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IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 13 of 2021
(CR 146-148 of 2021)

KAUTAI MOALA

**-v-
REX**

Second application for bail pending appeal

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Ms A. Kafoa for the Applicant (on behalf of Mrs Ebrahim)
Ms T. Kafa for the Crown
Date of hearing: 15 July 2021
Date of ruling: 15 July 2021

1. This is a second application by Mr Kautai Moala for bail pending appeal.
2. On 5 May 2021, Mr Moala was convicted possession of 19.49 grams of methamphetamine.
3. In his reasons for verdict, Judge Cooper identified certain evidence at trial from which he inferred that Mr Moala had the necessary knowledge and control over the subject methamphetamines to establish the offence of unlawful possession beyond reasonable doubt. That evidence and the reasons by which His Honour arrived at that inference are set out, in particular, at paragraphs 169 to 176 of the reasons for verdict. Notably, at paragraph 173, His Honour described various aspects of the evidence as preempting the "strongest inference" that Mr Moala knew "what was going on" and of the methamphetamines found inside the Fau trees nearby.
4. On 2 June 2021, Judge Cooper sentenced Mr Moala and his co-accused, Mr Alatini. Relevantly, His Honor sentenced Mr Moala to a total of 5 ½ years imprisonment with the last 6 months thereof suspended for 2 years on conditions.
5. On 24 May 2021, a notice of appeal was filed on behalf of Mr Moala. In that notice, he sought to appeal against his conviction on the grounds stated therein.
6. On 2 June 2021, Mr Moala applied for bail pending appeal. The grounds of that first application were that there was a possibility that the hearing of his appeal would not be heard this year; alternatively, that there are strong prospects (or 'likelihood') of his appeal succeeding. At that stage, he had not appealed against his sentence.

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7. On 14 June 2021, that first application for bail pending appeal was heard. At paragraph 9 of the ruling, I recorded that:

“Mrs Ebrahim referred to the various grounds of appeal which are specific to Mr Moala. However, Mrs Ebrahim was unable to point to any evidence nor any passage or verdict under consideration to discharge the applicant’s onus of persuading this Court that Mr Moala’s appeal has reasonable prospects of success. In fact, passages of the verdict to which the Court had to direct Mrs Ebrahim’s attention tended to support the verdict rather than any of the stated grounds of appeal referred to during the submission.”

8. For those reasons, the first application was dismissed.
9. On 25 June 2021, a proposed amended notice of appeal was filed, relevantly, in respect of Mr Moala. None of the grounds of the original notice of appeal were altered. Rather, an appeal against sentence was inserted which complains that the sentence imposed on Mr Moala was manifestly excessive “in view of circumstances of the offense and in view of precedent” [sic].
10. On 6 July 2021, counsel for Mr Moala filed this second bail application.
11. The application and supplementary supporting the affidavit were prepared by Mrs Ebrahim who appeared for Mr Moala at the trial and on the first bail application. Ms Kafoa, who appeared for the co-accused, Alatini, at the trial and on his (successful) bail application, appears here today an agent of Mrs Ibrahim for Mr Moala.
12. As with the first, on this application Mr Moala relies upon s 4B(1)(a) of the *Bail Act* (set out in full in the last ruling), which has been interpreted in the application as that the grounds of appeal “in strong and likelihood of the appeal succeed” [sic]. Those grounds are then elaborated upon or more specifically identified in subparagraphs 2(a) to (h) of the application to which I will return shortly. Otherwise the grounds for this second application include that Mr Moala “has no intention of absconding from custody if the appeal is not allowed”.
13. In his supplementary affidavit, Mr Moala deposed, relevantly, that:
- (a) his sentence is manifestly excessive by comparison to the sentences of two offenders whom he has met in prison;
 - (b) he honestly believes that during the trial, the judge ‘prejudged’ his case by saying that the piggery was owned by Mr Moala and that therefore he should have known about the drugs found in the Fau trees;
 - (c) at the time of the police raid, he was away from home and arrived back at the property to be led by police to the Fau trees where the methamphetamine was found.
14. There is no need to recite the balance of the affidavit because it simply affirms the particular grounds of appeal which have been advanced on this application.
15. Those grounds are (verbatim) as follows:

