It is not clear from the material presently available whether the learned Judge was made aware of the fact. It was a factor that should have been considered in mitigation and leave is granted.
- [22] Turning to the application for bail pending appeal it is convenient to refer to the principles that were considered in Zhong -v- The State (unreported AAU 44 of 2013 Ruling delivered 15 July 2014) and which are now reproduced in the following paragraphs:



*"The application is made pursuant to section 33(2) of the Court of Appeal Act and comes before me pursuant to the jurisdiction given to a single judge of the Court under section 35(1) of the Act. It is appropriate to outline the principles upon which such an application is determined by this Court. In doing so I am content to quote in part from an earlier decision in **Balaggan -v- The State** (unreported AAU 48 of 2012; 3 December 2012) involving a similar application.*

*Whether bail pending appeal should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to bail pending appeal. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*

*The starting point in considering an application for bail pending appeal is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*

*Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*

*"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:*

- (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 appellant when the appeal is heard."*

*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 by cases decided in Fiji that bail pending appeal should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others -v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*



*"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."*

*The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of bail pending appeal. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

*This second aspect of exceptional circumstances was discussed by Ward P in Ratu Jope Seniloli and Others –v- The State (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

*"The likelihood of success has always been a factor the court has considered in applications for bail pending appeal and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for bail pending appeal to delve into the actual merits of the appeal. That as was pointed out in Koya's case (Koya v The State unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

*It follows 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" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

- [23] Counsel for the Appellant in both his written submissions and in his oral submissions before me relied on the grounds of appeal having a very high likelihood of success. Whilst leave has been granted in respect of ground 3 it does not necessarily follow that the appeal will succeed on that ground. Leave granted to an Appellant indicates no more than that the ground is arguable. It does not follow that it has a high likelihood of success. Although the Appellant is at liberty to renew before the Full Court the application for leave to appeal against conviction on the grounds for which leave has been refused (section 35(3) of the Act) there is no basis upon which bail pending appeal can be granted. The application is refused.



**Orders:**

- (1) *Leave to appeal against conviction is granted in respect of ground 3 only.*
- (2) *Leave to appeal against sentences is granted.*
- (3) *Application for bail pending appeal is refused.*



*W. Calanchini*

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**Hon. Mr Justice W. D. Calanchini**  
**PRESIDENT, COURT OF APPEAL**