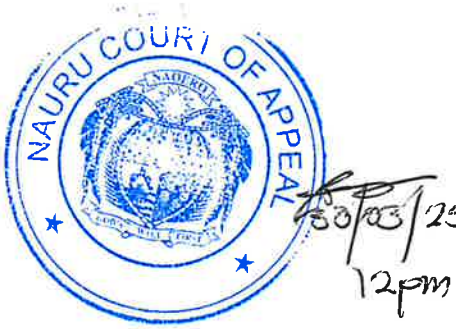

IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal
No. 01 of 2023
Supreme Court
Criminal Case
No. 06 of 2020

BETWEEN

WAJEEH UDDIN

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena**

DATE OF HEARING: **17 March 2023**

DATE OF JUDGMENT: **30 March 2023**

CITATION: **Wajeeh Uddin v The Republic of Nauru**

KEYWORDS:	Bail pending appeal; entitlement to bail; presumption in favour of granting bail is displaced when the accused is convicted and appealed against the conviction; likelihood of success in the appeal; likely time before the appeal hearing; proportion of original sentence served; requisite criteria to warrant consideration for bail; exceptional circumstances.
LEGISLATION:	s.42(2) of the Nauru Court of Appeal Act 2018; Rule 20 of the Nauru Court of Appeal Rules 2018; s.3, s.4, s.17(3) of the Bail Act 2018; s106(1)(a)(b)(c)(ii) of the Crimes Act 2016.
CASES CITED:	Engar v Republic Criminal Appeal No 4 of 2018; Re Clarkson [1986] VR 583; Cama v State [2022] FJCA 112;AAU42.2021; Potier v R [2010] NSWCCA 234; R v Wilson (1994) 34 NSWLR 1; Ex Parte: MAHER [1986] 1 Qd R 303

APPEARANCES:

COUNSEL FOR the Appellant:	**R Tagivakatini**
COUNSEL FOR the Respondent:	**S Shah**

RULING ON BAIL PENDING APPEAL

1. On 13 October 2022 the Appellant was convicted for Indecent act, contrary to section 106(1)(a),(b),(c)(ii) of the Crimes Act 2016. He was sentenced by the Supreme Court on 03 February 2023 for 18 months imprisonment. After deducting the time spent in custody, the Appellant was ordered to serve 14 months imprisonment.

2. On 09 February 2023, the Appellant filed a notice of appeal against the conviction. Subsequently, the Appellant filed the instant application on 23 February 2023 seeking bail pending appeal.

3. The Appellant, who is of Pakistani origin, has been in Nauru since 07 September 2013, as an asylum seeker. He does not possess any travel documents, and according to his affidavit, his application for refugee status is still pending. The Appellant appeared in the Supreme Court on 20 April 2020, and was granted bail on 28 April 2020. He claims that he complied with bail before without breaching any conditions except for being late to court on a few occasions. The Appellant has provided five grounds of appeal and claims that there is a likelihood of success in the appeal. He further argues that the appeal hearing is not likely to take place any time soon, and as a result, he will have served a significant portion of his sentence. Additionally, the Appellant asserts that he has been discussing his resettlement overseas with officials and being in prison hinders that process. The Appellant also claims to have suffered injuries to his collarbone and skull, and medical reports indicate that he sustained multiple injuries from falling off a motorbike in 2019.

4. Section 42(2) of the Nauru Court of Appeal Act 2018 provides that: *on an application for bail pending appeal, a single Justice of Appeal may grant the appellant bail pending the determination of the appeal.*

5. In addition, Rule 20 of the Nauru Court of Appeal Rules 2018 stipulates:

> "**Bail pending appeal or intended appeal**
>
> (1) Where a person convicted and sentenced to a term of imprisonment appeals or 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 orders in Form 9 in Schedule 1; and
>
> (b) one or more affidavits in support of the application for bail pending appeal or intended appeal.

(2) The affidavit in subrule (1)(b) shall include:

(a) the reasons for bail;

(b) the prospect of 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 each of the judgment, decision or order made by the Supreme Court after the delivery of the judgment, decision or order being the subject of appeal; and

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

(3) For the purposes of this rule, the application shall comply with the 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

(5) An appellant admitted to bail, shall be personally present on each occasion the appeal is listed before the Court including the hearing of 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 to Court as required under subrule (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.

6. Before addressing other matters, it is pertinent to ascertain whether a person appealing against a conviction is entitled to the presumption in favour of granting bail, as per the Bail Act. The Respondent in his submissions highlighted paragraph 10 of Enger v Republic Criminal Appeal No 04 of 2018, where Jitoko CJ had stated that:

"The presumption in favour of granting bail is displaced where the applicant has been convicted and has appealed the conviction."