- (a) "His Honour erred in law by inferring that the piggery and Fau trees were the First Appellant [Moala] supplying and dealings of drugs while no evidence in court regarding that issue.
 - (b) His Honour erred in law stating in his judgment that the Second Appellant [Alatini] and Mr Vaipulu are methamphetamine users without any evidence produce in court about Mr Vaipulu.
 - (c) His Honour erred in law convicted the First Appellant on count 4 for a methamphetamine found at a common ground while he had ruled that there's no need of search warrant to obtain in order to lawfully search the common ground since is not belonged to any person.
 - (d) His Honour erred in law by convicted the First Appellant on count 4 but acquitted the other defendants were charged for joint enterprises.
 - (e) His Honour erred in law and in fact held that the search without warrant was lawful.
 - (f) His Honour erred in law by pre-judging this case during the hearing not even the ending of the trial.
 - (g) His Honour erred in law by conducting the trial in a manner that prejudice defendant's right to fair trial.
 - (h) His Honour sentenced the First Appellant for 5 ½ years imprisonment with suspension of the last 6 months for 2 years which is manifestly excessive in view of the circumstances of the offense in view of precedents".
16. During submissions, Ms Kafoa did not press grounds (f), (g) and (h) for the purposes of this bail application.
17. After hearing her submission on grounds (a) to (e), Ms Kafoa agreed, in summary, that Mr Moala's main complaint, which he will seek to demonstrate at the hearing of his appeal, is that the inference drawn by the trial judge that Mr Moala had control over the Fau trees and knew what was in them, and therefore had possession of the methamphetamines, was unsafe and unsatisfactory. In short, she submits that the evidence relied upon by the trial judge was insufficient to support that inference. Therefore, it was submitted that the judge should have had a reasonable doubt about Mr Moala's knowledge and/or control over the methamphetamines found in what was described as 'common ground'.
18. Ms Kafa, who appeared for the Crown, opposed bail. She submitted that the applicant had failed to discharge his onus in relation to the reasonable prospects test in s 4B(1a) and that the evidence referred to by the judge supported the inference drawn and thereby led to his conclusion of guilt.
19. Section 4B(1)(b) - that the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served - does not apply here given the length of the sentence relative to when this appeal against conviction and sentence will be heard which will be in the March 2022 session.

20. There is no issue between the parties in respect of the considerations in subsection (1)(c), that is, there are substantial grounds for believing that if he is released on bail (whether or not subject to conditions), Mr Moala will surrender to custody without committing any offence whilst on bail.
21. Of the relevant considerations specified in ss (2):
- (a) the nature of the offence is serious, and the sentence is long, which militates against bail;
 - (b) the grounds of appeal overlap with the reasonable prospects test, to which I will turn shortly;
 - (c) Ms Kafoa presented four letters during her submissions in relation to Mr Moala's character, antecedents, associations and community ties, namely from:
 - (i) the Ministry of health concerning Mr Moala's wife and a health which has now stabilized
 - (ii) the principal of the school attended by his older children, who observed that, since Mr Moala's incarceration, the children have suffered adversely in terms of their education in the classroom and attendance at school;
 - (iii) the town officer who identified that Mr Moala's business provided income for his family and also others in his town; and
 - (iv) a member of parliament referring to Mr Moala's wife and children.
 - (d) subsection (d) draws attention to Mr Moala's record in surrendering to custody at the trial and on other occasions during the proceedings below, and, as mentioned in respect of ss (1)(c), he has a good record in that regard.
22. I have also taken into account the fact that Mr Moala has a wife and children as a relevant consideration.
23. Ultimately, this application depends for its success on the applicant demonstrating reasonable prospects of success in relation to the grounds which were advanced for the purposes of this application. There are other grounds set out in the proposed amended notice of appeal but this application for bail was based only on those set out in paragraphs 2(a) to (e) thereof.
24. On 9 July 2021, in *Lavulavu v R* [2021] TOSC 111; AC 17 of 2021, it was stated:
- “30. Despite neither counsel referring to it, s 26(2) of the *Court of Appeal Act* provides that this Court may, if it sees fit, admit an appellant to bail pending the determination of his/her appeal.
31. Previous decisions of this Court have produced the following guiding principles:

(a) The granting of bail after conviction is a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevails because a convicted person's right of appeal does not revive the pre-conviction presumption of innocence: *Kaho v R* [2009] Tonga LR 466.

