

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

Criminal Misc. No. HAM 74 of 2019

BETWEEN : **FREDERICK EPELI**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. A. Rayawa for the Applicant.
: Ms. P. Lata for the Respondent.

Date of Hearing : 15 May, 2019
Date of Ruling : 28 May, 2019

RULING

[Application for bail pending trial]

1. The applicant by Notice of Motion dated 5th April, 2019 seeks bail pending trial, in support of the application the applicant relies on the affidavit of Murray Isimeli sworn on 5th day of April, 2019 filed on his behalf. The proposed sureties Murray Isimeli and James Pranjivan also provided their respective affidavits sworn on 23rd day of April, 2019.
2. This application is opposed by the State they rely on the affidavit of Detective Constable Ratu Kaliova Vakaruru sworn on 6th day of May, 2019. The applicant filed an affidavit in reply of Murray Isimeli sworn on 9th May, 2019.

BACKGROUND INFORMATION

3. The applicant is charged with another for one count of attempted unlawful exportation of illicit drugs contrary to section 4 (1) and 9 of the Illicit Drugs Control Act.
4. It is alleged that the applicant with another on the 23rd of December, 2018 at Nadi in the Western Division, without lawful authority attempted to export 2015.7 grams of cocaine.
5. This matter was transferred by the Magistrate's Court on 2nd April, 2019. The State filed information in this matter on 20th May, 2019. On 21st May when the substantive matter was called in this court leave was granted to both counsel to file further bail submissions if they so wished by Thursday, 23rd May. The applicant's counsel filed further submissions which have been taken into consideration by this court. It is to be noted that the applicant has been charged with another and there is no doubt the Director of Public Prosecutions is contemplating consolidation of the charges.

APPLICANT'S CONTENTION

6. It is deposed on behalf of the applicant by his brother in law Murray Isimeli that the applicant denies all the charges brought against him. The first phase disclosures served by the prosecution as per the advice of their solicitor does not reveal any evidence that supports any of the charges. The applicant was employed by Fiji Airways as a Flight Attendant prior to the allegations, however, by letter dated 1st April, 2019 the applicant has been summarily dismissed by the company.

7. Further it is deposed that the applicant is willing to surrender all his travel documents, will be providing two sureties to ensure that he attends all his court dates until the matter is disposed of. The applicant has never been convicted of any crime he does not drink alcohol or smoke cigarettes, he is a person of good character and that he is presumed to be innocent until proven guilty. Both the proposed sureties namely Murray Isimeli and James Pranjivan support the application for bail by giving their assurance that the applicant will abide by any conditions for bail including a curfew.

RESPONDENT'S RESPONSE

8. The State in its response relies on the affidavit of Detective Constable Ratu Kaliova Vakaruru. It is deposed that the State has a strong case against the applicant. The main prosecution witness was contacted by the applicant to take a small bag of Pure Fiji items to one of his friends in Sydney. The witness checked the contents of the parcel with her brother and found white substance in it. When the white powder was tested by the Fiji Police Forensics Laboratory the contents were found to be cocaine weighing 2015.7 grams. It is further deposed that considering the likelihood of punishment upon conviction which will be a long term imprisonment there is a high likelihood that the applicant will abscond to avoid prosecution.
9. It is further deposed that being remanded in custody will ensure the applicant's presence in court and that the applicant under the Bail Act can be remanded for up to 2 years. The applicant will be able to prepare for his defence whilst in custody since the applicant is represented by counsel. There would not be any difficulties faced by the applicant in instructing his counsel from the remand centre. Moreover, the allegation against the applicant is serious and prevalent.

APPLICANT'S RESPONSE

10. The applicant's brother in law Murray Isimeli in his affidavit in reply deposes that the applicant was not a flight risk and that the prosecution should show evidence that the applicant has previously absconded bail or had previously failed to surrender to custody. The final phase of disclosures does not reveal any evidence that supports the charge. The applicant strongly denies the allegation.

