

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

Criminal Misc. No. HAM 167 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 : 11 September, 2019

Date of Ruling : 26 September, 2019

RULING

[Application for bail pending trial due to change in circumstances]

1. The applicant seeks bail pending trial on the grounds that there has been a change in circumstances since his application for bail was refused on 28th May, 2019. This is the applicant's second bail application.

2. The applicant has filed a notice of motion supported by the affidavit of Murray Isimeli sworn on 19th July, 2019.
3. The application filed by the applicant is opposed by the prosecution. They rely on the affidavit of Detective Constable 3333 Ratu Kaliova Vakaruru sworn on 6th August, 2019. Furthermore, both counsel filed their written submissions and also made oral submissions during the hearing for which this court is grateful.

BACKGROUND INFORMATION

4. 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.
5. 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, an illicit drug to Sydney, Australia.

APPLICANT'S CONTENTION

6. It is deposed on behalf of the applicant by his brother-in-law Murray Isimeli that there has been a substantial change in circumstances since the applicant's first bail application was refused on 28th May, 2019. The deponent made reference to three instances which he mentions point to material change in circumstances warranting the grant of bail. However, during the hearing counsel for the applicant abandoned the first instance but relied on the second and third instances only:

a) Second instance

The applicant's solicitor had visited the applicant (date of visitation not mentioned) at the remand centre and had requested for a private room to take instructions from the applicant. The solicitor was not given a private room but was sent to the Medical Orderly's room to take instructions. The Medical Orderly was also present in the room attending to sick prisoners. It is submitted that as a result of the above the right of the applicant to consult a legal practitioner was denied.

b) Third instance

That police investigators had approached the applicant at the remand centre without the knowledge of his solicitor and had obtained information from the applicant by asking series of questions and answers in the presence of police officers from the Australian Federal Police Force. During the question and answer session the Australian Federal Police Officers had made several offers to the applicant one of which was for the applicant to travel to Australia in exchange for the applicant's statement on certain facts. The applicant submits this action by the Police Officers and the prosecution is tantamount to prosecutorial misconduct and a breach of his human rights.

7. Counsel for the applicant also submits that there is insufficient evidence against the applicant in the disclosures to secure a conviction and therefore the applicant should be released on bail.

RESPONDENT'S RESPONSE

8. The prosecution in its response relies on the affidavit of Detective Constable Vakaruru. In respect of the second issue raised it is deposed that the applicant's right to consult his legal practitioner was not denied, counsel was allowed to see the applicant at the remand centre in the Medical Orderlies room. State counsel further states that the defence counsel could have requested for privacy if there was any interference in his taking of instructions but he did not.
9. The state counsel further submits that there is no need for the applicant to be granted bail when there is no restriction or obstruction for the accused to instruct his counsel. The applicant's counsel is able to visit the applicant any time during working hours.
10. In respect of the third issue raised the prosecution is not aware of the Australian Federal Police meeting with the accused at the remand centre.

LAW

11. Section 14 of the Bail Act provides for numerous applications for bail provided they are not frivolous or vexatious. Furthermore section 14(3) provides that a court may refuse to entertain an application for bail if it is satisfied that the application is frivolous or vexatious.
12. The statutory test for a renewed or subsequent application for bail is whether there are special facts or circumstances to consider releasing the applicant on bail. This test is mentioned in section 30 (7) of the Bail Act which states:
"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 afresh application, refuse to hear the review or application.”

13. His Lordship Goundar J. has clearly stated the above test in the case of *Justin Ho v State* [2019] FJHC 820, HAM 146.2.19 (23 August 2019) at paragraph 8 that:

“The Bail Act has not defined the phrase ‘special facts or circumstances’ but has left it to the courts to decide on case by case basis. The word ‘special’ has been given the meaning exceptional or unusual in a number of cases. For the facts to be special they must be “peculiar to the particular case which set it apart from other cases” (Lyon v Wilcoz [1994] 3 NZLR 422, 431 (CA), following the Full Court in Re M [1993] NZFLR 74). For circumstances to be special they must be exceptional, abnormal or unusual (Crabtree v Hinchliffe (Inspector of Taxes) [1971] 3 All ER 967.976 (Lord Reid), 983 (Viscount Dilhorne)).”

DETERMINATION

14. The applicant’s counsel submits that the two instances highlighted by the applicant in his renewed application for bail meets the criteria required by the law. The change in circumstances is exceptional and peculiar to the case which sets it apart from other cases.
15. Before going any further it is important to have a look at the wordings of section 30 (7) of the Bail Act. The phrases “special facts” or “circumstances” in the context of this section places the onus on the applicant to satisfy the court that the change in circumstances are exceptional, abnormal or unusual so that the court is justified in reviewing the refusal or consider favorably the making of a fresh application.

