

2. This Notice of Motion is being supported by an affidavit of the Applicant, stating the background of this application. Applicant has been charged with another in the Magistrate's court of Nasinu for one count of Bribery, contrary to Section 4 (1) (a) of the Prevention of Bribery Act. On the 16th of October 2017, the Applicant was granted bail by the learned Magistrate with strict conditions. The Applicant was asked to surrender his travel documents and a stop departure order was issued as part of the bail conditions. The Applicant had then made an application in the Nasinu Magistrate's court for variation of his bail condition as he wanted to travel to China for his legal wedding and also to be there for the birth of his child and registration of the birth of his child.
3. The Applicant had submitted in the Magistrate's court that it is a requirement under the laws of China that he has to be legally married in order to register the birth of his child. For that purpose he has to go to China before his *de-facto* wife gives birth to their child. Moreover, the Applicant said that the father has to personally be present to register the birth of a child. The Respondent had objected for that application. Having heard both parties, the learned Magistrate in her ruling dated 25th of July 2018, has refused the application for variation of bail. The Applicant then files this Notice of Motion invoking the jurisdiction of this court to review the said ruling of the learned Magistrate pursuant to Section 30 (3) of the Bail Act.
4. The Respondent filed an affidavit of Milika Cakacaka, stating the objections of the Respondent for this review application. The objections of the Respondent are mainly based upon on the ground that the Applicant is a flight risk and there is no strong reason for him to return to Fiji, if he is allowed to travel to China.
5. Section 30 (7) of the Bail Act states that the court could refuse to hear a review application if the court it not satisfied that there are special facts or circumstances that justify a review. Section 30 (10) of the Bail Act has stipulated the scope of the review hearing, where it states that:

“The review must be by way of a hearing, and evidence or information given or tamed on the making of the decision may be given or obtained on review”.

6. Section 31 of the Bail Act has provided the procedure for the appeal on bail decisions, where it states that:
 - i) *All grants or refusals 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.*
 - ii) *The High Court may-*
 - a) *in its original jurisdiction grant or refuse bail upon such terms as it considers just;*
 - b) *on an appeal under subsection (1), confirm, reverse or vary the decision appealed from.*
 - ii) *This section is in addition to section 22(8) (as to the acceptance of sureties or security) and section 30 (as to review of bail decisions).*
7. Accordingly, any decision, orders, conditions or limitation imposed in relation to bail can be appeal to the High Court pursuant to Section 31 of the Bail Act. Section 31 (3) of the Bail Act further states that this appeal procedure can be utilized in addition to the review procedure under Section 30 of the Bail Act.
8. The review procedure is a rehearing of the evidence and the information. (*vide section 30 (10) of the Bail Act*) . Pursuant to Section 30 (7) of the Bail Act, the court which has power to review a decision in relation to bail, may refuse to hear such a review application if the court is not satisfied that there are special facts or circumstances that justify the reviewing of the decision. Therefore, the court is only proceed to review in the form of rehearing if there are special facts or circumstances that justify the review. Section 30 (2), (3), (7) of the Bail Act is founded on the principle that each court must respect and recognize the

decisions of other courts, including the decisions of lower court. A court should not revisit or to give a different consideration in the form of rehearing to the same facts that has previously been considered and determined by another court or the same court, unless it has a special facts or circumstances that justify such a revisit and a different consideration.

9. However, in an appeal hearing, the Appellate court will determine the errors and correctness of the decision or the ruling of the lower court. It is not a rehearing of the evidence. According to Section 31 of the Bail Act, the High Court, in exercising its appellate jurisdiction, is allowed to grant or refuse bail, and also could confirm, reverse or vary the decision that is appealed from the Magistrates' court.
10. Justice Goundar in **Masirewa v State [2017] FJHC 956; HAM178.2017 (29 December 2017)** has discussed the scope of the review application and the appeal procedure under the Bail Act, where his Lordship found that:

“The Bail Act 2002 (the Act) provides for two avenues to challenge a bail decision. Section 31 (1) of the Act states that all bail decisions are appealable to the High Court. Section 30 (3) of the Act states that the High Court may review any decision by a magistrate in relation to bail. Section 30 (10) of the Act states that a review is a rehearing and the Court may receive evidence before making a decision on bail. The key distinction between an appeal and a review is that on appeal the decision on bail is considered for errors in the exercise of discretion by the lower court, while on review, the decision on bail is considered afresh.

*In the present case, the applicant justified invoking the review procedure on the ground that he had exhausted the appeal procedure and was unsuccessful. However, there is no record that an appeal was ever filed in this matter. In my judgment the review procedure is unavailable if the bail decision could have been appealed. As was said by Scott J in *Abhay Kumar Singh v State Miscellaneous Application 1/2004 (23 June 2004)* that ‘review*

is only available where, for one reason or another, the appeal procedure cannot be resorted to."

11. Accordingly, the review procedure under Section 30 (3) of the Bail Act is only available when the Applicant cannot invoke the appellate jurisdiction of the High Court pursuant to Section 31 of the Bail Act.
12. The learned counsel for the Applicant specifically stated in court that this is not an appeal against the ruling of the learned Magistrate dated 25th of July 2018. This is an application to review the said ruling of the learned Magistrate.
13. The ruling of the learned Magistrate dated 25th of July is a refusal of the application to vary bail conditions. The said ruling of the learned Magistrate falls within the scope of orders as stipulated under Section 31 of the Bail Act. Therefore, the Applicant has a right to appeal against the said ruling of the learned Magistrate pursuant to Section 31 of the Bail Act. According to the principles enunciated in **Masirewa v State (supra)**, the review procedure is not available for the Applicant, as he can invoke the appellate jurisdiction of the High Court pursuant to Section 31 of the Bail Act.
14. Moreover, this application is founded on the grounds that the Applicant want to visit China in order to legally marry his *de-facto* wife before she gives birth to their child. The Applicant claims that if he fails to do so, the child will become stateless under the Chinese law. However, the learned counsel for the Applicant in his oral submissions stated that under the Chinese law, children born out of wedlock shall enjoy the same rights as children born in wedlock. Apart from the date of the expected birth of the child, all other factors that the Applicant relies on in this review application have already been considered by the learned Magistrate in her ruling dated 25th of July 2018. Therefore, I am not satisfied that there are special facts or circumstances that justify the hearing of this review application.
15. In view of the reasons discuss above, I refuse and dismiss this application.

16. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in blue ink, appearing to read "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
26th September 2018

Solicitors
O'Driscoll & Company for the Applicant.
Fiji Independent Commission Against Corruption for the Respondent.