IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 31 the Bail Act 2002.

[APPELLATE JURISDICTION]

PRAJEET SINGH

Appellant

CASE NO: HAA. 018 of 2020 [Lautoka] **Vs.**
[MC, Nadi Criminal Case No. 316 of 2020]

STATE

Respondent

Counsel	**:**	Mr. J. Rabuku for the Appellant Ms. S. Tivao for the Respondent
Hearing on	**:**	08 April, 2020
Judgment on	**:**	24 April, 2020

JUDGMENT

1. The appellant stands charged jointly with another before the Magistrate Court at Nadi for one count of Unlawful Possession of Illicit Drugs contrary to section 5(a) of the Illicit Drugs Control Act 2004.

2. The particulars of the offence are as follows;

> ***Prajeet Singh*** *and* ***Desiree Camaitovu*** *on the 24th day of February 2020 at Nadi in the Western Division without lawful authority had in their possession 18.2 grams of Cannabis Sativa or Indian Hemp an Illicit Drugs.*

3. The Learned Magistrate in her ruling pronounced on 12/03/20, refused to grant bail to the appellant and this ruling was made in relation to the application for bail filed on 04/03/20.

4. Aggrieved by the aforementioned ruling, the appellant filed a Notice of Appeal before the High Court of Lautoka assailing the said ruling on the following grounds of appeal;

    a. **That** on the 26th of February 2020, and within 24 hours thereafter, the learned Magistrate erred in law in failing to convey to the Appellant written reasons for the refusal of bail as required under section 20(1)(2) of the Bail Act 2002.

    b. **That** on the 4th of March 2020, and within 24 hours thereafter, the learned Magistrate erred in law in failing to convey to the Appellant written reasons for the refusal of bail as required under section 20(1)(2) of the Bail Act 2002.

    c. **That** the learned Magistrate erred in law in considering the Prosecution's written submissions in the absence of any Affidavit filed by the Prosecution opposing bail.

    d. **That** the learned Magistrate erred in fact and in law in her analysis of section 19(1)(a) of the Bail Act 2002 by finding:

        i) That the charge against the Appellant was a serious one given the prescribed penalty under the Illicit Drugs Control Act 2009 and therefore his likelihood to surrender to custody was doubtful when it is clear that the current sentencing tariff set by the Fiji Court of Appeal on such offending is a fine and a non-custodial term.

        ii) That the Appellant had failed to observe bail conditions by being arrested 5 days after being enlarged on bail in another matter being Nadi CF 271/20 and therefore his likelihood to surrender to custody was doubtful, when there was no evidence before the learned Magistrate that the Appellant had refused to cooperate with the Police or surrender himself to custody at any given occasion.

    e. **That** the learned Magistrate failed to judiciously and properly exercise her discretion in analyzing the affidavit evidence of the Appellant in respect of the considerations under section 19(1)(b) of the Bail Act 2002, in that the

interest of the Accused/Appellant would not be served through the granting of bail.

f. **That** the learned Magistrate failed to judiciously exercise her discretion in respect of the considerations under section 19(1)(c) of the Bail Act 2002 being the public interest and the protection of the community in that there was no evidence before the learned Magistrate that the Appellant had:

   i) Previously failed to surrender into custody or observed bail conditions;
   ii) The likelihood of interfering with evidence, witnesses or assessors or any specifically affected person;
   iii) The likelihood of the accused person committing an arrestable offence while on bail.

g. **That** the learned Magistrate erred in fact and in law in ruling that the Appellant had failed all three tests under section 19(1) of the Bail Act 2002.

5. This appeal has been filed pursuant to section 31 of the Bail Act 2002 ("Bail Act"). The said section reads thus;

(1) 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.

(2) 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.

(3) 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).

6. As highlighted in the case of ***Koroi v State*** [2019] FJCA 22; AAU0072.2018 (7 March 2019), the central issue in an appeal against a decision refusing to grant bail is whether the lower court erred in principal or fact in the exercise of the discretion to grant bail. Therefore, the appellate court would consider whether the court below acted on a wrong principle, whether the court was guided by extraneous or

irrelevant facts, whether the court failed to consider relevant facts or whether it mistook the facts.

7. Section 19(1) of the Bail Act reads thus;

An accused person must be granted bail unless in the opinion of the police officer or the court, as the case may be-

(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 person will not be served through the granting of bail; or

(c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult.

