IN THE COURT OF APPEAL TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 17 of 2021
(CR 173 & 174 of 2018)

BETWEEN:

[1] AKOSITA LAVULAVU
[2] ETUATE LAVULVAU

Appellants / Applicants

-and-

REX

Respondent

Application for bail pending appeal

RULING

BEFORE:	PRESIDENT WHITTEN QC LCJ
Appearances:	Mr W. Edwards Jnr for the Appellants / Applicants
	Mr T. 'Aho for the Respondent
Date of hearing:	6 July 2021
Date of ruling:	9 July 2021

Introduction

1. This is an application to a single Judge of the Court of Appeal for bail pending the hearing of the applicants' appeals against their convictions (and proposed appeals against sentence).

Background

2. On 4 June 2021, following a trial by judge alone between 12 April 2021 and 21 May 2021, Cooper J found each of the applicants guilty of three counts of obtaining a total of $558,600 by false pretences, contrary to s 164 of the *Criminal Offences Act.*

3. The counts spanned the period 2013 to 2015, during which, the applicants, through 'Unuaki 'o Tonga Royal Institute ("UTRI"), of which they were the Director and President respectively, were found to have applied to the Ministry of Education and Training for technical vocational educational training ("TVET") grants in respect of students claimed to have been enrolled at the Institute. In essence, the trial judge found that:

   (a) the numbers of students specified in the applications, and on which the quantum of the grants was based, had been falsified;

(b) the applications constituted representations by both applicants;

(c) which they both knew were false (and had therefore acted dishonestly); and

(d) upon which, the Ministry relied in approving and paying the grants.

4. On 30 June 2021, the applicants filed Notices of Appeal against conviction.

Grounds of appeal

5. The identical Notices of Appeal run to some 20 pages consisting of an apparent 14 grounds, many with numerous 'particulars' which, in combination, raise various questions of law, fact and mixed law and fact. They may be summarised as follows:

(a) The trial judge erred by applying the law of agency, to wit:

(i) by finding that Mr Lavulavu was liable for the representations made by Mrs Lavulavu on all three counts;

(ii) by finding, in respect of count 3, that they were both liable for the acts of a UTRI employee who prepared and signed the TVET application for that period;

(iii) by finding that Mr Lavulavu knew of the falsity of the applications by reason only that, his wife, Mrs Lavulavu knew of the falsity;

(iv) by finding that as both Mr and Mrs Lavulavu ran the college, they were jointly responsible for the false representations made by staff on their behalf and at their order;

(v) the relationship between the appellants is "one of aiding and abetting each other";

(vi) agency does not apply because the applications for TVET grants were made by UTRI, "a separate legal entity";

(vii) there is no criminal offence in Tonga where an accused can be charged and found guilty by way of agency;

(viii) the trial judge failed to apply sections 8 to 12 of the *Criminal Offences Act* (principal offender and abettor) as the applicable law of Tonga; and.

(ix) there was no evidence of Mr Lavulavu assisting with, procuring, encouraging or signing any of the applications.

(b) In relation to count 1:

(i) Mrs Lavulavu relied on the application as prepared by staff;

(ii) neither the application form nor the *Education Act* provided any 'guidance' on the making of applications;

(iii) there was no 'clear evidence' to establish falsity;

(iv) the judge's finding that students claimed for had to have paid their fees in cash, not in kind, was an irrelevant consideration;

(v) the judge wrongly rejected Dr 'Eke's evidence that private schools were free to regulate their own fee payment methods, including, in kind; and

(vi) the TNQAB approved UTRI's quality management system manual and therefore 'knew about' the tuition scheme implemented by UTRI.

(c) In relation to count 2:

(i) there was no evidence the application form was wrong;

(ii) the trial judge held that the date of the representation was 29 October 2014, when the money was paid, not the date the application was signed by Mrs Lavulavu; and

(iii) the application form was incomplete as it did not contain the conditions to be complied with.

(d) In relation to count 3:

(i) the 2015 application form was neither completed nor signed by either of the applicants, nor did they apply for the grant that year on behalf of UTRI;

(ii) the trial judge erred in finding that Mrs Mele Tovi, who did complete and sign the application, did so as the agent of Mrs Lavulavu;

(iii) there was no evidence that either appellant knew of any falsity in that application; and

(iv) there was no evidence that Mr Lavulavu even knew of the application.

