IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAM NO. 92 OF 2015

BETWEEN : MOHAMMED SHAHEED KHAN

Applicant

AND : STATE

Respondent

Counsel : Mr. Iqbal Khan for Applicant

Ms. N. Kiran for Respondent

Date of Hearing: 27th of May, 2015

Date of Ruling: 12th of June, 2015

BAIL RULING

1. The applicant files this notice of motion / redress seeking following orders inter alia;

   i. *That the applicant be granted bail on any terms and conditions this honourable court deems fit and proper in this case,*

   ii. *That the time for service of this motion be abridged,*

2. The applicant states that this application is made pursuant to Bail Act and the inherent jurisdiction of this court. The motion is being supported by an affidavit of the applicant, stating the grounds for this application for bail. This application is mainly founded on the ground that the applicant was assaulted by some police officers while he was waiting to be transported to Lautoka Prison at the Suva Cell Block Centre. The applicant stated that he was taken to Suva from the Natabua correctional centre to attend his appeal in the Fiji Court of Appeal on 18th of May 2015. He was taken back to the Police Cell Block in Suva after attending his matter in the Fiji Court of Appeal and was waiting to be transported back to Natabua. During his stay in the cell blcok some police officers have assaulted him without any lawful justification. His hands were forcefully handcuffed from behind and assaulted.

3. Subsequent to the complaint made by his family to A.S.P. Brown, officers from the complaint unit had come and taken him to the hospital. He was medically examined by a doctor. The report of that medical examination has been tendered as an annexure to the affidavit for my consideration. His visible injuries and X- ray reports were examined by the doctor. However, the applicant claims that he suspects of an internal bleeding in his head due to the assault as he is still suffering from pain and dizziness.

4. Upon being served with this notice of motion, the respondent appeared in court on 22nd of May 2015. Both parties were then given direction to file their respective objections and submissions, which they filed accordingly. The motion was then set down for hearing on 27th of May 2015, where learned counsel for the applicant and the respondent made their respective oral arguments and submissions. Having considered the respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.

5. The Respondent filed an affidavit of Detective Inspector Aiyaz Ali in opposition to this application. D.I. Ali stated that he is not in a position to respond to the alleged assault of the applicant, as it is still being investigated by the police. He requested the court not to consider this alleged assault at this time on the basis that it is still being investigated and the outcome is yet to be finalised. Moreover, D.I. Ali stated that the allegation of assault has no relevance to the issue of granting of bail.

6. Though, this application is founded on the ground of breach of constitutional rights as a result of this alleged assault, the applicant has not sought any form of relief other than release on bail.

7. According to the evidence presented by the applicant, it appears that he has had some injuries on his wrists and neck. The doctor in his medical report has stated that the applicant had complained of a pain on his head and chest. Having examined the applicant, and his x-ray reports, the doctor has only prescribed him pain killers and has not found any life threatening or critical health condition. The doctor is a registered medical practitioner with thirty years of experience.

8. However, the applicant claims in his affidavit that he is still suffering from pain and suspects of an internal bleeding in his head. He claims that he has a vomitish feeling, but couldn't do such and only vomited twice. In contrast to this claim, he has deposed in the same affidavit that he vomited several times. He has further stated that he is in fear of his safety in prison as he could be subjected to such assault further.

9. Having considered the evidence and information presented before me, I am satisfied that the applicant has sustained injuries at the police cell block in Suva. However, in view of the evidence presented, I find that those injuries

are not serious or critical as claimed by the applicant. However, the reason and the background of this assault is still being investigated by the separate police unit.

10. Justice Madigan in **State v Mani Lal and others (High Court Review case No 001 of 2015)** found that

"the granting of relief to a party on a purported constitutional breach is a serious decision by a court and not one that can be " spontaneously" thrown at the prosecutor without due process, without consideration of alternative remedies, and without taking time for considered reflection on the proposed order".

11. Having considered the observation of Justice Madigan in **Mani Lal (supra)** and the respondent's claim that the reasons and background of this alleged incident of assault is still being investigated, I do not wish to make any conclusion or declaration on the claim of breach of constitutional right. It is prudent to allow the police to conclude the investigation into this alleged assault and present their findings before any final determination on the issue of constitutional breach. However, this would not prevent me in considering this application of bail.

12. This is the fourth bail application of the applicant, where his all previous bail applications have been refused and dismissed by the court. It is an issue of great importance to understand the scope of second or subsequent bail application.

13. Section 14 (1) of the Bail Act allows an accused person to make any number of applications for bail. However, the liberty of making any number of bail applications is subjected to two limitations. The first is that pursuant to section 14 (3) of the Bail Act, the court could refuse to entertain an application

for bail if it views that the application is frivolous or vexatious. The second limitation is that pursuant to section 30 (7) of the Bail Act, the court could refuse to hear an afresh bail application in the absence of special facts or circumstances to justify the making of such afresh application.

14. In view of section 30 (2) and (3) of the Bail Act, it appears that, unlike in the magistrate court, the high court is not vested with jurisdiction to review any decision made by the same or another high court in relation to bail. It has only jurisdiction to review the decisions made by a magistrate or by a police officer. The scope of the hearing of review application has stipulated under section 30 (10) of the Bail Act, where it states that the review must be by way of a rehearing. Section 30 (10) also allows to present or to obtain evidence or information considered in making the decision under review.

15. Donaldson L.J. in **Regina v Nottingham Justices, Ex parte Davies (1981) QB 38, 71 Cr.App R 178 DC)** has discussed the applicable principles pertaining to subsequent bail application in an inclusive manner, where his lordship held that;

"However this does not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. Far from it. On those previous occasions, the court will have been under an obligation to grant bail unless it was satisfied that a schedule 1 exception was made out. If it was so satisfied, it will have recorded the exceptions which in its judgment were applicable. This "satisfaction" is not a person intellectual conclusion by each justice. It is a finding by the court that schedule 1 circumstances then existed and it to be treated like every other finding of the court. It is res judicata or analogous thereto. It stands as a finding unless and until it is overturned on appeal. .....

But the starting point must always be the finding of the position when the matter was last considered by the court. I would inject only one qualification to the general rule that justices can and should only investigate whether the situation has changed since the last remand in custody. The finding on that occasion that schedule 1 circumstances existed will have been based upon matters known to court at that time. The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also of circumstances which, although they then existed, were not brought to the attention of the court. To do so is not impugn the previous decision of the court and it is necessary in justice to the accused. The question is little wider that "has there been a change". It is "are there any new consideration which were not before the court when the accused was last remanded in custody?"

16. It appears from the findings of Donaldson LJ in **Regina v Nottingham Justices, Ex parte Davies (supra)** and section 30 of the Bail Act, that the court is allowed to consider only new facts or circumstances or any other facts or circumstances which were not presented in the previous bail hearing. This alleged issue of assault at the Suva cell block by the police officers is a new circumstance as stipulated under section 30 (7) of the Bail Act.

17. The bail is a right unless it is not in contravention with the interest of justice. The right to bail has been further recognised and enshrined under section 13 (1) (h) of the Constitution. The presumption in favour of bail could be rebutted on the following grounds, that;

    i. The likelihood of the accused person surrendering to custody and appearing in court,
    ii. The interest of the accused person,
    iii. The public interest and the protection of the community,

18. Section 19 (1) (b) (ii) and (vi) of the Bail Act states that court is allowed to consider "the condition of the custody" and "whether the person in incapacitate by injury or otherwise in danger or in need of physical protection" in order to consider the interest of the accused person.

19. The competing nature of the right to bail and interest of justice has been discussed elaborately in **Hurnam v State of Mauritus (2006) 1 WLR 859,** where Lord Bingham of Cornhill found that ;

"the courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to condition, pending his trail. Such decisions very often raise question dog importance to both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and his family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence and that he does not take advantage of the inevitable delay before trial to commit further offence".

20. Section 9 (1) (e) of the Constitution has stipulated that a person's personal liberty could be deprived if he is reasonably suspected of having committed an offence. In the meantime, section 13 (1) (h) has recognised that an arrested or detained person has a right to be released on reasonable terms and condition, pending a charge or trial, unless the interest of justice otherwise requires so. Accordingly, it appears that the Constitution has fashioned a judicious balance between the rights of the individuals and the wider interest of the community as a whole.

21. As I mentioned above, this application of the applicant is founded on the ground that his rights as an arrested or detained person under the Constitution have been breached as the result of this alleged assault, wherefore, he is to be granted bail. I am mindful of the observation of justice Madigan in **Mani Lal (supra)** and section 44 (4) of the Constitution, where it states that;

"the high court may exercise its discretion not to grant relief in relation to an application or referral made under this section, it if considers that an adequate alternative remedy is available to the person concerned".

22. Upon careful consideration of the three case authorities tendered by the learned counsel of the applicant in his submissions, namely **Sailasa Naba and others v The State (Criminal Case No 0012 of 2001), Naushad Ali v State (Criminal Appeal No HAA oo83 of 2001) and State v Baljeet Singh (Criminal Action No HAC 002 of 2001),** I find the legal principles enunciated in those cases have now been further elaborated in order to create more harmonious and judicious balance between the rights of individuals and the interest of the community as a whole.

23. Lord Bingham of Cornhill in **Attorney General's Reference No 2 of 2001 (On Appeal from the Court of Appeal (Criminal Division))[2003] UKHL 68)** has discussed the desirable approach in considering the adequate alternative remedy in the event of alleged breach of individual rights, where his lordship held that;

"If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention

terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time. (underline is mine)

24. In view of the observation of Lord Bingham of Cornhill in **Attorney General's Reference No 2 of 2001 (supra),** the remedy should be just, appropriate and effective in order to protect the rights of the individual as well as the interest of public.

25. Bearing in mind the reasons discussed above, I now turn to consider the judicial approach in this jurisdiction in granting of bail for the suspect charged under the Illicit Drugs Control Act of 2004.

26. Justice Madigan in **Xhemali v State (2011) FJHC 148; CRC 050.2011 (8 March 2011)** has outlined the serious nature of the offences under the Illicit Drugs Act, and its adverse impact on public interest, where his lordship found that;

"the potential charge will be very serious. Never before in Fiji have dangerous and addictive drugs in such quantity been imported by such sinister means. The method displays obvious sophisticated planning and the latent risk to the vulnerable and uninformed consumers in our society is alarming. It is definitely in the public interest that the perpetrators of this consignment be brought to justices as soon as possible, and to this end it would perilous to admit this applicant to bail".

27. Having considered the observations of Justice Madigan in **Xhemail (supra),** Justice Nawana in **Kreimanis v State (2012) FJHC 1316; HAM86.2012 (6 September 2012)** found that;

"Recently, in ***Xhemali v State*** *[2011] FJHC 148, Madigan J., dealing with an identical case of a foreigner suspected of having been in possession of a large quantity of an addictive drug, held that it was definitely in the public interest that the perpetrators in possession of such a large consignments of illicit drug be brought to justice as soon as possible; and, to that end it would be perilous to admit such suspect-applicants to bail.*

Accordingly, I conclude that the grant of bail to the applicant in this case is certainly not in public interest, which attracts paramount consideration in granting bail under the Bail Act of Fiji. In the result, bail is refused. Refusal of bail, even after ten-month long detention on remand, is within the statutory framework of the Bail Act -

especially under Section 13 (4) of the Act – which empowers court to detain an accused on remand for a maximum period of two years before the trial in appropriate circumstances."

28. I am mindful of the fact that unlike in this instant application, two foreigners were involved in **Xhemail (supra),** and **Kreimanis (supra).** However, in view of the observations made in those two judicial precedents, it appears that the judicial approach in granting of bail for the offences of this nature is heavily depended on the issue of public interest.

29. This application is mainly founded on the ground of the interest of the accused, more specifically on the ground of *"the person is incapacitated by injuries or otherwise in danger or in need of physical protection as a result of this alleged assault by the police officer"*.

30. Having considered personal ties of the applicant in the community, seriousness of the offence, and the public interest, Justice De Silva in the first bail application of the applicant has refused bail on the ground of public interest and the likelihood of interference of the prosecution case. In this instant application the applicant has deposed nearly the same grounds which he had already deposed in his first bail application in respect of the grounds of public interest and the protection of community.

31. Having considered the judicial approach in granting of bail for the offences under Illicit Drugs Control Act, the circumstances and the surrounding of this alleged assault, and the length of time that the applicant has to remain in custody before the trial, which is already set down from 1st of July, I find the interim orders granted for the applicant on the 22nd of May 2015 as an adequate alternative remedy rather than granting of bail.

32. I accordingly refuse this bail application of the applicant and grant the following alternative remedies that;

i. The Officer in Charge of Natabua Prison is hereby ordered to provide sufficient and effective protection to the applicant during all material time of his custody; and

ii. The officer in Charge of Natabua Prison is further ordered to provide the applicant sufficient and appropriate medical attention at the suitable medical centre on the advice of a qualified medical practitioner.

33. The applicant may invoke the jurisdiction of the Fiji Court of Appeal to review this ruling pursuant to section 30 (4) of the Bail Act.

HIGH COURT OF FIJI
LAUTOKA

R. D. R. Thushara Rajasinghe

Judge

At Lautoka

12th of June 2015

Solicitors : **Messrs Iqbal Khan & Associates for Applicant**

Office of the Director of Public Prosecutions