(b) Therefore, the power to grant bail is rarely exercised and should be regarded as very much the exception rather than the rule. "Exceptional circumstances must be shown to exist": *Tuitavake v Rex* [2005] TOCA 13.

(c) There are plain policy reasons why there should not be a wide latitude, after conviction and sentence, in the granting of bail. "The spectacle of a recently sentenced man walking free may be seen by the public as equivocation by the courts and does not tend to foster respect for the system": *ex parte Mahera* [1986] 1 Qd R 303, 310. Moreover, if bail is granted pending the outcome of an appeal which proves to be unsuccessful, the appellant has to be recalled from the community, possibly months after his/her conviction, to serve the sentence imposed: *Sefo & anor v R* [2004] Tonga LR 266. Further, if a more relaxed approach is taken to applications for bail pending appeal, the serious risk of availability of bail pending appeal may lead to a proliferation of unmeritorious appeals, thereby adding to the strains on the system of justice: *R v Giordano* (1982) 31 SASR 241.

(d) The true question has been described as whether there are exceptional circumstances which would "drive this Court to the conclusion that justice can only be done by the granting of bail": *Kaho v Rex*, *ibid*.

(e) In *Tuitavake*, the Court considered it impossible to lay down hard and fast rules as to what may be exceptional circumstances. They may include, for instance, "the brevity of a sentence rendering appeal rights futile without bail and the prospect of undue delay occurring before the hearing of an appeal". Whether an appeal has reasonable prospects of success has also been considered in determining the existence of exceptional circumstances.

32. Approximately five months after the commencement of the *Court of Appeal Act*, the *Bail Act* was introduced.⁹ Section 3 provides, relevantly, that subject to the provisions of the Act, every person who has appealed against conviction or sentence, shall be released on bail until the date when he is next due to surrender to custody. That 'right' is expressly conditioned by s 4B, recited above.

33. Where an application for bail pending appeal is made to the trial judge following verdict, the relevant considerations will those prescribed by s 4B. However, few decisions on applications of this kind have discussed the relationship, if any, and approach to be taken, in light of this Court's dual statutory sources of power to grant bail.

34. A provision empowering the Court should be broadly construed so as to give it full efficacy and to enable justice to be administered: *Estate of Wong v Commercial Factors Ltd* [2011] TOCA 9 at [35].

35. As the two provisions are *in pari materia*, I consider it appropriate to apply the subsequent and specific requirements of s 4B as informing the discretion conferred by s 26(2). Moreover, by its mandatory nature ("shall") entitling an applicant to bail "if" he/she can satisfy the Court of its requirements, s 4B represents a codification of the common law on

applications of this kind and has the effect of defining the exceptional circumstances referred to above. In other words, the Court is likely to consider it fit to grant bail where the requirements of s 4B are satisfied.

36. The applicants bear the onus of satisfying the Court of the requirements of ss (1)(a) or (b) and to establish the grounds in (c).”

[other citations omitted]

