

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal Case No.: HAA 024 of 2012

BETWEEN : THE STATE

Appellant

AND

- 1. APETE VERETI**
- 2. SEMISI LASIKE**
- 3. MERE SAMISONI**
- 4. MATAIASI RAGIGIA (Deceased)**

Respondents

COUNSEL : Mr Vakaloloma for the 1st and 2nd Respondents

Ms S Vaniqi and Ms T Draunidalo for 3rd Respondent

Date of Hearing : 18th March 2013

Date of Judgment : 07th June 2013

JUDGMENT

01. **APETE VERETI, SEMISI LASIKE, MERE SAMISONI and MATAIASI RAGIGIA (Deceased)** (hereinafter referred to as “the Respondents”) were charged with following offence. The particulars of offence were:

Statement of Offence

Urging Political Violence: contrary to section 65(1) (b) of the Crimes Decree No: 44 of 2009.

Particulars of Offence

APETE VERETI, SEMISI LASIKE, MERE SAMISONI and MATAIASI RAGIGIA (Deceased) between the months of September 2011 to the 23rd of December 2011 at Suva in the Central Division intentionally urged **WASEA KALOUMAIRA** to

burn the city of Suva and to overthrow by force the Government of Fiji.

02. The Respondents were released on bail on 4th January 2012 with conditions.
03. On 22nd of February 2012, the Respondents first applied for bail variations and it was allowed to the extent that they had to report three times a week instead of daily as earlier prescribed in their bail conditions of 4th January 2012 and the third respondent was allowed to move to Sukuna Road from Cakobau Apartments.
04. On 10th of July 2012 the 3rd and 4th Respondents applied for following bail variations from the Magistrate Court Suva.
 - a. Delete on reporting conditions;
 - b. Delete on of travel restrictions within Fiji;
 - c. Permission to travel to Brisbane, Australia for emergency Dental treatment for 3rd Respondent;
 - d. Reporting to be every fortnight;
 - e. Lifting curfew order currently in place.
05. The 3rd and 4th Respondents based on their applications for bail variation on their individual change of circumstances.
06. The Appellant opposed the applications for bail variations on the basis that the change of circumstances raised by the 3rd and 4th Respondents was not special facts or circumstances that could justify a variation to their bail conditions.
07. On the 31st of July the Magistrate Court Suva ruled on the application allowing the following variations:
 - (a) Removing the curfew.
 - (b) Allowing the Respondents to travel unrestricted throughout Fiji for unspecified lengths of time.
08. Further the ruling by Magistrate Court Suva on 31st July 2012 was applied as a blanket approval for all Respondents including those that did not apply for a variation or provide any individual reasons or show any change in circumstances to warrant the ordered variation.
09. Being dissatisfied with the said decision the Appellant appealed against the bail variation order of learned Magistrate dated 31st July 2012 on the following grounds:

1. That the learned Magistrate failed to act judicially in exercising his discretion when he failed to consider the merits of each respondent separately.
 2. That the learned Magistrate erred in law by accepting a pending holiday as a special facts or change in circumstances that necessitated a variation for the 3rd respondent.
 3. The learned Magistrate erred in law by accepting that visiting the chemist after the hours of curfew for pre-existing medical condition was change in circumstances that necessitated a variation for the 4th Respondent.
 4. The learned Magistrate erred in law in finding that the significant change in circumstances justified a blanket application for variation in relation to all the Respondents.
 5. The learned Magistrate erred in law by failing to take judicial notice of the fact that the 3rd Respondent had previously breached her bail conditions.
 6. That the learned Magistrate erred in law by failing to consider that the onus of proving the need for a variation was on the Applicant.
 7. That the learned Magistrate erred in law when he based his decision to vary bail conditions on the premise that the Appellant is serving additional disclosures which is contrary to the settled principle for allowing a variation.
 8. The learned Magistrate erred in law in failing to consider the likelihood of the Respondents surrendering into custody after the removal of the previously applicable bail conditions, and in failing to consider the public interest and the protection of the community.
10. The section 31 of Bail Act 2002 states as follows:
- “31 (1) All grants or refusal of bail and all orders, conditions or limitations made or imposed under this Act are appealable to the High Court upon the application either of the person granted or refused bail or of the Director of Public Prosecutions.

- (2) The High Court may,
 - (a) In his original jurisdiction grant or refuse bail upon such terms as it consider just;
 - (b) On an appeal under subsection (1), confirm, reverse or vary the decision appealed from.
- (3) This section in addition to section 22(8) (as to the acceptance of sureties or security) and section 30(as to review of bail decisions).