(e) There was 'no direct evidence', and the trial judge misdirected himself by drawing an inference, that an indemnified Crown witness, Ms Kivalu, was ever told to mislead or do anything wrong or unlawful with the receipts or any other document.

(f) The receipts were not representations as they did not form part of the applications.

(g) The trial judge made adverse findings in relation to the credibility of Ms Nasilai, Ms Tahi and Dr 'Eke; the knowledge of the appellants; Mr Lavulavu using "his political connections to facilitate these frauds"; UTRI operating on a cash basis "to help try and hide dishonest transactions", which were unsupported by any evidence and were "speculative and prejudicial" to the appellants.

(h) The appellants were subject to 'unfair judicial treatment' (by reference to be made to the transcript of evidence) including:

(i) by indicating, early in the trial, that there had been "fraud on the

receipts" and that the law of agency applied, the trial judge predetermined the applicants' guilt;

(ii) the trial judge misstated certain of the evidence, in a manner prejudicial to the appellants and thereby demonstrated bias towards them;

(iii) by directing certain questions to witnesses and Mrs Lavulavu, the trial judge 'entered the fray' and acted as another prosecutor; and

(iv) the large number of interjections by the trial judge 'appeared unfriendly and unfair' and demonstrated bias against the appellants and their witnesses.

(i) The conduct of the trial was therefore unfair and the verdicts are therefore unsafe and unreliable.

6. On 2 July 2021, Cooper J sentenced both applicants to 6 years' imprisonment,[1] with the final year of Mrs Lavulavu's sentence being suspended for 2 years on conditions.

7. Later that day, the applicants filed this application for bail pending appeal.

Grounds of the application

8. The grounds for bail are stated as:

(a) "the Appeals against the verdict have considerable merit"; and

(b) "the Appeals are unlikely to be heard until the Court of Appeal session to be held in September 2021 or March 2022".

9. Apart from affirming those grounds, by their affidavits in support, the applicants deposed, relevantly, that:

(a) they believe, upon advice, that they are not guilty;

(b) their grounds of appeal "speak for themselves";

(c) they "strongly disagree" with the judge's conclusions during sentencing that they had "implemented a fraudulent scheme", which was "contrary to the facts of the case"; and

(d) they have two young children.

Material considered

10. In considering this application, I have considered the following material:

(a) the statements of agreed and disputed facts (and the applicants' explanatory memorandum in relation to the disputed facts);

(b) the parties' written closing submissions at trial;

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[1] The statutory maximum penalty for the offences is the equivalent to theft, namely, 7 years imprisonment.

(c) the trial judge's reasons for verdict;

(d) the trial judge's sentencing remarks;

(e) the Notices of Appeal; and

(f) the application for bail pending appeal and the applicants' supporting affidavits.

11. I have also scanned 19 folders of documents, including the exhibits, produced in the lead up to and during the trial.

Submissions

12. At the commencement of the trial below, Mr William Edwards of counsel appeared for both applicants. During the trial, he withdrew from acting for Mr Lavulavu but continued to act for Mrs Lavulavu.[2] The trial judge recorded the reason for that change as being 'a breakdown in the relationship' between Mr Edwards and Mr Lavulavu. During submissions on this application, Mr Edwards explained that the change was due to 'differences in his clients' interests'. At sentencing, Mr Lavulavu was represented by Mr Clive Edwards SC. On this application, Mr William Edwards returned to appear for both applicants.

Section 4B of the Bail Act

13. In his oral submissions, Mr Edwards presented the application by reference to the requirements of s 4B of the *Bail Act* which provides:

> **4B Bail whilst awaiting appeal**
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> (1) A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against that conviction or sentence shall be granted bail if the Court is satisfied that —
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> (a) there is a reasonable prospect of the appeal succeeding; or
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> (b) the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
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> (c) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will surrender to custody without committing any offence whilst on bail.
>
> (2) In taking the decision required by subsection (1), the Court shall have regard to all the relevant circumstances and in particular —
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> (a) the nature of the offence and length of the sentence;
>
> (b) the grounds of appeal;
>
> (c) the character, antecedents, associations and community ties of the person; and

[2] Reasons for verdict at [251] to [253].

(d) his record in surrendering to custody at the trial and on other occasions.