7. However, it must be noted that Section 4 of the Bail Act 2018 (Bail Act) has been amended by Act No. 30 of 2020. The Bail Act previously included Section 4(4)(e), which explicitly stated that the presumption in favour of granting bail is displaced when the accused is convicted and has appealed against the conviction. However, after the amendment, section 4 of the Bail Act no longer explicitly provides for this.

8. Section 4 of the Bail Act provides:

Entitlement to bail

(1) Subject to the provisions of this Act, every accused person has a right to be released on bail.

(2) A court may grant bail to an accused person charged with an offence in accordance with the provisions of this Act.

(3) The presumption in favour of the granting of bail to an accused person under subsection (1) may be rebutted by a prosecutor or any other person, where the interests of justice so requires.

9. Nevertheless, the definition of 'an accused person' in the Bail Act seems to shed light on this issue. Following the amendment to the Bail Act by Act No. 06 of 2022, Section 3 of the Bail Act defines an accused person as:

"a person who has been charged with an offence and:

(a) who is awaiting trial before the District Court or the Supreme Court;

(b) whose trial has commenced and adjourned for continuation, judgment, decision or order or for sentencing".

10. Prior to the 2022 amendment, an accused person included someone who had been convicted as well. However, in light of the 2022 amendment, it appears

that the Bail Act provides the presumption in favour of granting bail only for accused persons before the delivery of the judgment or sentence, and not for persons convicted of an offense and who have appealed their conviction. The reasoning behind this can be understandably attributed to the principle of presumption of innocence until proven guilty, which serves as the foundation for the presumption in favour of granting bail. Once an accused person is convicted by a court, the presumption of innocence no longer applies.

11. Although a convicted person has the right to appeal against the conviction, the emphasis lies in upholding the conviction until an appellate court reverses it. There is a higher likelihood for a convicted person to evade the justice system if their appeal fails. On the other hand, adopting a lenient approach to granting bail for individuals appealing convictions may undermine public confidence, as it could encourage convicted persons to file frivolous appeals merely to avoid imprisonment.

12. Conversely, a court must ensure that no injustice is caused to a convicted person if a patent error has occurred in the lower court and there are manifest prospects of success in the appeal to reverse the conviction, without unjustly subjecting the person to serve a sentence in prison. However, it is important to note that, just as the denial of bail to an accused person before trial cannot be considered unjust in the event of an acquittal, the refusal of bail pending appeal and the subsequent reversal of a conviction do not necessarily become unjust, unless the refusal of bail was based on wrong considerations.

13. Be that as it may, the resulting position of these amendment to the Bail Act is that a person who has been convicted and has appealed against the conviction does not have the benefit of the presumption in favour of granting bail in this jurisdiction.

14. In light of that context, I will now consider the provisions in the Bail Act regarding granting of bail to a person appealed against a conviction. Section 17(3) provides that:

> "When a court is considering the granting of bail to an appellant who has appealed against conviction, sentence or both, 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 will have been served by the appellant when the appeal is heard."

15. It is clearly discernible from the plain reading of the provision that the Bail Act requires a court to consider circumstances under all three of these limbs. In most common law jurisdictions, bail will be considered for a person appealing against a conviction only in very exceptional circumstances. These exceptional circumstances have been discussed in various cases as submitted by the parties, and predominantly, courts seem to have relied on prospects of success in determining bail pending appeal. Another common exceptional circumstance considered by the courts is the likelihood that the entire or a significant portion of a custodial sentence will be completed before the appeal is heard. In addition to these two exceptional circumstances, Section 17(3) of the Bail Act provides a third exceptional ground: the likely time before the appeal hearing.

16. Although there could be other exceptional circumstances that a court may take into account, as far as this jurisdiction is concerned, section 17(3) of the Bail Act must be strictly complied with when determining bail pending appeal. It is also essential to give effect to the intention of the legislature by according due regard to the objectives of the specific provisions introduced in the Bail Act. The Bail Act is specifically amended with customized provisions to cater to the circumstances in Nauru, and it is essential to implement these provisions to

meet the distinct requirements of this jurisdiction. However, there seems to be no bar for the court to consider any other exceptional circumstances in addition to those enshrined in Section 17(3). The court must be satisfied with clear and convincing prospects of success before proceeding to consider any additional exceptional circumstances. Given this backdrop it is imperative for the court to consider all three criteria stipulated in section 17(3) of Bail Act.

