

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

CR NO 517/13

CROWN

v

BRIAN TOA

Hearing: 26 November 2013

Counsel: Ms Henry for the Crown
Mr Rasmussen for the Defendant

**DECISION OF GRICE J
(Variation of Bail terms)**

[1] This is an application for variation of terms of bail by the Applicant/or Defendant who is bailed to appear on a charge of rape. No date for the hearing of the rape charge has yet been scheduled. The Crown indicated that it would cooperate with a priority fixture in this matter. However, while it has been remanded to March 2014 for a callover there are a number of other matters which relate to sexual offending which are older than this offence and may take priority. It is possible further sitting time may be available next year but this is dependent on the administrative and financial constraints on the Ministry.

[2] Accordingly, at this time, given the offence was committed in September 2013 the allocation of a trial date in the first half of next year is unlikely.

[3] The Defendant is on bail subject to conditions imposed on the 23rd September 2013 as follows:

- (a) Not to associate with the victim;
- (b) Not to purchase and/or consume alcohol;
- (c) Not to enter any liquor licensed premises, commencing Sunday 22 September 2013;
- (d) To surrender passport by 4.00 pm Thursday 19 September 2013;
- (e) To report to the Police station on Monday, Wednesday and Friday at 6.00 pm

[4] There is also a order for name suppression of the Complainant.

[5] The Defendant now wishes to return to Samoa for Christmas and beyond. He therefore seeks a variation of his bail conditions to enable him to do so.

[6] The Defendant was in the Cook Islands in the course of his rugby career as a national rugby player. He was sponsored by a Cook Islands rugby club and at the end of the season he would have returned to Samoa. As part of that sponsorship he was provided with employment by a member of the club. He holds the relevant immigration status.

[7] The alleged rape is said to have occurred on the 15 September 2013. The Defendant has pleaded not guilty to the charge but he is unable to return to Samoa because of the bail conditions.

[8] His counsel submitted that:

- (a) The sponsorship arrangement is now at an end and the people responsible for him no longer wish to take that responsibility. In addition the Defendant's employment is tied to a sponsorship and that too may end. His counsel submitted he will be unemployed and homeless without the support both economically and otherwise of his family who live in Samoa. A letter was produced which I refer to later.

- (b) The rugby club is prepared to pay his airfares – as I understand it both to Samoa and back for the trial in the Cook Islands.
- (c) He is unlikely to flee. His Cook Islands sponsors will know where he is and he and his family is known by the Samoan community here.

[9] In addition Mr Rasmussen referred to the close relationship between Samoa and the Cook Islands which while not formal nor does it entail any extradition treaty nevertheless is both diplomatic as well as a strong relationship between the Samoan Polynesian people and the Cook Island people. He contrasted this with Fiji which is a military dictatorship and has no diplomatic relations with the Cook Islands. This contrast was made in the context of a case cited by the Crown referring to an application to vary bail terms to enable a Defendant to return to Fiji and I refer to this below.

[10] Mr Rasmussen also pointed out that there would possibly be immigration difficulties for the Defendant if he was remained in the Cook Islands. He would be an over-stayer and compromise not only himself but the people he is staying with.

[11] Mr Rasmussen also referred to the Cook Islands Constitution and in particular Article 64(1)(a) which says (and I quote from Mr Rasmussen's submissions): "without discrimination by reason of race, national origin... the right of an individual to life and liberty... and the right not to be deprived thereof... his/her fundamental rights and freedom" (except in accordance with the law)" (sic). Mr Rasmussen submitted that a decision not to vary the bail terms could be seen as discriminating against the Defendant because he was Samoan. He referred to some decisions by the Justices of the Peace that might be interpreted as racist particularly in relation to the frequency of foreign nationals appearing in Court for criminal offending.

[12] Mr Rasmussen also referred to Article 65(1)(a) of the Constitution which prohibits arbitrary detention of any person. He submitted that as the Defendant is a Samoan national who entered the Cook Islands on a contract to play rugby and that contract is no longer available therefore he is going to be a derelict on the island.

[13] Turning to the submissions of the Crown, it underlined the seriousness of the charge and pointed to breaches of bail conditions on two previous occasions. The Crown submitted there was a real risk that the Defendant would not return to the Cook Islands. Ms Henry also provided a copy of a decision of *Prasad v Police* (25 July 2013) (Hugh Williams J), dealing with an appeal from Justices of the Peace who had declined an application by Mr Prasad for variation of bail to travel to Fiji to visit his family for a fortnight. The offences faced by Mr Prasad were theft as a servant of funds totalling over \$10,000.00. Mr Prasad was on bail with sureties and had indicated that he would deposit a sum as a bond toward the cost of enforcing his return. The Judge found that given there was no extradition treaty with Fiji and there was no way which the Defendant could be compelled to leave that country and return to face his obligations in the Cook Islands. The Judge commented that whilst the amount of the bond might be expended in legal action, in Fiji no judge in Fiji would have the power to order his return. That case related to an appeal against the exercise of a discretion by Justices of the Peace (“JPs”) and accordingly proceeded on the basis that the discretion must have been shown to be wrong or the JPs shown to have acted on a wrong principle for the High Court to overturn it.

[14] Ms Henry also referred to the Transfer of Offenders Act 1994 which provides for convicted offenders who have been sentenced outside the Cook Islands to be transferred back to the Cook Islands under specific arrangements between governments. As submitted, it has no application in this case as the Defendant is not convicted.