14. Working through those considerations, in reverse order, Mr Edwards submitted, in summary, that:

    (a) of the requirements of subsection (2):

        (i) the applicants were not likely to "infringe" if granted bail and that they have a good record of appearing before the court to date;

        (ii) their good character was evidenced by the references produced for sentencing;

        (iii) the applicants take issue with some of the comments by the probation officer in the presentence report about how certain of those references were obtained;

        (iv) the subject offending occurred prior to Mrs Lavulavu's appointment as a Minister of the Crown;

        (v) with the recent withdrawal of a Magistrates Court private prosecution involving allegations of dishonesty against him, Mr Lavulavu has not been the subject of any other allegations of wrongdoing since 2015; and

        (vi) however, the nature of the offending and the length of the sentences militates against the application for bail;

    (b) in relation to ss (1)(c), the Court could be satisfied, that if released on bail, the applicants will surrender to custody without committing any offences whilst on bail; and

    (c) given the length of the sentences and the fact that the appeals will be heard in the March 2022 session, subsection (1)(b) does not apply.

15. Therefore, the principal basis advanced is subsection (1)(a), namely, that there is a reasonable prospect of the appeal succeeding.

16. Mr Edwards identified that grounds 8 to 14 of the Notice of Appeal require a review of the transcript of the trial which is yet to be completed.

17. Of the 14 grounds or issues for appeal, as summarised above, Mr Edwards elected to make submissions in support of this application in relation to four.

18. Firstly, Mr Edwards submitted that:

    (a) there is no authority in Tonga supporting the trial judge's reliance upon common law principles of agency as a basis for criminal liability;

    (b) the agency issue will "play a large part in the appeals";

    (c) the appropriate sections are 8 to 12 of the *Criminal Offences Act* dealing with accessorial liability such as abetment;

(d) neither of the applicants were charged in accordance with those provisions; and

(e) if agency principles were to be applied in Tonga, the result could be quite "frightening" in that people would not know whether their actions could lead to criminal liability or whether a spouse could be found criminally liable simply for being married.

19. By contrast, Mr 'Aho submitted that he was not aware of any authority for the proposition that the doctrine of agency does not apply in Tongan criminal law. He added that ss 2 and 3 of the *Civil Law Act* imported the common law of England wherever Tongan statutes are silent. Further or alternatively, Mr 'Aho submitted that even without resort to the law of agency, the ultimate findings were open to the trial judge upon his acceptance of the evidence of Ms Kivalu that both the applicants instructed her to prepare the inaccurate student lists.

20. Secondly, Mr Edwards referred to grounds 9 to 14 of the notice of appeal in which the appellants complain of various forms of "unfair judicial treatment" during the trial. Mr Edwards focussed on ground 10. The chapeau to that ground refers to the trial judge "entering the fray" and directing questions to witnesses which ought properly have been put by the prosecution. In so doing, the appellants complain that the trial judge "acted as another prosecutor in the proceedings, instead of independently adjudicating the matter".

21. Mr Edwards purported to give evidence from the bar table as to his recollection of this aspect of the trial. For instance, he estimated that in relation to Mr Lavulavu's evidence, the judge asked about 60% of the questions. As noted, Mr Edwards accepted that this complaint required a review of the transcript of the trial. He acknowledged, therefore, that this ground of appeal "may have to be amended" after consideration has been given to the transcript.

22. Mr Edwards then handed up a copy of a decision of the UK Privy Council in *Peter Michel v R* [2009] UKPC 41 as authority for the principles concerning unfair hearings where the questions asked by a trial judge are inappropriate in number and/or kind (referred to further below).

23. Mr 'Aho confirmed that this issue could not be assessed without reference to the transcript. However, he submitted, this time from his recollection, that the judge's questions were of a "clarifying nature". Further, no complaint or objection was raised during any of the questioning by the judge or in closing submissions. He also referred to s 162 of the *Evidence Act*, which will be discussed further below.

24. Thirdly, Mr Edwards submitted that there was no evidence adduced at trial that Mr Lavulavu had any knowledge of, or participated in any way in the preparation of, the inaccurate student lists which underpinned the applications for TVET grants. He contended, therefore, that there was no basis for the trial judge to have drawn the inference he did to the contrary. During further discussions with Mr Edwards on this point, that categorical submission contracted, firstly, to one which

again depended upon reference to the transcript; then secondly, to a concession that there was *some* evidence upon which the inference was open; to thirdly, a criticism of the Crown in failing to have adduced any direct evidence of the defendants' knowledge of falsity or that they ordered their staff to 'add names to the student lists', which, he opined, 'was available'. In that latter regard, Mr Edwards explained that Ms Kivalu was not cross-examined on any prior inconsistent statements she may have given to police because her evidence was "not considered prejudicial".