8. Section 19(2) of the Bail Act further elaborates on the three factors that are laid down under section 19(1) alluded to above. Section 19(2) reads thus;

(2) In forming the opinion required by subsection (1) a police officer or court must have regard to all the relevant circumstances and in particular-

(a) as regards the likelihood of surrender to custody-

(i) the accused person's background and community ties (including residence, employment, family situation, previous criminal history);

(ii) any previous failure by the person to surrender to custody or to observe bail conditions;

(iii) the circumstances, nature and seriousness of the offence;

(iv) the strength of the prosecution case;

(v) the severity of the likely penalty if the person is found guilty;

(vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);

(b) as regards the interests of the accused person-

(i) the length of time the person is likely to have to remain in custody before the case is heard;

(ii) the conditions of that custody;

(iii) the need for the person to obtain legal advice and to prepare a defence;

(iv) the need for the person to beat liberty for other lawful purposes (such as employment, education, care of dependants);

(v) whether the person is under the age of 18 years (in which case section 3(5) applies);

(vi) whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;

(c) as regards the public interest and the protection of the community-

(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;

(ii) the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person:

(iii) the likelihood of the accused person committing an arrestable offence while on bail.'

9. At the outset, it should be noted that this appeal was filed before the High Court at Lautoka but it is dealt with by this court at the instance of the appellant on the basis that he failed secure a hearing date given the lockdown of the Lautoka area owing to Covid-19 Pandemic, at the time the said request was made. It was also submitted that the appellant is being kept in the Suva Remand Centre for certain reasons when this request for this matter to be heard in Suva was made.

10. The appellant was initially produced before the Magistrates Court at Nadi on 26/02/20. The appellant submits that his (previous) counsel had made an oral application for bail on this day and the Learned Magistrate had directed written submissions to be filed within 07 days. According to the appellant, a formal application for bail was made on the next day which was 04/03/20 (by this date there was a change of counsel), and on this day the Learned Magistrate had provided 07 days for the prosecution to file a response. The prosecution had filed

objections on 11/03/20 and the impugned ruling was delivered on 12/03/20.

Grounds (a) and (b)

11. Through grounds of appeal (a) and (b), the appellant alleges that the Learned Magistrate refused to grant bail to him on 26/02/20 and on 04/03/20 and failed to provide written reasons within 24 hours from the said refusals in line with provisions of section 20(1) and section 20(2) of the Bail Act.

12. I am surprised by the issues raised and the submissions made on these two grounds.

13. Firstly, it should be noted that this appeal is preferred against the decision made by the Learned Magistrate on 12/03/20. Therefore, it is not open for the appellant to challenge other decisions made by the Learned Magistrate on previous occasions, in this appeal.

14. Secondly, counsel for the appellant is attempting to misinterpret the remanding of the appellant by the Learned Magistrate on 26/02/20 and on 04/03/20 pending the relevant bail applications, as 'decisions refusing bail', knowing very well that a decision to refuse bail was not made by the Learned Magistrate on either of those dates.

15. What is provided in section 20(1) of the Bail Act is that the court or the police officer as the case may be, must record in writing the reasons for refusing bail when bail is refused. Section 20(2) provides that the written reasons must be conveyed to the accused within 24 hour after the decision was made to refuse bail.

16. Based on the information submitted by the counsel for the appellant himself, the Learned Magistrate did not make a decision on the relevant oral application for bail on 26/02/20 and on the relevant written application for bail on 04/03/20. On both these dates, the relevant applications for bail were pending before the court. The oral application for bail made on 26/02/20 could be regarded as being substituted by

the written application made on 04/03/20. Therefore it was no longer necessary to make a decision on the said oral application made on 26/02/20. The decision on the written application made on 04/03/20 was made on 12/03/20 and the written reasons appear to have been provided by the Learned Magistrate on the same day.

17. The counsel for the appellant argues that remanding the appellant on 26/02/20 and on 04/03/20 was effectively a refusal of bail.

18. The underlying contention of the counsel for the appellant appear to be that, after an application for bail is made, each day the case is adjourned for the relevant step to be taken in relation to the determination of that application, the court must give written reasons for not releasing the applicant on bail (on each adjournment). In other words, the issue raised in these two grounds is about providing written reasons when not releasing an applicant on bail, pending the relevant bail application. The flip side of this argument is that in every bail application, the decision should be made on the same day the application is made.

19. Section 14(2) of the Bail Act reads thus;

> *(2) An application to a court for bail must be dealt with as soon as reasonably practicable after it is made.*

20. Accordingly, the Bail Act does not expect a bail application to be determined *instanter*.

21. When an application for bail is made, an opportunity must be given to the prosecution to respond and the prosecution would require a reasonable time to properly respond. With the number of cases to be dealt with each day, a magistrate would also require time to make a decision on a bail application and to prepare a written ruling. The Bail Act [section 14(2)] says that a bail application should be dealt with as soon as "**reasonably practicable**".