Likelihood of success in the appeal

17. During a bail hearing, the issues on appeal are evaluated without the benefit of hearing in-depth arguments on the merits of the appeal from the parties. As a result, the assessment of the prospects of success is made on a superficial level, and the Court is unable to conduct a thorough examination of the issues. Within this context, evaluating the prospects of success cannot be regarded as an exhaustive exercise. Nevertheless, if the Court identifies blatant errors, these could ideally be considered as indicative of a high likelihood of success. It is also important to note that for bail pending appeal, the mere presence of arguable points in appeal does not satisfy the initial threshold. In Re Clarkson [1986] VR 583 at 586 it was stated that: *the fact that there is a fairly arguable ground of appeal cannot, standing alone, be regarded as constituting exceptional circumstances so as to justify the grant of bail pending appeal.*

18. Bearing these principles in mind, I will now consider if the Appellant presented a case with likelihood of success. The Appellant advanced the following grounds of appeal in his Notice of Appeal:

    i. The learned Trial Judge erred in law and fact when he accepted that the complainant had positively identified the Appellant; despite the complainant failing to satisfy 'the principles of identification' established under case law, her heavily intoxicated condition at that time and the extreme difficulty in seeing properly inside a room of dark blue-coloured lights as was shown in the video evidence (Exhibit D2-A)

ii. The learned Trial Judge erred in law and fact when he failed to give more weight to 'motive'; as the complainant admitted that she did not like the Appellant and had strong cause to blame him for what happened to her, her intoxicated condition at that time, the Appellant never bothering her during the drinking session and Abel Dowabobo clearly shown to be bothering her as was shown in the video evidence (Exhibit D2-A).

iii. The learned Trial Judge erred in law and fact when he gave more weight by drawing inferences from the Defence's cross examination of the prosecution witnesses that the Appellant was awake, instead of giving more weight to the reasonable alternative hypothesis that was proposed by the Defence (which was not excluded by the Prosecution), in that Abel Dowabobo was the actual perpetrator of indecent acts against the complainant.

iv. The learned Trial Judge erred in law and fact when he found that the 9.30am video (Exhibit D2-A) was taken during the earlier part of the drinking session and not around 9.30am, despite the Appellant clearly identifying and proving the time that the video was captured and there being no contrary evidence from the prosecution to disprove the time in the video evidence.

v. The learned Trial Judge erred in law and fact when he failed to consider the investigative failures by the police in this case, in failing to record Abel Dowabobo's statement and calling him as a witness, failing to utilize the video evidence from the Appellant's phone and the overall disinterest of the investigating officer during investigations and during trial.

19. It was the contention of the Appellant that those grounds establish a likelihood of success in the appeal. To support the bail pending appeal application the Appellant relied on the following passage from Engar v Republic (supra) where Jitoko CJ commented at page 16:

> "I find comfort in this observation by the court in Mario Giordano 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 is 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 prospects of success is obvious or has little chance of success.
>
> In my opinion that there is merit in the appeal and a good prospect of success."

20. Further, the Appellant relied on Fiji Court of Appeal decision, Cama v State [2022] FJCA 112;AAU42.2021 (17 October 2022) where it was stated:

> "[10] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section

17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result."

21. It should be noted that in most jurisdictions courts have stressed the requirement of likelihood of success to 'very likelihood' of success to elaborate the strict test that needs to be applied in considering bail pending appeal. This was discussed by the full court of Victorian Supreme Court in Re Clarkson (supra) at 584:

> "In our view there is no difference between the approach of those who have spoken in terms of very exceptional circumstances and those who have referred only to special or exceptional circumstances. If the principle that special or exceptional circumstances must be shown to warrant admitting a prisoner to bail pending appeal is regarded as meaning only that the applicant bears a burden and must put forward, as justifying the grant of bail, something that is not present in most or all cases, then the statement of principle has failed adequately to convey the practice of the court and the principle on which it acts. It is probably for this reason that judges have on occasion expressed the requirement as one of "very" exceptional circumstances. The adverb reflects the difficulty of persuading the court that the circumstances put forward as special or exceptional are strong enough to overcome the powerful considerations of a general character which militate against the grant of bail pending appeal".