25. Mr 'Aho sought to counter that by referring to what he described as the Crown's "three big pieces of evidence at trial", namely, the Auditor General's report, the agreed summary of facts signed on 9 April 2021 by which both sides agreed that 158 students claimed for did not attend the school, and Ms Kivalu's unchallenged evidence. Then, Mr 'Aho submitted, the evidence of Mele Lupe Ilaiu, to effect that Mr Lavulavu 'knew all about the applications', 'sealed the accuseds' fate'.

26. Fourthly, and following from the last, Mr Edwards submitted that the trial judge's finding that:[3]

> *"Miss Kivalu was clear that the creating of the enrolment list and the receipts was done at the order of both defendants. By 'order' she implied that it arose not out of administrative processes or true accounting, but to mislead."*

was unsafe.

27. Mr 'Aho submitted that Ms Kivalu gave evidence that she was instructed by both applicants to prepare the student lists, which she knew were inaccurate, but which she understood were for internal purposes only. When Mr Edwards sought to dispute those recitations of the evidence, Mr 'Aho produced and read from an informal transcript of the evidence compiled by the Prosecution during the running of the trial. That difference between counsel only served to highlight the extent to which the formal transcript of proceedings was necessary in order to assess the competing arguments on appeal that are based on the evidence or lack of it.

28. Mr 'Aho also referred to the judge's adverse credit and reliability findings in relation to the applicants' evidence. He also found that one of their witnesses had perjured herself in relation to her working relationship with Mrs Lavulavu.

29. Finally, Mr 'Aho submitted that upon "pulling all those strands together", it was open to the trial judge to make the findings of guilt that he did.

Consideration

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:

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[3] Reasons for verdict at [1085].

(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.[4]

(b) Therefore, the power to grant bail is rarely exercised[5] and should be regarded as very much the exception rather than the rule.[6] "Exceptional circumstances must be shown to exist": *Tuitavake v Rex* [2005] TOCA 13.[7]

(c) There are plain policy reasons why there should not be a wide latitude, after conviction and sentence, in the granting of bail.[8] "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

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[4] See also *R v Hartstone* [1988] NZCA 1.
[5] *Kafoa v Rex* [1997] TOCA 3.
[6] *Kaho*, ibid.
[7] Applying *Halsbury's Laws of England*, 4th ed, (1990), Vol 11(2) paragraphs 904 and 998; Donovan on *The Law of Bail* (1981) p 98; *Re Cooper's Application for Bail* [1961] ALR 584; *Hayes v R* (1974) 48 ALJR 455.
[8] *Tuitavake*, ibid, citing *Chamberlain v R* (1982) 69 FLR 445 at 447 per Fox J.
[9] The *Court of Appeal Act* came into force on 1 July 1990. The *Bail Act* came into force on 13 November 1990.

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).[10] 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[11] 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).

37. On the relevant temporal facts of this application, subsection (1)(b) does not apply. The applicants have each been sentenced to six years imprisonment, with the final year of Mrs Lavulavu's sentence being suspended for two. Given the proximity of the date of filing their Notices of Appeal, the applicants' appeals are unable to be heard in the September 2021 session of the Court of Appeal but will be listed to be heard in the March 2022 session, that is, in approximately nine months' time. Therefore, the appeals will be heard before the whole or a substantial portion of their sentences have been served.

38. In relation to ss (1)(c), the history of the proceedings below and her hitherto unblemished record provide some grounds for believing that, if released on bail (whether or not subject to conditions), Mrs Lavulavu will surrender to custody without committing any offence whilst on bail. On the other hand, and even though, to date, Mr Lavulavu has also appeared before the Court when required, his history of dishonesty casts doubt over the last limb of subsection (c), namely, whether he might commit further offences whilst on bail. His offer, during submissions on sentence, to make full restitution in return for a non-custodial sentence, while at the same time maintaining his innocence, tends to reinforce those reservations. The comments in the presentence report about a number of character references having been prepared by the applicants, and another having been amended after signing, exacerbates those concerns. On balance, however, I am prepared to assess the considerations in s 4B(1)(c) as neutral.