22. Grounds (a) and (b) are grossly misconceived and frivolous.

Ground (c)

23. On this ground the appellant submits that the prosecution failed to submit affidavit evidence in opposing bail and the Learned Magistrate erred by taking into account the written submissions filed by the prosecution.

24. In my view, filing an affidavit is not a *sine qua non* of a bail response. An affidavit is necessary only if there is a necessity to present evidence in support of the bail response. It is not necessary for the prosecution to file an affidavit simply to say that they are objecting to bail when that objection is not premised on a factual basis but only on a legal basis. On the other hand, in cases where the presumption in favour of bail is displaced in terms of section 3(4) of the Bail Act where the relevant applicant bears the burden of convincing the court that he/ she should be released on bail, it may not be necessary for the prosecution to present evidence through an affidavit.

25. Admittedly, if bail is opposed by the prosecution based on a factual basis, it is necessary to present those facts by way of an affidavit. For an example, if the position of the prosecution is that there is a flight risk because the case against the particular applicant is strong, the prosecution should provide at least a summary of the relevant witnesses' statements through an affidavit. Especially in a case before the Magistrate Court where disclosures are not filed in court, this is essential. Unless the strength of the prosecution case is demonstrated by way of an affidavit as mentioned above, the court or the relevant magistrate cannot form a view on the likelihood of the applicant surrendering to custody and appearing in court based on the strength of the prosecution case.

26. However, an error is not made by a court when considering a bail application simply by taking into account the submissions in a bail response opposing bail filed by way of written submissions alone without an affidavit. An error is made only if there

were facts included in the written submissions that were not presented through an affidavit and the Learned Magistrate relies on those facts in arriving at the decision on whether or not to grant bail.

27. On this ground, the appellant has failed to demonstrate that the Learned Magistrate has relied on such improperly presented facts in arriving at the impugned decision. The contention that the Learned Magistrate erred in law merely by taking into account the written submissions filed by the prosecution opposing bail in the absence of any affidavit, is misconceived.

28. Ground (c) should fail.

Ground (d)

29. Ground (d) deals with the opinion the Learned Magistrate formed in relation to the likelihood of the appellant surrendering to court custody and appearing in court to answer the charge against him. This is the first of the three factors laid down in section 19(1) of the Bail Act that should be considered by a police officer or a court when called upon to decide whether to grant bail to an accused.

30. It is worth reminding that it is not necessary for all the three factors outlined in section 19(1) of the Bail Act to stand against a person applying for bail in a particular case for bail to be refused. It should be noted that the three factors under section 19(1) are separated by semicolons and the word 'or' is found before the third factor [section 19(1)(c)]. Forming an opinion on one of those three factors to the disadvantage of such applicant is sufficient to refuse bail. [See ***Wakaniyasi v State*** [2010] FJHC 20; HAM120.2009 (29 January 2010)]

31. The appellant submits that the Learned Magistrate made two findings in relation to section 19(1)(a) and he challenges those findings.

32. According to the appellant, the first finding is that the appellant faces the risk of life imprisonment or a fine of one million dollars if he is found guilty. Appellant submits

that in view of the judgment of the Court of Appeal in ***Sulua v State*** [2012] FJCA 33 and given the fact that the quantity of the drug mentioned in the charge against him in the instant case is 18.2g, the applicable tariff is a non-custodial sentence and a suspended sentence or a short sharp sentence is to be imposed only in worst cases.

33. The life imprisonment and the fine of one million dollars the Learned Magistrate had referred to as stated above is in fact the maximum penalty for the offence the appellant is charged with and it appears that the Learned Magistrate had overlooked the applicable tariff when making that statement. I would however regard that as a mere statement and not as a finding. Admittedly, the said statement is inaccurate. But, the pertinent question is whether that mistake of overlooking the applicable tariff played a substantial role in forming the opinion that the appellant is a flight risk or whether there were other grounds to justify that opinion. It should also be noted that if the appellant is found guilty on the charge in the previous case and then also in the case at hand, he would not be dealt with as a first offender when it comes to sentencing in the case at hand.