[15] The Crown also handed up an agreement between the Government of the Independent State of Western Samoa and the Government of the Cook Islands for the transfer of convicted offenders dated 1st February 1995. Again this matter relates to persons convicted and sentenced to a term of imprisonment in one country being returned to the other country and has no application in this case. Ms Henry also indicated she had made enquiries with the Ministry of Foreign Affairs and Immigration following an indication by Mr Rasmussen that a group of people had been transferred from Samoa to the Cook Islands who had been charged with some offences but the only indication she was able to locate referred to transfer of convicted offenders. Again these are not relevant to the present case.

[16] Ms Henry did confirm that while this matter would be in the callover as I said in March 2014 there was already one case which was to be given priority for hearing at the upcoming sessions in March. This case that we are dealing with now has an estimate of four or five days and is a sexual offence so it will rate some priority, nevertheless I understand there are a number of cases that need dealing with which may take priority over this as they are older and also involve sexual offending.

[17] Ms Henry also referred to the breach of bail conditions as relating to entering licensed premises and consuming alcohol. The Defendant pleaded guilty to both of these. He was fined on these charges and the Justices of the Peace dealing with them noted that he was employed and earning money at that time.

[18] In reply Mr Rasmussen indicated the bail conditions had been opposed but nevertheless did apply. There seemed to be some doubt, he submitted, as to whether the Defendant understood the conditions due to the language difficulties. Nevertheless those conditions remain in place.

[19] The jurisdiction to grant bail set out in Section 83 of the Criminal Procedure Act 1980-81 ("CPA"). It confers a discretion on the Court to grant bail in the case of rape. The discretion is unfettered but there are established principles guiding the exercise of the discretion.

[20] Before I turn to those, the short point which deals with Mr Rasmussen's constitutional arguments is that that variation application and resultant decision is made according to law so is contemplated by the provisions of the Constitution. In particular, clause 64(2) refers to enactments made in the interests of public safety and in my view the Criminal Procedure Act (which deals with bail applications) falls within that general category and therefore deals with the constitutional point.

[21] Turning to the issues to be considered in the bail application; primarily the likelihood of the Defendant surrendering to custody and appearing in Court; the interests of the Defendant and generally the public interest and protection of the community.

[22] The primary consideration in deciding whether to grant bail is the likelihood of the Defendant appearing in Court to answer the charges laid. In this case I do not have any specific affidavit evidence before me as to the Defendant's background. Mr Rasmussen has submitted that he has community ties and family waiting for him in Samoa. I was not referred to any previous criminal history.

[23] I take into account the failure to observe the bail conditions – regardless of the submission that they may or may not have been understood. There was a breach, those conditions remain in force. I also take into account the circumstances, nature and seriousness of the offence and the severity of the likely penalty if the Defendant is found guilty. In this case, of relevance is that the charge is a serious charge of rape – it carries a term of imprisonment of a maximum 14 years.

[24] In addition, in looking at this variation application I must consider the lack of an extradition treaty with Samoa – despite the good relationship that Mr Rasmussen has pointed to between the two countries I find that this consideration weighs heavily against granting a variation of bail to enable the Defendant to travel to Samoa.

[25] I now turn to look at the interests of the Defendant. He is not in custody but on bail subject to conditions. He is able to obtain legal advice and presumably has the support of his family even from afar. He is at liberty although Mr Rasmussen has pointed out that due to immigration requirements he may find it difficult to obtain employment or long term accommodation.

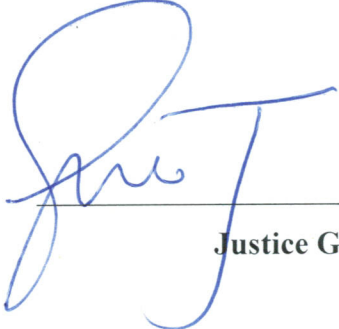
[26] I have Mr Rasmussen's submissions on this point but no affidavit evidence although Mr Rasmussen handed up a letter from the Takuvaine Tutakimoa Rugby Club dated 19th November 2013 which relates to another rugby player and that letter indicates that in relation to that player the union president was concerned about both his status under immigration laws (he having stayed to face Court proceedings) and his unplanned extended stay with the rugby union member. In bail applications the rules of evidence are of course relaxed given the nature of the application however I am unable to place much weight on this letter given it is not supported by an affidavit and it is about someone else. Mr Rasmussen did provide it to the Court in order to give the Court a flavour of the likely response to the present Defendant staying on in accommodation. And I note that but that is all.

[27] I was not pointed to any other issues in relation to public interest or the protection of the community which may be relevant here.

[28] Overall I am faced with a situation where I have little substantial information and no affidavit evidence other than the submissions of counsel as to the personal circumstances and likely effect of the Defendant remaining here. However, I am faced with a situation in that if the Defendant chose not to return from Samoa to the Cook Islands voluntarily for trial it would be difficult, if not impossible, to bring him back to face the charges through any official channels. The Defendant does not offer a bond or any surety which might have gone some way in allaying that concern.

[29] In the circumstances at the present time the application for variation of bail is refused and the Defendant will be remanded on bail on the present conditions to continue in terms to 13th March 2013.

[30] However, I reserve leave for a further application to be made if it appears that this matter is not going to reach trial in a timely manner. Now that of course is relative in the context of the trials that are backing up for hearing in the Cook Islands including in relation to sexual offending. If the Defendant is going to be detained in the Cook Islands for a considerable period of time the application must be reconsidered. And I would add that any further application should be supported by proper affidavit evidence perhaps take into account my comments about sureties and bonds. Accordingly, I reserve leave to apply for variation of bail on 14 days notice.



Justice Grice