39. It is convenient at this point to record my regard to all the relevant circumstances

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[10] *Cape Brandy Syndicate v IRC* [1921] 2 KB 403. See also *Bin Huang v Police* [2020] TOSC 28 at [49] citing Bennion on 'Statutory Interpretation', p. 429.
[11] *Kaho*, ibid.

as required by ss (2), and the specific considerations listed therein.

40. As accepted by Mr Edwards, the offences are of a very serious nature, involving some of the largest monetary amounts for offences of this kind seen in the Kingdom to date. Relative to the statutory maximum term of 7 years imprisonment, the sentences imposed are long. Both those matters weigh against a grant of bail.

41. The grounds of appeal overlap with the central issue on this application, namely, whether the applicants have demonstrated a reasonable prospect of success on their appeal, which will be discussed in detail further below.

42. Similar to the assessment of the considerations in ss (1)(c), Mrs Lavulavu's previous character, antecedents, associations and community ties are positive factors. However, Mr Lavulavu's previous history of dishonesty tends to overshadow any meritorious antecedents such as his time in public office and other civic associations, and in my view, does not assist his cause on this application.

43. During the proceedings, to date, both applicants have surrendered to custody when required. The current Covid-19 pandemic (since March 2020) and consequent border closures may have indirectly ensured that. According to most recent Government indications, those conditions are not expected to change significantly any time soon.

44. I have also taken into account that the applicants have two young children. However, as the trial judge observed in sentencing, the children are being cared for by their grandparents. There is no indication in the material on this application of any change to that arrangement. Clearly, that an offender has dependent children cannot, on its own, be a reason for granting bail. In applications where the more substantive requirements of ss (1) may be finely balanced, children may tip the balance in favour of bail.

Reasonable prospects on appeal?

45. As confirmed by Mr Edwards, the applicants rely, as they must, primarily on s 4B(1)(a), namely, that they have a reasonable prospect of succeeding on their appeals.

46. In that regard, the orders sought in their respective Notices of Appeal include not only that their convictions be set aside but that the appellants also be acquitted. In other words, the appellants will be asking this Court to go beyond a determination as to whether the conduct of the trial resulted in a substantial miscarriage of justice or whether the verdicts are infected by errors of law or are unsafe or insupportable on the evidence, and to foreclose any possibility of a re-trial by acquittals on appeal.

47. At this stage of the analysis, it bears repeating that the applicants bear the onus of satisfying the Court that their grounds of appeal, as articulated in the Notice of

Appeal, or any of them, have reasonable prospects of success. Further, it must be demonstrated that any successful ground or grounds will warrant the convictions being quashed. For present purposes, I do not propose to extend that burden by requiring the applicants to also demonstrate reasonable prospects of being acquitted.

48. The hearing of an application of this kind is not the occasion for any in-depth consideration of all the arguments that may be presented at the hearing of the substantive appeal. *A fortiori*, any decision on an application for bail cannot be interpreted as pre-empting any decision of the Full Court on the substantive appeal.

49. A 'reasonable' prospect is one which may be regarded as rational or according to reason. Reasonable prospects of success mean a 'real chance' of that, rather than whether it is more likely than not: *Taufa v Rex* [2005] TOCA 1. However, in *Tuitavake*, supra, it was observed that the prospects of the success of the appeal may be discounted as a factor to be assessed by the Court hearing an application for bail "unless those prospects are obvious".[12]

50. To discharge the aforesaid onus, it will usually not be enough for an applicant to simply point to the grounds in the Notice of Appeal and assert, as here, that they "speak for themselves". Nor is it appropriate to either expressly or impliedly invite the judge hearing the application to blindly accept or presume the accuracy of the complaints in the Notice of Appeal. Such an approach would be antithetical to the principles and policy considerations observed by this Court, as referred to in paragraph 31 above, to effect that a grant of bail pending appeal is rare and only in exceptional circumstances. As discussed, that position must also be considered in light of the right to bail enshrined in the *Bail Act* subject to the requirements of s 4B.

51. There may, of course, be cases where the Notice of Appeal identifies, with precision, that a trial judge misapprehended the relevant law by, for instance, relying on authority which may be swiftly demonstrated to have been overturned on appeal. Similarly, there may be cases where the Notice of Appeal clearly identifies misapprehensions of fact by, for instance, cross-referencing internal inconsistencies within the reasons for verdict in relation to the identification or characterisation of evidence by which a trial judge obviously misdirected him/herself as to facts which were material to the verdict. In such cases, an assessment of the prospects of success is likely to be relatively straightforward. Here, however, by the number and manner in which the grounds of appeal have been expressed in the Notices of Appeal, this case is clearly not such a case.

