IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Nyarangi, Gachuhi & Apaloo JJA)

CRIMINAL APPLICATION NAI 18 OF 1986

BETWEEN

JIVRAJ SHAH...APPLICANT

AND

REPUBLIC...RESPONDENT

(Application for bail pending appeal in an intended appeal from a judgment of the High Court at Nairobi, Amin & Aluoch JJ)

RULING

The notice of motion under Rule 5(2)(a) of the rules of this court raises the question whether the applicant, whose appeal to the High Court Nairobi against conviction and sentence of two years' imprisonment was dismissed on September 30, 1986, should be admitted to bail pending the hearing and determination of his appeal.

The grounds of the application are that there is an overwhelming likelihood of success in the appeal, likelihood of the applicant having served a substantial part of the sentence prior to the hearing and decision of the appeal, the applicant suffers from ill health and his condition is likely to worsen unless he is released and the applicant has always been a person of good character.

There is an affidavit of the applicant's advocate in support of the application.

We have considered all the points of law adumbrated by counsel for the applicant and by Mr Chunga for the Republic respondent.

There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears *prima facie* from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* [1972] E A 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to

be argued. It is almost selfdefeating to attempt to define phrases or to establish formulae. There is a helpful passage in *Archbold, Criminal Pleading Evidence and Practice,* 41st Edition page 783, paragraph 7-86.

We find it unnecessary to go in detail into the circumstances of the grounds of the application. We will not pre-empt the hearing of the appeal. We would grant that the issue of law to be argued as to whether there was a “taking” within section 268 of the Penal Code (cap 63) is substantial. The circumstances in which the presiding judge became a complainant against the applicant were brought to our notice. It would appear to us that there is a serious question whether justice can be said to have been done and have been seen to have been done.

For that reason, we think this is a proper case in which to exercise our discretion in the applicant’s favour and admit him to bail.

Accordingly bail is granted on the applicant’s own bond of Kshs 250,000 with the same two sureties as before in the sum of Kshs 200,000 each. In addition the applicant’s passport shall be deposited with the deputy registrar of this court.

Dated and Delivered in Nairobi this 12th day of November 1986.

J.O.NYARANGI

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

F.K.APALOO

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR