IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 211 OF 2016

BETWEEN	:	KRISHNEEL KUMAR
		Applicant
AND	:	STATE
		Respondent
Counsel	:	Ms. U. Baleilevuka for Applicant
		Ms. L. Latu for Respondent
Date of Hearing	:	23rd January, 2017
Date of Ruling	:	7th February, 2017

BAIL REVIEW RULING

1. The Applicant is charged in the Magistrates Court at Tavua with Unlawful Possession of an Illicit Drug contrary to Sections 5 (a) of the Illicit Drug Control Act of 2004.

2. The Applicant applied for bail twice in the Magistrates Court. His first bail application was refused by the learned Magistrate by his Ruling dated 18th October, 2016 on the basis that the Applicant had been charged with the present allegation whilst he was on bail in another two pending matters

before the Magistrates Court at Lautoka. By the same Ruing, one of the co-accused was granted bail as he had no pending cases.

3. Applicant's second bail application was refused on the 1st of December, 2016 on the basis that there was no martial change of circumstances from his first bail application. Personal circumstances highlighted by the Applicant in his second bail application were considered not exceptional.

4. It is against these bail Rulings that the Applicant has filed this notice of motion seeking a bail review.

5. This application is made pursuant to Section 30 (3) of the Bail Act 2002. The Section 30 (7) states:

> *"A court which has power to review a bail determination, or to hear a fresh application under section 14(l), may, if not satisfied that there are special facts or circumstances that justify a review, or the making of afresh application, refuse to hear the review or application"*
>
> Section 30 (9) states: *the power to review a decision under this Part includes the power to confirm, reverse or vary the decision.*

6. The Respondent has filed objections to the application supported by the affidavit of the Investigating Officer (IO) CPL Naraga. Both parties made oral submissions at the hearing and they rely on the same.

7. The Bail Act 2002 provides for a presumption in favour of granting bail pending trial to an accused. The party opposing bail carries the onus to rebut

the presumption on the balance of probability. Bail should be granted unless the Court is satisfied of any one or more of the considerations set out in Section 19(1). They are:

(a) That the accused is unlikely to surrender to custody and appear in court.

(b) The interest of the accused will not be served through granting bail.

(c) Granting bail would endanger the public interest or make the protection of the community more difficult.

8. The State, in the Magistrates Court, relied on the third limb to oppose granting of bail to the Applicant. In considering this limb, the Court must have regard to factors such as any previous failure by the accused person to surrender to custody or to observe bail conditions, and the likelihood of the accused person committing an arrestable offence while on bail (s. 19(c)).

9. The Applicant does not dispute the fact that he had two pending cases before the Lautoka Magistrates Court in which he was on bail when the charge against him was brought in the present matter. According to IO's affidavit, the Applicant with others is charged with one count of Aggravated Robbery and one count of Theft in the first case (CF 202 of 2015). In the 2nd matter, (CF 474 of 2009), he with another is charged with Robbery with violence. The nature of the offending in pending matters is materially different from the one he is facing in the present matter.

10. The Applicant claims that the two pending charges are totally different factual scenarios for which he was granted bail and that he had never violated any bail conditions imposed by the Lautoka Magistrates Court.

11. The learned Magistrate formed the view that it was not in the interest of the public to grant bail to the Applicant because there was a real likelihood of him committing an arrestable offence if released on bail.

12. According to Section 19(2) C III of the Bail Act, in forming the opinion whether to grant bail, a court must have regard to the likelihood of the accused person committing an arrestable offence while on bail. The objects to be achieved are the protection of the community and public interest.

13. The question hear is whether the learned Magistrate's finding is lawful and the view he formed that the Applicant is a potential threat to the protection of the community and public interest was justified in the circumstances of the case.

14. The learned Magistrate relied on the bail decisions in ***State v Tuilagi*** [2008] FJHC 317; HAC069.2008 (13 November 2008) ***State v Tuimouta*** Criminal Case No. HAC 078/2008 (18 August 2008) and ***Williams v State*** Criminal Misc. Case No. HAM 079/2008 (8 October 2008) ***Deo v State*** [2013] FJHC 71; Criminal Case 16.2013 (25 February 2013) where the Court held that when an accused is faced with a new allegation while on bail, the test is whether there is a likelihood of the accused committing a further arrestable offence on bail.

15. It was held in ***R v Crown Court at Harrow*** [2003] 1 WLR 2756, at 2778 that

> *"the fact that new offences appear to have been committed whilst on bail is likely to be a factor of considerable importance against the defendant when deciding whether there is substantial grounds for believing that, if released, he would commit a further offence while on bail."*

16. In should be noted that factual scenarios that led to the decisions cited by the learned Magistrate are materially different from what he was confronted with in the present case. In the present case, Applicant had no previous convictions whereas in the cases cited by the learned Magistrate, the accused or applicant had previous convictions.

17. In ***State v Tuilagi*** (supra) the 2nd accused was charged with Robbery with violence a serious offence which was punishable by maximum penalty of life imprisonment under the penal Code. The charge in that case arose while the 2nd Accused was serving a suspended sentence for theft. Accused person had previous convictions. He allegedly committed the subsequent offence whilst serving a suspended sentence for theft. Shortly after he was granted bail in that case, a new allegation of similar nature, a charge of robbery with violence arose against him.

18. Gounder J observed:

> [14] *The offence of robbery with violence is prevalent in our community. The public has legitimate concern for their safety and security because of the increase in this offence. I need not to be satisfied that the 2nd Accused is guilty of these offences before remanding him in custody pending trial. It is sufficient if I am satisfied that the interests of justice, which includes the public interests, outweighs the Accused's right to personal liberty in order to remand him.*
>
> *[15] I am satisfied on balance of probability that there is a likelihood of the 2nd Accused committing a further arrestable offence while on bail and therefore it is in the public interests that he remains in remand pending trial.*

19. In ***Williams,*** the Judge was concerned about the Applicant's history of breaching bail conditions. The State opposed bail saying the Applicant had a history of breaching bail conditions. In two matters, the Applicant was arrested on a bench warrant for failure to appear in the hearings in breach of his bail conditions. Further the Applicant had two previous convictions for escaping from lawful custody and two for robbery with violence.

20. In ***Tuilagi,*** the applicant, before being charged in that case, had previous convictions. The 2nd Accused person had allegedly committed the offence whilst serving a suspended sentence for theft.

21. In ***Deo v State*** (supra) the bail decision of the Magistrate was upheld by the High Court. The applicant had applied for bail in the Magistrates Court but his application was refused by the learned Magistrate. The leaned Magistrate gave the following written reasons for refusing bail to the applicant:

> *"In this case, whilst I find that the accused was not on bail but serving a sentence extra-murally when he was charged with this new offence, the bringing of this most serious charge, allegedly committed whilst serving an extra mural sentence inevitably points to a real likelihood that the accused could re-offend if granted bail. I do not have to be satisfied of his guilt beyond a reasonable doubt, and it is sufficient if I am satisfied on the balance of probabilities that he is likely to re-offend whilst on bail. I am satisfied on the balance of probabilities that the accused is likely to commit an arrestable offence if granted bail, and bail is refused accordingly."*

22. It is clear that the learned Magistrate's finding in ***Deo*** was not questionable as it was based on a previous conviction of the accused. The new charge against him arose while he was an extra-mural prisoner.

23. In ***R v Crown Court at Harrow*** (supra), the claimant had a previous conviction for rape, and for that offence and another offence of violence he had served 14 years' imprisonment, so in accordance with section 25 of the Criminal Justice and Public Order Act 1994, as amended, the judge could only grant bail if he was satisfied that there were "exceptional circumstances" which justified that course. He was not so satisfied, and bail was refused.

24. In the matter under review, the learned Magistrate's finding is questionable for number of reasons. Firstly, the learned Magistrate took into consideration mere allegations pending before another Magistrate's Court to form the opinion that the Applicant would be a potential threat to the protection of the community and public interest. He merely took judicial notice of the fact that the Applicant had two pending cases in another court. He had not taken trouble to examine the evidential substance on which those charges were based.

25. Secondly, the pending charges against the Applicant are mere allegations. It may be true that the charges are not generally brought without an evidential foundation. Still, the Applicant is presumed innocent until the charges against him are proved. Presumption of innocence is inalienable right entrenched in our Constitution. The learned Magistrate premised that the Applicant was likely to commit another crime because of the pending charges against him that were yet to be proved.

26. Thirdly, the factual scenario and the nature of the chargers pending before Lautoka Magistrates Court are materially different from the present charge brought before the learned Magistrate. The Applicant is presently charged with Unlawful Possession of illicit drugs (3.2 g of Cannabis Sativa and 0.7 g of

Methamphetamine). If the Appellant was produced before him for an offence of similar nature like theft, burglary or robbery the learned Magistrate's finding would have been quite justified.

27. Indeed this was the South African High Court's observation in ***S. v Maharaj and Others***, 1976 (3) SA 205 to the effect:

> *"It is my view that a person who commits a* ***similar offence*** *to the one with which he is charged while on bail shows not only a disregard for the rule of law, but contempt for the administration of justice as well. He has, in this situation, and by his own act, forfeited his general rights." It was said in these circumstances the onus would be on accused to satisfy the Court that there is no likelihood of any repetition if granted bail.*

28. In ***R v Phillips*** 32 CAR 47 (another South African case) a 23-year-old accused had a bad record and it was accepted while on bail he committed nine similar offences. The Court consisting of Goddard LCJ, Atkinson and Cassels JJA had this to say:

> *"The Court feels very strongly that the applicant ought to have been released on bail. In case of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person*

committing it".

29. While there is no allegation in the present application that the illicit drugs had been introduced or the allegation was concocted by police officers with the view to prolonging Applicant's remand period, Courts should be mindful of such possibilities also and should take every precaution to prevent abuse of court processes by frustrated crime investigators.