52. In a case such as the present, an applicant for bail, relying on the 'reasonable prospects' ground, must at least be able to identify some part of the reasons for verdict and/or the evidence at trial (including where it is contended that there was

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[12] Citing *R v Giordano* (1982) 31 SASR 241 at 243.

no evidence to support the verdict) and present counter arguments which persuade the Court that the particular ground of appeal has a 'real chance' of success. By that approach, it will often be possible to form a view, perhaps more instinctual than analytical, that something has gone wrong below.

53. Where any ground of appeal relies upon an appraisal of the evidence at trial, whether that be oral testimony, documentary exhibits or admissions, evidence of same should be presented to the Court as the foundation for the submission as to reasonable prospects. Such submissions cannot be made in a vacuum. Nor are they likely to gain any traction if based solely on counsel's belief or view of the applicant's prospects or counsel's recollection from the bar table as to the evidence below. Usually, therefore, the primary reference source will be the transcript of the trial (and any relevant exhibits or statements of agreed facts). Where that may not yet be available, and absent any agreement between the parties, it is open to them to file affidavits from persons who were present during the relevant part of the trial deposing to their recollections (or better still, from notes taken during the course of the trial) of the relevant evidence or exchanges between the trial judge and counsel or any witnesses. When asked why, on this application, he and his clients had not filed any affidavit material deposing to the relevant evidence or exchanges with the trial judge, Mr Edwards explained that they had not done so for "fear of being inaccurate".

54. With the exception of references to certain paragraphs of the reasons for verdict in grounds of appeal 8, 12 and 13, the applicants here failed to provide any objective evidence of what occurred at the trial either by the transcript or any affidavit as to the relevant evidence or exchanges relied upon.

55. Order 8 rule 2 of the *Court of Appeal Rules* provides that a transcript of proceedings in the lower court (or a specified part thereof) will not be prepared unless requested by a party when lodging his Notice of Appeal, or respondent's notice, as the case may be. The applicants here did not make such a request when filing their Notices of Appeal.

56. As it happened, given the estimated length of the trial, I directed the Registrar to arrange for court staff to commence work on the transcript during the running of the trial, and which the available court staff have been working on since. Those staff are also responsible for the preparation of transcripts for a number of other appeals which have been listed for hearing in the next session of the Court of Appeal commencing 20 September 2021. The transcript for this matter, which is likely to run in excess of 1,000 pages, is currently expected to be completed within the next 1 to 2 weeks. But for that direction, the transcript would likely not have been completed for several more months.

57. Despite being cognisant of that deficiency bearing upon the majority of the grounds of appeal, as noted above, Mr Edwards advanced four grounds or issues, which, he submitted, have reasonable prospects of success.

Agency

58. Mr Edwards' submission that the trial judge erred in applying the law of agency lies at the heart of grounds 1, 2, 6 and 7. Mr Edwards did not make any submission in relation to the authorities cited by the trial judge which illustrated the application of agency principles.[13] Nor did Mr Edwards cite any authority in support of his submission that the law of agency is not applicable in fixing criminal liability in Tonga.

59. Despite its title, the operative provisions of the *Civil Law Act* do not limit or exclude the importation of the English common law in criminal proceedings.

60. In the seminal text by Archbold, "Criminal Pleading, Evidence & Practice", 2009, the learned authors state:[14]

> "18-7 ...It is not necessary that a principal should be actually present when the offence is committed: *R v Harley* (1830) 4 C & P 369. Nor is it necessary that the act should have been perpetrated with his own hands; or if an offence is committed through the medium of an innocent agent, employer, though absent when the act is done, is answerable as a principal: *R v Manley* (1844) 1 Cox 104; *R v Bull and Schmidt* (1845) 1 Cox 281; *R v Butt* (1884) 15 Cox 564, CCR; 1 Russ.Cr., 12th ed., 129. Thus, if... any other person who is not criminally responsible (whether by reason of defect of understanding, ignorance of the facts, absence of mens rea or other cause) is incited to the commission of any crime, the inciter, though absent when the act constituting the crime is committed, is liable for the act of his agent, and is a principal: *Fost.* 349; 1 Hawk. C. 31, s.7; *R v Butcher* (1858) Bell 6; *R v Tyler* (1838) 8 C & P 616."