25. Here, the above summary of the grounds advanced in support of this application focused on whether the evidence for the inference drawn by the trial judge was sufficient to amount to a safe or satisfactory verdict. Ms Kafoa candidly conceded that the aspects of the evidence by the judge at paragraph 169 of the verdict and following were in fact part of the evidence at trial, which His Honor was entitled to accept, and which he did accept. In other words, this is not a ‘no evidence’ case rather an ‘insufficient evidence’ case.
26. Circumstantial evidence is evidence which, if accepted, tends to prove a fact from which the existence of a fact in issue may be inferred: *Festa v R* (2001) 208 CLR 593. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. Ms Kafoa here emphasized that there was no direct evidence which could support a conclusion that Mr Moala knew of or controlled the methamphetamines found in the Fau trees.
27. Circumstantial evidence can be powerful evidence, but it is equally important to examine it with care and to consider whether the evidence upon which the Prosecution relies in proof of its case is reliable and if it does prove guilt or are there any other circumstances which are, or may be, of sufficient reliability and strength to weaken or destroy the prosecution’s case: *R v Siosiu Po’oi Pohiva* [2008] TOSC 20. A court should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation which amounts to no more than guessing or making up theories without good evidence to support them: *R v Siosiu Po’oi Pohiva*, *ibid*.
28. Circumstantial evidence necessarily calls upon processes of reasoning that involve the drawing of inferences from a jigsaw of established facts: *De Gruchy v R* (2002) 211 CLR 85 at [47]. In order to draw an inference, the Court is required to make findings of primary fact from which the inference may be drawn: *Kolo v Leone* [2008] Tonga LR 188.
29. In *Shepherd v R* (1990) 170 CLR 573, Dawson J observed:¹

“4. ... In most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed, the number will

¹ Citing *Chamberlain v. The Queen* (No.2) 153 CLR 521 at 599.

depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. That means that the essential ingredients of each element must be so proved. ...

6. ... It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. ...

11. ... An inference of guilt may properly be drawn although any particular primary fact, or any concatenation of primary facts falling short of the whole, would be insufficient to exclude other inferences. It follows that the insufficiency of a piece of evidence to support an inference of guilt does not by itself warrant the setting aside of a verdict of guilty if that piece of evidence, however important, is but a part of the whole body of evidence available to support the inference."²

30. To convict, the inference of guilt must be the only inference that is reasonably open on all the primary facts, established to the requisite standard of proof: *De Gruchy*, *ibid*, at [48]. It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference: *Teper v The Queen* [1952] AC 480.
31. On this application, Ms Kafoa (who, as mentioned, acted for Mr Alatini at the trial below) made submissions, which I understood were to the effect, that by the trial judge's acquittal of Mr Alatini in respect of count 4, his conviction of Mr Moala could be doubted because Mr Alatini was clearly found to be have been a guard employed by Mr Moala who was at the piggery and who was found to have small amounts of methamphetamine on him which were the subjects of the counts on which he was convicted. The logical implication from Ms Kafoa's submission was that there was a hypothesis available on the evidence in relation to Alatini which ought to have led the trial judge to have held a reasonable doubt about Mr Moala's knowledge and control of the methamphetamines the subject of count 4. For obvious reasons, Ms Kafoa did not go as far as to say that it could have been Mr Alatini who owned those drugs. That, of course, was not the case put on behalf of Mr Alatini below.
32. The only other inference or hypothesis consistent with Mr Moala's innocence suggested by Ms Kafoa was based on the fact that the Fau trees were said to be on common ground and that, therefore, any number of other persons who had access to or walked by those trees could have owned the methamphetamines.
33. In my view, by comparison to the aspects of the evidence and reasoning set out in paragraphs 169 to 175 of the verdict, I am not satisfied that the applicant here has demonstrated reasonable prospects of success by which the verdict, as a

² Citing *Chamberlain v. The Queen* (No.2) 153 CLR 521 at 599.

matter of principle or approach, or for the reasons relied upon by the trial judge, could be upset by this Court.

34. That does not preclude the possibility of further, more expansive argument on the hearing of the appeal which might strengthen Mr Moala's case concept. But on the basis of the grounds referred to in the application, and the way in which were advanced, I am not satisfied that they, or any of them, have the requisite reasonable prospects (or a real chance) of succeeding in demonstrating that the inference of knowledge and control was not open to the trial judge. There is a high threshold to be met in a case of that nature compared to others which rely upon no evidence below to support a particular inference. This case is not one of those.
35. Therefore, even though some of the other statutory considerations favour the granting of bail, the primary requirement of reasonable prospects of success on appeal has not been met and therefore this application must be refused.

NUKU'ALOFA
15 July 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC LCJ
PRESIDENT