11. Section 30 of Bail Act states as follows:

- 30(1) A Magistrate may review any decision made by a police officer in relation to bail.
- (2) A Magistrate may review a decision made by another Magistrate, including a reviewing magistrate in relation to bail.
- (3) The High Court may review any decision made by a magistrate or by a police officer in relation to bail.
- (4) The Court of Appeal may review any decision made by the High Court in relation to bail.
- (5) The Supreme Court may review any decision of magistrate, the High Court or the Court of Appeal, in relation to bail.
- (6) A court may not review a decision under this Part if the court is prohibited from making a decision in relation to the grant of bail by any other written law.
- (7) A court which has the power to review a bail determination, or to hear a fresh application under section 14(1), may if not satisfied that there are special facts or circumstances that justify a review, or the making of fresh application, refuse to hear the review or application.
- (8) The power to review a decision under this Part in relation to an accused person may be exercised only at the request of –
 - (a) the Accused Person;
 - (b) the police officer who instituted the proceedings for the offence of which the person is accused;
 - (c) the Attorney General;
 - (d) the Director of Public Prosecution; or

(e) the victim of the offence.

- (9) The power to review a decision under this Part includes the power to confirm, reverse or vary the decision.
 - (10) The review must be by way of a rehearing, and evidence or information given or tamed on the making of the decision may be given or obtained on review.
 - (11) The regulations may limit the power of review conferred by subsections (1), (2) and (3).
12. In this case the learned Magistrate unilaterally varied the bail conditions of 1st and 2nd Respondent in absence of their application for bail variation. As per section 30(8) of the Bail Act 2002 the learned Magistrate can only review or vary the existing bail condition only upon receiving an application.
 13. Appellant submits in the absence of an application for bail review or variation, the learned Magistrate was thereby not exercising his discretion judicially.
 14. Exercise of Judicial Discretion was discussed in Lautoka High Court in **Sada Siwan v The State** HAA 050.2008L. In that case the court said:

“The law in relation to an appeal against the exercise of discretion is settled. The discretion will be reviewed on appeal, if the trial court acts on a wrong principle, or mistakes the facts is influenced by extraneous considerations or fails to take account of relevant consideration”.
 15. Learned Counsel for the 1st Respondent submits that he appeared before learned Chief Magistrate on 22nd February 2012 and made verbal application seeking variation of bail conditions and the learned chief Magistrate considered bail variation to all the Respondents on 31st July 2012.
 16. On perusal of magistrate court record pertains to this case there is no entry whatsoever confirms the contention of Counsel of 1st Respondent.
 17. In **State v Karunaratne** HAM 111 of 2012S at paragraph 17, page 8 of the Ruling, Justice Temo has highlighted the fact that a court of law is not restricted to the affidavits submitted by parties to an application for bail or bail review. In fact, Justice Temo encouraged the court to take judicial notice of matters pertaining to the court record.
 18. In absence of application for bail variation by counsel for 1st Respondent and 2nd Respondent the learned Magistrate has failed to consider the merits of each Respondent separately. Thereby he failed to act judicially in exercising his discretion.

19. The Appellant submits that application for bail variations on the basis that the change of circumstances raised by 3rd and 4th Respondents was not special facts or circumstances that could justify a variation to their bail condition.
20. After careful consideration of the written and oral submissions by the State and counsels for 3rd and 4th Respondent, the learned Chief Magistrate, in his ruling dated 31st July 2012, approved the variations sought by 3rd and 4th Respondents. After varying the bail conditions the 3rd Respondent travelled to Brisbane for essential Dental work and returned to Fiji and handed over her passport to the Court. Up to now 3rd Respondent has adhered to all bail conditions imposed on her without any breach. Final bail variation was granted ten months ago.
21. The change of circumstances alleged by the 4th respondent was in relation to access to the Chemist after the hours of curfew for a pre-existing medical condition that he supported with a medical note from 2006. Due to his medical condition he has passed away very recently.
22. After careful consideration of all the materials presented before this court by both Appellant and the Respondents the court arrived at following decisions.
 - i) The operation of the bail variation given by the learned Chief Magistrate in favour of 1st and 2nd Respondent on 31st July 2012 is suspended. They have to continue and abide by the bail conditions imposed by the learned Chief Magistrate on 22nd February 2012.
 - ii) The operation of the bail variation given by the learned Chief Magistrate in favour of 3rd Respondent on 31st July 2012 will continue until further determination by an appropriate court.
23. The Appeal is partly allowed subject to above variation.
24. No cost ordered.
25. 30 days to appeal.

P Kumararatnam
JUDGE

At Suva
07/06/2013