30. Remand prisons should not be used as a means to protect the public due to the fear of the accused re-offending. In ***State v Tak Sang Hao*** HAM 3/2001s Justice Fatiaki observed:

"Needless to say the laying of criminal charges ought not to be allowed to become any easy means of depriving or prejudicing a person's liberty.

31. In considering whether or not to admit the accused to bail, careful balance should be struck between the two principles, and this boils down to the interest of the accused versus the public interest. Whilst the accused is entitled to his liberty which flows from his constitutional presumption of innocence, it is in the public interest that offenders are brought to court and tried for their offences. The basic purpose from society's point of view of the procedure known as bail is to strike a balance between two competing interests - the liberty of the accused, and the requirement of the State that he stand trial to be judged and that the administration of justice be safeguarded from interference or frustration.

32. In this respect, steps should be taken to ensure that the accused is available for trial when he is so required and also to obviate the probability of the accused interfering with prosecution witness or destroying evidence. This

may justify the pre-trial incarceration of the accused despite his constitutional presumption of innocence. However, mere allegations or suspicions against an accused arising from a pending case, standing alone, should not in my opinion be the basis in forming the opinion that he is likely to commit another crime whilst on bail.

33. This position was stated with clarity in a South African case of ***S v Fourie*** 1973 (1) SA 100 when Miller J at p 101G-H stated:

> *'It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the Court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence...*
>
> *But if there are no indications that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper cause of justice, he is prima facie entitled to and will normally be granted bail.'*

34. In ***S v Fourie***, (supra) Miller J expressing the view that "an accused person should not be denied bail merely because it appears that he may commit a crime if released from custody." The learned Judge proceeded at 102H:

> *"This is not to say that evidence of the accused's past record, or of his conduct while out on bail in another case, is irrelevant and may not be considered. On the contrary, the grant or refusal of bail being, in which may have some bearing on the result in receivable in evidence and ought to be considered by the Court."*

35. It has been said quoting from Dickens: *"one foul wind no more makes a winter than one swallow makes a summer,"* so too one previous conviction, or an unsubstantiated suspicion against the accused would not indicate that he would be liable to commit further crimes if released on bail (see also ***Nangutuuala en 'n Ander***, 1973 (4) SA 640 (SWA).

36. A judicial officer determining bail must be satisfied that the deprivation of personal liberty is the only option available and resorting to that option is not disproportionate to the objective to be achieved thereby. If the concerns of public interests and protection of the community can be addressed by imposing stringent bail conditions, courts must not resort to curtail personal liberty, since the primary consideration in determining bail is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.

37. Applicant has been in remand for more than three months, the learned Magistrate referred to substance of section 13 (4) of the Bail Act to justify the continued detention of the Applicant.

38. Although courts are possessed of a discretion to order a detention of an accused person in remand for a period of up to two years, that discretion must be exercised judiciously having regard to other provisions of the Bail Act and the provisions of the Constitution and for a valid reason or reasons that would justify such a detention.

39. Section 14 (2) (g) of the present Constitution states: *every person charged with an offence has the right to have the case determined within a reasonable time.* When

deciding whether to grant bail to an accused person, Courts must take into account the time the accused may have to spend in custody before trial if bail is not granted [Section 17.-(1) of the Bail Act].

40. Courts are bound to uphold the Constitution and the provisions of the Bail Act when called upon to determine bail. When a court decides, for whatever reason, to refuse bail to an accused person it must expeditiously deal with the matter and ensure a speedy trial. If the court is overburdened with backlogs, the case flow of the court must be managed to give priority to those cases where accused are in remand.

41. It appears that even the plea had not been taken by the time the second bail application was refused. *(Para 12 of the Bail Review Ruling).* There is no time frame fixed within which the matter may be disposed of. Therefore, it is not reasonable to keep the Applicant in remand for an uncertain period of time without a trial.

42. The learned Magistrate stated that there is no change in circumstances that justify a review. In my opinion, a long and inordinate delay without a trial since the last bail determination can be considered as a change in circumstances giving rise to a new ground for bail.

43. The medical report issued by the Lautoka Hospital shows that the Applicant is an asthmatic since childhood. He is currently on salbutamol puffers. The doctor has recommended that he visit the hospital for further treatments if his asthma attacks do not improve. His release from remand pending trial should be in the interest of the Applicant.

Order

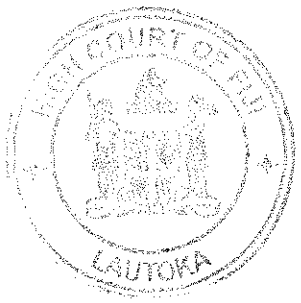
44. For the reasons given, Ruling of the learned Magistrate is rescinded and reversed.

45. Applicant is granted bail on following bail conditions.

[1]. Personal bail of $1000.

[2]. Surety bail of $1000 with two sureties.

[3]. Reporting to the Lautoka Police Station on every Saturday between 8 a.m. and 4 p.m.



Aruna Aluthge

Judge

At Lautoka

07th February 2017

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

Office of the Director of Public Prosecution for Respondent