61. Of course, the concept of agency as referred to in Archbold is closely related to the criminal law principle of accessorial liability by way of aiding and abetting, etc. But, as the trial judge noted, that is not how the Prosecution put its case. I did not understand Mr Edwards to submit that the Prosecution was obliged to do so; rather, that it was 'more appropriate' for the applicants to have been charged in accordance with the relevant provisions of the *Criminal Offences Act* concerning accessorial liability. Given that s 8(a) of the *Criminal Offences Act* provides that an abettor is liable to the same punishment as the principal offender, the significance of the submission proved elusive.

62. The applicants' submission on this issue (and relevant grounds of appeal) largely focussed on agency being applied by the trial judge solely by reason that the applicants were husband and wife. The trial judge also applied the principles of agency on the undisputed bases that Mr Lavulavu was the founder and President of UTRI and was at all material times its "managing authority", Mrs Lavulavu was its Director, "they both ran the college"[15] and they personally held or controlled

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[13] Reasons for verdict at [1003] and [1004].
[14] See also [21.43]: "Property may be appropriated through the acts of an innocent agent: *R v Stringer* 94 Cr.App.R. 13, CA."
[15] Reasons for verdict at [1156] as referred to in particular (i) to paragraph 6 of the Notice of Appeal.

the bank accounts into which the TVET grant funds were paid.

63. Further, Mr 'Aho's alternative submission that even without resort to the law of agency, the ultimate findings were open to the trial judge upon his acceptance of the evidence of Ms Kivalu that both applicants instructed her to prepare the inaccurate student lists, like her evidence at trial, went unanswered.

64. For those reasons, I am not satisfied that the applicants have demonstrated reasonable prospects of success on this ground of appeal.

Unfair judicial treatment

65. Again, as acknowledged by Mr Edwards, the applicants' complaint in ground 10 of their Notice of Appeal, that they suffered "unfair judicial treatment", cannot be properly assessed without a review of the transcript.

66. As further acknowledged by Mr Edwards during submissions, the five paragraphs set out under the heading "Particulars" to paragraph 10 do not in fact provide any details of the trial judge "entering the fray". References to the trial judge "entering the fray", "directing questions at witnesses which ought properly have been put by the prosecution", the trial judge's questions being "unfair and onerous", and that "a large number of interjections made by the trial judge appeared unfriendly and unfair to the appellants and their witnesses"[16] are all conclusory statements. Without consideration of the record of what was actually said on those occasions, and the context in which it was said, it is impossible to determine whether the applicants' characterisations are fair and, if so, whether, as a result, their trial was unfair.

67. Unfortunately, Mr Edwards did not refer this Court to any particular part of the decision in *Peter Michel v R*. There, the UK Privy Council, on appeal from the Court of Appeal of Jersey, discussed the 'canons' of judicial conduct[17] required to ensure a fair trial and the circumstances in which a verdict may be set aside where aberrant judicial conduct results in a "substantial miscarriage of justice". For instance, the Committee observed:

> "27. There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, the Appeal Court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried: so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor. This wider principle is not in doubt. Perhaps its clearest enunciation is to be found in the opinion of Lord Bingham of Cornhill speaking for the Board in *Randall v R* [2002] 2 Crim App R, 267, 284 where, after remarking that 'it is not every departure from good practice which renders a trial unfair' and that public confidence in the administration of criminal justice would be undermined 'if

[16] Notice of Appeal, [11].
[17] E.g. at [31] and [34].

> a standard of perfection were imposed that was incapable of attainment in practice,' Lord Bingham continued:
>
> > *'But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.'"*

68. The Committee described an appellant's task of persuading an appeal court, in effect, that the jury (or, as here, a judge alone) would have come to the same conclusion without the judge's inappropriate interventions, as 'formidable'.[18] Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process.[19] Ultimately, the question is one of degree.

69. In the present case, and as Mr Edwards properly conceded, the principles discussed in *Peter Michel* were considered in a statutory context which did not include a provision such as, or even remotely similar to, the somewhat unique discretion conferred by s 162 of the Tongan *Evidence Act* which provides, relevantly:

> **"Court's power to ask question**
>
> The Court may in its discretion ask any question in any form at any time of any witness:
>
> Provided that by the leave of the Court any party may cross-examine the witness upon any answer given in reply to any question: ..."

