

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO.AAU 0045 of 2016**  
**[High Court Criminal Case No. HAC 36 of 2016]**

**BETWEEN** : **ELIKI MOTOTABUA**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Prematilaka, JA**  
**Fernando, JA**  
**Nawana, JA**

**Counsel** : **Appellant in person**  
**Mr. Babitu. S for the Respondent**

**Date of Hearing** : **12 February 2019**

**Date of Judgment** : **07 March 2019**

## **JUDGMENT**

**Prematilaka, JA**

[1] This appeal arises from an Order relating to the Appellant's application to the High Court in terms of section 30(3) of the Bail Act, 2002 to review a decision in relation to bail granted by the Learned Magistrate of Sigatoka.

- [2] The Appellant had been charged in the Magistrates Court on a single count of Unlawful Possession of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act No.09 of 2004. By his order dated 20 January 2016, the Learned Magistrate *inter alia* had imposed \$500.00 cash bail with two reliable sureties of the same amount as one of the conditions attached to the release of the Appellant on bail. This required the Appellant to deposit \$1500.00 in cash along with two sureties.
- [3] The Appellant had complained to the High Court that cash bail of \$1500.00 was excessive and the State had conceded to that at the hearing before the Learned High Court Judge who, too, had found it to be excessive in the impugned Order. Accordingly, the Learned Judge had, in terms of powers vested in the High Court by section 31(2)(b) of the Bail Act, varied the said bail condition as ‘\$1000.00 bail bond with two sureties’. The other conditions imposed by the High Court included ‘not to re-offend’, ‘Not to interfere with Prosecution witnesses’ and ‘To report to Korovou Police Station on every Saturday between 6.00 a.m. to 6.00 p.m.’
- [4] The Appellant, being aggrieved by the condition of \$1000.00 bail bond with two sureties, had filed an application for leave to appeal against that decision invoking the appellate jurisdiction of this Court and canvassing the said Order of the High Court in terms of section 21(3) of the Court of Appeal Act and another application for bail pending appeal pursuant to section 33(2) of the of the Court of Appeal Act invoking its original jurisdiction (see **Artika v State** AAU33B of 2011: 21 March 2012 [2012] FJCA 14).
- [5] The single Judge of the Court of Appeal, having considered the Appellant’s both applications under section 35(1) (a) and (d) respectively of the Court of Appeal Act, had granted both leave to appeal under section 35(1)(a) and admitted the Appellant to bail pending appeal under 35(1)(d) read with section 33(2).
- [6] In the order dated 02 December 2016 the single Judge specifically refers to the fact that the Learned High Court Judge had not expressly stated that the condition of bail was cash bail but treated as to whether the condition of imposing \$1000.00 bail bond was excessive, as an arguable ground of appeal. The Appellant had in his letter

addressed to this Court had stated that the Registrar of the High Court had interpreted this condition to mean that the two sureties have to pay \$1000.00 in cash. His submission to this Court at the hearing was that \$1000.00 cash bail was excessive and he was unable to fulfil that condition.

[7] According to the impugned Order of the High Court, the Appellant had been in custody since 15 December 2015 as he could not furnish cash bail of \$1500.00 as directed by the Learned Magistrate. It appears from the single Judge Ruling that the Appellant had not been able to furnish even \$1000.00 cash bail as ordered by the High Court until he was enlarged on bail pending appeal by the single Judge of this Court on 02 December 2016. The Appellant informed this Court that the trial in his case in the Magistrate court is fixed for 15 March 2019.

[8] Section 3 (1) of the Bail Act states that every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted while section 3(3) states that there is a rebuttable presumption, which is displaced in the circumstances set out under section 3(4), in favour of the granting of bail to such a person. The primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charges laid against him or her [vide section 17(2) of the Bail Act] and when deciding whether to grant bail to such a person, the court must take into account the time the person may have to spend in custody before trial if bail is not granted [vide section 17(1) of the Bail Act]. The presumption of bail may, however, be rebutted and bail may be refused if the court, upon being satisfied and having regard to all the relevant circumstances, is of the opinion that the accused is unlikely to surrender to custody and appear in court to answer the charges or the interests of the accused person will not be served through the granting of bail or granting bail to the accused would endanger the public interest or make the protection of the community more difficult [vide section 18 & 19 of the Bail Act].