22. Thus, the counsel for the Appellant argued that the Appellant has meritorious grounds of appeal, and a superficial appraisal of the grounds establishes prospects of success in the appeal. The counsel for the Respondent opposed the bail application and argued that Engar v The Republic should not be followed, as in that case, the court granted bail only after concluding that there were arguable appeal grounds and no likely date for the next sitting of the appeal. It was submitted by the counsel for the Respondent that all three limbs of section

17(3) must be satisfied to consider bail pending appeal. I agree with the contention of the Respondent's counsel, as according to the provisions in the Bail Act it is crystal clear that all three criteria must be satisfied. Furthermore, the Respondent asserted that merely having arguable points is not sufficient and relied on Potier v R [2010] NSWCCA 234 where it was observed:

> [21] Where an applicant for bail pending appeal to this Court relies upon his/her prospects of success in the appeal, it must be shown that the ground(s) of appeal are not merely arguable but are "very likely to succeed": see *R v Wilson* (1994) 34 NSWLR 1 per Kirby P at 6. In the same case (at 7), Hunt CJ at CL said:
>
> > "What must be established is a ground of appeal which is certain to succeed - and one which can be seen without detailed argument to be certain to succeed. It is not sufficient to show a merely arguable ground of appeal, or even one which has a reasonable prospect of success".

23. I have considered the affidavit filed by the Appellant in relation to the grounds of appeal. While the Appellant has raised arguable points, particularly regarding the inferences drawn from the manner in which suggestions were made to the witnesses during cross-examination by the Defense, I am not convinced that these points meet the higher threshold of likelihood of success in the appeal.

Likely time before the appeal hearing

24. The Appellant has stated in the affidavit that the likelihood of this appeal being heard within this year is relatively low. However, I cannot concur with this assertion. Following the Covid-19 pandemic, the Court of Appeal resumed its regular court sittings, and there is nothing preventing this case from being scheduled for hearing during the next court sitting, which is set to take place in June-July 2023. This court can accommodate this appeal during the next court

sitting taking into account the shorter sentence imposed on the Appellant. By doing so, any potential prejudice that may be caused to the Appellant may be avoided.

Proportion of the original sentence served

25. The counsel for the Appellant submitted that if the Appellant serves the full sentence he will be released on 03 February 2024. The Appellant also claimed that he would be eligible for parole in July 2023, having served half of his sentence by that time and he will be eligible for remission in October 2023. In Ex Parte: MAHER [1986] 1 Qd R 303 the full court of the Queensland Supreme Court discussed that bail pending appeal should be granted only in exceptional circumstances and stated that shorter sentences can be considered as exceptional ground at page 312:

> "In some cases an appellant may inevitably be required to serve an unacceptable portion of his sentence before his appeal can be heard. This commonly occurs when the main penalty is a short custodial term. (*R v. Pottage*[1917] V.L.R. 317; *Watton* (1978) 68 Cr. App. R. 293, 296). Indeed, experience suggests that these instances are the most common examples of favourable exercise of discretion for applicants for bail after a conviction".

26. Undoubtedly, the Appellant is serving a comparatively shorter sentence. However, this fact alone cannot hold significant weight in the bail pending appeal application, since the Appellant failed to satisfy this Court of the likelihood of success in the appeal. The Bail Act in Nauru requires courts to examine all three criteria enumerated in Section 17(3). Consequently, the mere presence of one factor, in isolation, does not warrant the granting of bail pending appeal, as the legislation mandates courts to consider bail pending appeal in a comprehensive manner. Besides, the effects of a significant portion or the entirety of a custodial sentence being served before the appeal can be

mitigated by prioritizing the appeal hearing. As a matter of good practice it is always justifiable to prioritize appeals with shorter sentences and to deliver early judgments in such cases.

27. Furthermore, the Appellant has submitted that he has medical conditions requiring treatment. However, the medical reports submitted do not substantiate this claim. Additionally, there is no indication that the Appellant cannot receive treatment at the correctional facility, even if medical attention is necessary. While it is not disputed that the Appellant arrived in Nauru as an asylum seeker, no evidence has been presented to support his assertion that he requires bail to facilitate the process of his resettlement. In absence of such evidence I am not inclined to attach any weight to these claims.

28. In the circumstances, I decide that the Appellant has failed to satisfy the requisite criteria outlined in section 17(3) to warrant consideration for bail pending appeal due to the absence of exceptional circumstances. Nonetheless, in view of the length of the sentence imposed, I decide that it is appropriate to accord priority to this appeal for hearing during the upcoming full court session of the Court of Appeal, in the interest of justice.

29. Accordingly the application for bail pending appeal is refused.

30. The parties are hereby directed to promptly undertake necessary measures to prepare for the appeal hearing, which is to be scheduled for hearing during the forthcoming full court session. The registry to prioritize preparation of transcripts for the appeal books.

Dated this 30 of March 2023

Justice Rangajeeva Wimalasena

Justice of the Court of Appeal