70. In my view, s 162 reflects the realities of the Tongan legal context in which many defendants are unable to afford legal representation and, for those who can, many of their lawyers have limited trial experience. As such, greater and more robust intervention by a judge in the trial process is often required than would usually be expected (or tolerated) in other jurisdictions in order to ensure that all reasonably obtainable admissible evidence is before the court[20] (subject to any forensic decision by any party, or legal right [21]) and that the evidence that is adduced is relevant, complete, clear and coherent. For if judges in Tonga do not ensure that trials are conducted with those safeguards, then the constitutional right to a fair trial may be jeopardised and different kinds of miscarriage of justice are likely to result.

71. It ought not be doubted, however, that the broad discretion conferred by s 162 must still also be tempered by the principles of judicial conduct discussed in *Peter*

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[18] [26]
[19] [28]
[20] Per s 5 of the *Supreme Court Act*.
[21] E.g. ss 17 and 121 of the *Evidence Act*.

Michel in order to ensure a fair trial.

72. Accordingly, as this issue presently stands, I am unable to be satisfied that it has reasonable prospects of success on appeal. Moreover, it is not possible to form any assessment as to whether, if the appellants are able to establish, for instance, inappropriate interventions by the trial judge, such conduct resulted in a substantial miscarriage of justice which necessitates setting aside the verdicts.

Evidence of knowledge

73. Mr Edwards' assertion that there was no evidence adduced at trial that Mr Lavulavu had any knowledge of or participated in any way in the preparation of the inaccurate student lists which underpinned the applications for TVET grants, when refuted by Mr 'Aho, was another example of an issue, the assessment of which, required the transcript or other record of the evidence given by each of the relevant witnesses during the trial.

74. Mr Edwards' 'no evidence' submission was also at odds with the summary of the evidence set out in the judge's reasons for verdict,[22] and from which he sought to draw together the "strands"[23] (as the Prosecution termed them) of the evidence he did accept in order to draw relevant inferences and arrive at the conclusion that the Prosecution had proven its case to the requisite standard.

75. As Mr Edwards' submissions on this issue devolved into acknowledging that there was some evidence available upon which the judge could have drawn the relevant inference of knowledge, but that the judge should not have had to do so because direct evidence on the issue was available which the Prosecution did not adduce, it became apparent that this issue is in fact not about lack of evidence or even sufficiency; but rather, weight.

76. Mr 'Aho's submissions identifying what he dubbed as the Crown's "three big pieces of evidence at trial", were not refuted by Mr Edwards, and to be fair to him, in the absence of any transcript, it may not yet be possible to attempt to do so. While I do not regard the Crown's internal transcript as being authoritative in any way, nor was it referred to as such, it was notable that when Mr 'Aho referred to passages from it, Mr Edwards' earlier remonstrations as to the accuracy of that evidence faded.

77. Accordingly, and again as this issue presently stands, I am not satisfied that there are reasonable prospects of its success on appeal.

Whether the verdict was unsafe

78. For much the same reasons, I am also not satisfied, at this time, that the fourth issue or ground of appeal relied upon by Mr Edwards has reasonable prospects of success. Again, the parties' respective submissions conflicted at the point of an accurate record of the evidence given by the indemnified witness, Ms Kivalu.

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[22] [1018] to [1025], [1135] to [1137], [1173], [1181] and [1225].
[23] [1012], [1082], [1111] and [1174].

79. Without consideration of the actual evidence she gave, it is not possible to form any reliable assessment of the applicant's complaint that the judge's finding that Ms Kivalu 'implied' that the purpose of the applicants' order to her was to mislead, is unsafe.

Result

80. For those reasons, I am not satisfied that the applicants' prospects of success on their appeals, as they were presented for the purposes of this application, are obvious or even reasonable.

81. The requirements of ss 4B(1)(a) and (c) are conjunctive. Notwithstanding the reservations expressed in paragraph 38 above, even with a neutral assessment of the requirements in (c), the failure by the applicants to satisfy the necessary requirement of (a), leads to the conclusion that, at this time, the Court does not consider it fit to admit them to bail pending their appeal.

82. Accordingly, the applications are refused.

NUKU'ALOFA
9 July 2021

SUPREME COURT TONGA

M. H. Whitten QC LCJ
PRESIDENT