- [9] Out of all relevant circumstances, section 19(2) of the Bail Act sets out what matters the court in particular should consider and have regard to as regards the likelihood of surrender to custody and appearing in court, the interests of the accused person and the public interest or the protection of the community.
- [10] Needless to say that the list of relevant circumstances to be taken into account in considering releasing an accused on bail is not exhaustive and depends on the facts of each and every case. It is also well established that the bail conditions should not be punitive or excessive so as to negate the very purpose of admitting an accused to bail.
- [11] The Appellant has been in remand for almost 12 months prior to being enlarged on bail pending appeal by the single Judge. He informed this Court that he is currently employed. He has not been in breach of any of the bail conditions imposed by the single Judge. His offence of possession of 137.2 grams of cannabis sativa is a category 2 offence contrary to section 5(a) of the Illegal Drugs Control Act No.09 of 2004 as set out in Sulua v State AAU0093.2008: 31 May 2012 [2012] FJCA 33 which may attract a sentence of less than 02 years of imprisonment (though the tariff is a sentence of imprisonment between 01-03 years) as the quantity is less than 500grams. The single Judge had assumed that the quantity of cannabis that the Appellant was alleged to have possessed being less than half of 500 grams, he would be likely to get a sentence of not much more than 12 months imprisonment if convicted after trial. Upon a plea of guilt the sentence might be even less.
- [12] On being questioned by this Court, the Appellant indicated at hearing that he was in a position to deposit \$500.00 in cash and provide two sureties where each one of them could deposit any other acceptable security (non-cash) to the value of \$500.00 in place of the bail condition of \$1000.00 bail bond with two sureties imposed by the High Court. The State had no objection to the variation of the contested bail condition on those lines.
- [13] The Appellant has advanced 04 grounds of appeal. They are as follows
- ‘1. *That the learned High Court Judge erred in law in not giving the Appellant a fair hearing in the High Court.*

2. *That the learned High Court Judge erred in not giving the Appellant a fresh bail condition but only to provide sureties for a bail bond of \$1000.00 bail.*
3. *That the learned High Court Judge erred in not viewing the alleged cannabis that the Police state \_ \_ \_ is only 137.2 grams.*
4. *That \_ \_ \_ the Appellant has already served (time in prison) for \_ \_ \_ 137.2 grams of cannabis.”*

[14] Having examined the 04 grounds of appeal urged by the Appellant, I am of the view that the first ground of appeal is devoid of any merits but, as I have already discussed earlier, the rest of the grounds taken together have sufficient merits for this Court to entertain this appeal under section 21(3) of the Court of Appeal Act.

[15] In the circumstances I think that this is a fit case for this Court to exercise its powers under section 23(4) of the Court of Appeal Act read with section 30(4) of the Bail Act to vary and review the decision of the High Court on the disputed bail condition and substitute that with a fresh bail condition while upholding the rest of the bail conditions imposed by the High Court.

[16] In the circumstances, the appeal is allowed subject to the Orders of Court.

**Fernando , JA**

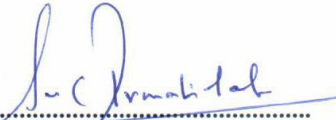
[17] I agree with the reasoning and conclusions reached by Prematilaka, JA.

**Nawana, JA**

[18] I have read in draft the judgment of Prematilaka, JA and I agree with reasons and conclusions therein.

**The Orders of the Court :**

- (i) *The appeal allowed.*
- (ii) *The Appellant is admitted to bail pending trial on the following conditions.*
  - (a) *The Appellant is to deposit in the High Court \$500.00 in cash and enter into a Bail Undertaking (Court Bail) in Form 1B of the Bail Act.*
  - (b) *Two sureties are to deposit acceptable security (non-cash) to the value of \$500.00 each and enter into Bail Surety Forms (Court Bail) in Form 2 of the Bail Act.*
  - (c) *The Appellant is not to re-offend in any manner whatsoever.*
  - (c) *The Appellant is at any time not to approach or interfere with witnesses connected with the case.*
  - (d) *The Appellant is to report to the Korovou Police Station between 6.00 a.m. and 6.00 p.m. on every Saturday.*
- (iii) *The Learned Magistrate is directed to conclude the trial against the Appellant as expeditiously as possible.*



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**Hon. Mr. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**



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**Hon. Mr. Justice A. Fernando**  
**JUSTICE OF APPEAL**



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**Hon. Mr. Justice P. Nawana**  
**JUSTICE OF APPEAL**