16. For completeness the two instances of the change in circumstances put forward by the applicant has to be examined in the context it has been raised:

(i) Taking instructions at the remand centre

At paragraph 15 of the affidavit filed on behalf of the applicant states:

“That Fredrick Epeli’s solicitor, Mr. Rayawa had visited Fredrick Epeli in the prison compound in Natabua and had requested for a private room to take instructions from Fredrick Epeli. The solicitor was not given a private room but was referred to the medical room to take instructions from Fredrick Epeli with the presence of the medical attendant in prison who was examining sick prisoners at the same time. Fredrick Epeli’s right to consult a legal practitioner has been denied”.

17. From the above it is obvious that the solicitor was able to consult the applicant the only issue taken by the applicant is that he was not given a private room but was referred to a room with the presence of the Medical Orderly who was attending to sick prisoners at the time.

18. There is nothing in the facts presented to this court that will suggest that the solicitor was unable to obtain instructions from his client whilst at the Medical Orderly’s room. Although the room may not be an ideal one, however, the purpose of the consultation appears to have been achieved despite the environment. The deponent has not alluded to any impediment the solicitor or the applicant had faced during the solicitor–client conference. It cannot be ignored that the remand centres are able to allow the use of their facilities in the manner the infrastructure is

available, solicitor's and applicant's should be able to adjust themselves accordingly.

(ii) Prosecutorial misconduct and breach of human rights

In respect of the final issue raised by the applicant the deponent at paragraph 16 and 17 of his affidavit states:

Paragraph 16

“That the Police investigators from Suva approached Fredrick Epeli in prison without the knowledge of his lawyer Mr. Rayawa and solicited information from Fredrick Epeli through questions and answers and in this question and answer session they had brought with them, police officers from the Australian Federal Police. The Australian Federal Police Officers made several offers to Fredrick Epeli, one of which that they were offering to Fredrick Epeli the opportunity to travel to Australia in exchange for Fredrick Epeli's statement on certain facts.

Paragraph 17

That the actions by the Police Officers and the prosecution is tantamount to Prosecutorial Misconduct and is in breach of Fredrick Epeli's fundamental Human Rights.

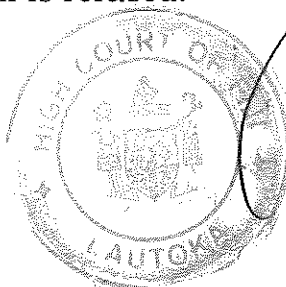
19. The deponent falls short of specifying the specific nature of the prosecutorial misconduct when there are no facts stated in the two paragraphs above suggesting the involvement of the Office of the Director of Public Prosecutions in the matters alleged. The facts point to the police investigators and the Australian Federal Police Officers there is nothing


raised by the applicant about the type of questions asked and whether it was related to the impending trial before this court or some other investigations in Australia. There is also no allegation by the applicant that he was forced to answer questions asked. From the above paragraphs it appears the applicant had voluntarily participated in the question and answer session.

20. There is also nothing to suggest that the applicant has been prejudiced in his defence in this trial as a result of the question and answer session conducted.
21. Moreover, the role of investigators are separate from the role of prosecutors and in the absence of any compelling facts indicating the involvement of the prosecuting agency, in this case the office of the Director of Public Prosecutions this court is unable to make any determination on the issue raised. It is unfortunate and a matter of concern that the applicant has arrived at a conclusion of prosecutorial misconduct when there is no iota of evidence before the court to substantiate the allegation advanced.
22. Likewise, there is nothing in the affidavit filed by the applicant that points to any specific breach of the applicant's human rights.
23. Moreover, this court is not concerned about the likelihood of a conviction or otherwise in this application. The Director of Public Prosecutions has decided to continue with the prosecution of the charge against the applicant which is his prerogative. Bearing this in mind, this court cannot ignore the applicant's obvious complicity or involvement in the commission of the offence with which he is charged. In any event the issue of merits in respect of the information filed will only be known at trial.

24. For the above reasons, the change in circumstances put forward by the applicant is not exceptional to enable this court to grant bail to the applicant. The applicant has failed to satisfy the test under section 30(7) of the Bail Act.

25. The second application for bail is refused.




Sunil Sharma
Judge

At Lautoka

26 September, 2019

Solicitors

Messrs Rayawa Law, Suva for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.