LAW

11. Section 3 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. There is a presumption in favour of the granting of bail but the person who opposes the granting of bail may seek to rebut this presumption. The presumption in favour of the granting of bail is displaced where:
 - a) the person seeking bail has previously breached a bail undertaking or bail condition;
 - b) the person has been convicted and has appealed against the conviction; or
 - c) the person has been charged with a domestic violence offence.
12. Under section 17 of the Bail Act when deciding whether to grant bail to an accused person the court must take into account the time the person may have to spend in custody before trial if bail was not granted. The primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charge laid against him or her.

13. Under section 19 of the Bail Act an accused person must be granted bail unless in the opinion of the court;
- a) the accused person is unlikely to surrender to custody and appear in court to answer the charges laid;
 - b) the interests of the accused will not be served through the granting of bail;
 - c) granting bail to the accused would endanger the public interest or make the protection of the community more difficult.

DETERMINATION

Likelihood of surrender to custody

14. The applicant did not give his detailed background in any of the affidavits filed on his behalf, however, from the caution interview of the applicant it is known that the applicant is married and was a cabin crew with Fiji Airways Limited for 15 years. The applicant has a house in Lautoka, he has no previous convictions and is 40 years of age.
15. The charges against the applicant without any doubt are serious the maximum penalty of attempt to export illicit drugs is a fine not exceeding \$500,000.00 or imprisonment not exceeding 14 years or both. In accordance with section 19(2) (a) of the Bail Act this court is mandated to look at the circumstances, nature and the seriousness of the offence and the strength of the prosecution case as per the disclosures.
16. The prosecution relies on direct evidence to prove the charge against the applicant. The applicant has the right to test the veracity of the prosecution case during trial so at this stage there is some evidence against the applicant which suggests that the prosecution has a strong

case against the applicant which is relevant to assess the likelihood of the applicant's appearance in court to answer the charge.

17. On the other hand this court is mindful of the fact that the applicant has no previous bail violations or previous convictions and that the Constitutional safeguard or presumption of innocence in respect of both the charges are very much in favour of the applicant (*See Bechu and Another vs. R, 8 FLR 240*).
18. Over the years case authorities relating to flight risks have been many. In *State v Tunidau [2003] FJHC 188*, it was stated that the test for the grant or refusal of bail must always be whether the accused person will appear for trial. Similarly, in *Tukai v State [2004] FJHC 235*, it was held that, although the applicant had a right to bail, the presumption could be rebutted where the State shows that there is a likelihood that the applicant would not appear in court or where it was not in the public interest to grant bail.

INTEREST OF THE ACCUSED


19. There is no doubt that the diary of this court is full with other pressing and urgent matters that has taken up the space for this year, however, it does not mean that arrangements cannot be made for this matter to be heard this year. The substantive matter is not expected to last more than a week and half.
20. The applicant is represented by counsel who will not have any difficulties in visiting the applicant in remand. The remand centre will no doubt be able to accommodate visitation requests by counsel. The accused has been in remand for about two months.

PUBLIC INTEREST AND THE PROTECTION OF THE COMMUNITY

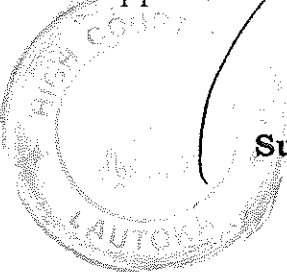
21. The allegations are serious they speak of a little over 2kg of cocaine being attempted unlawfully to be exported through unsuspecting cabin crews of the country's International Airline. The trade in illicit drugs has skyrocketed in this country there appears to be allegations of illicit drugs surfacing nearly every two weeks. In my judgment granting bail to the accused would endanger the public interest and/or make the protection of the community more difficult.
22. In *Xhemali v State [2011] FJHC 148*, Madigan J., held that it was definitely in the public interest that the perpetrators in possession of such a large consignments of illicit drugs be brought to justice as soon as possible and, to that end it would be perilous to admit such applicants to bail.

ORDERS

1. The application for bail pending trial is refused.
2. In the interest of justice both counsel are asked to attend to all pretrial issues with expediency so that a trial date can be assigned as soon as practicable.
3. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka
28 May, 2019

Solicitors

Messrs Rayawa Law, Suva for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.