34. With regard to the second finding the counsel for the appellant at paragraphs 47 and 48 of his written submissions states thus;

> *47. In paragraph 15 of the bail ruling the Magistrate found that since the Appellant had a pending case being Nadi CF 271/20 and had only been granted bail in that case five days prior, he had failed to observe bail conditions and therefore the Appellant's surrender to the court's custody was doubtful.*
>
> *48. It is not clear what bail condition the Magistrate was referring to that the Appellant had breached but it is assumed that it might have been a bail condition that the "accused was not to commit an offence during the bail period".*

35. The Learned Magistrate has in fact concluded that the appellant had failed to observe previous bail conditions. At paragraph 15 of the impugned decision the

Learned Magistrate states thus;

> 15. *He has been previously charged in Nadi CF 271/20 for a similar offence namely the Unlawful possession of 3.2963g of Methamphetamine and has been enlarged on strict bail conditions on 19/02/20. He has been arrested for this case just 5 days after obtaining bail in the previous case. The previous failure by applicant to observe bail conditions would stand against his benefit.*

36. Before I proceed further in the discussion in relation to this ground, I wish to deal with one incidental issue. The fact that the appellant was on bail in a case where he was charged with a similar offence as mentioned in the paragraph above appear to be a fact (in fact the only fact) that is mentioned in the written submission filed by the prosecution.

37. The appellant could have argued under appeal ground (c) above that this particular fact was not submitted by the prosecution through an affidavit. However, I also note that the appellant quite correctly has disclosed the fact that he has a pending case for possession of drugs in his bail application. Therefore, firstly, this particular fact was clearly within the knowledge of the appellant, which he himself had disclosed in his bail application. In fact, he was required to do that. Secondly, it appears that the relevant case was also before the same magistrate. The Learned Magistrate therefore had the access to the file and the material therein. Accordingly, it is clear that it cannot be argued that the Learned Magistrate had solely relied on the written submissions filed by the prosecution in taking cognisance of the aforementioned fact.

38. Coming back to the issue raised in ground (d), as the counsel for the appellant had highlighted, the Learned Magistrate had failed to identify the bail condition which she found the appellant to have breached, in her ruling. Then again in paragraph 48 of the written submissions, counsel for the appellant says that he assumes that it might have been the condition that the "accused was not to commit an offence

during the bail period".

39. Accordingly, it is clearly admitted by the appellant that there is a bail condition in relation to the Nadi Case No. CF 271/20 where the appellant is charged with the offence of unlawful possession of illicit drugs for being in possession of 3.2963g of Methamphetamine; to the effect that the appellant should not commit an offence whilst on bail.

40. Nevertheless, the contention of the counsel for the appellant is that because the appellant has not been convicted of the charge in the case at hand, the appellant had not committed an offence. In the written submissions it is submitted that this "new charge before the court was merely a charge".

41. In ***Seru v State*** [2015] FJCA 30; AAU0152.2014 (27 February 2015) Goundar J said thus;

> *[12] When considering an issue relating to bail, there is no requirement for formal evidence to be given. It is well established that the bail jurisdiction was not equivalent to a criminal charge, the rules of evidence need not apply, and a court may rely on written hearsay evidence provided it was properly evaluated. In* ***In re Moles [****1981] Crim LR 170 the Divisional Court stated that strict rules of evidence were inherently inappropriate when deciding a bail issue.*

42. In the case of ***State v Tuimouta*** [2008] FJHC 177; HAC078.2008 (18 August 2008) again Goundar J said thus;

> *[8] A bail hearing is not a trial. In a trial the prosecution carries the burden of proof to satisfy the guilt of an accused beyond a reasonable doubt. In a bail hearing the prosecution carries the burden of proof on balance of probability that the accused should not be granted bail.*

43. The two citations above makes it plain that the general strict rules of evidence do

not apply when it comes to the determination of a bail application and the standard of proof is balance of probability.

44. It is pertinent to note that a suspect in a criminal investigation becomes an accused when the Police or the Director of Public Prosecutions decides to charge that suspect before a court of law. A mere allegation is not sufficient to charge a person before a court of law. A decision to charge a suspect for an offence is made after gathering evidence and when the prosecuting body is satisfied that it is more likely than not for a court, properly directed in accordance with the law to convict the accused of the relevant charge, on the evidence so gathered. Paragraph 5 of the **Prosecution Code 2003**[1] which is also quoted in the **Prosecutors' Handbook**[2] states thus;

> ***5 THE TEST FOR PROSECUTION***
>
> *5.1 The test for prosecution: No person in Fiji shall be prosecuted unless there is sufficient evidence and it is in the public interest to prosecute. This test is adopted in all Commonwealth countries and is part of the prosecution policy of many common-law jurisdictions.*
>
> *5.2 The first step is to be sure that there is a reasonable prospect of a conviction. This is an objective test, which includes an assessment of the reliability of evidence, and the likely defence case. The test is whether a court, property directed in accordance with the law is more likely than not, to convict the accused of the charge alleged.*

45. Therefore, when the Police or the Director of Public Prosecutions files a criminal charge against a person, it is safe to assume that the said decision to prosecute has been made in line with the abovementioned principles laid down in the Prosecution Code 2003. In the case of ***Fiji Independent Commission Against Corruption v Sekitoga*** [2013] FJCA 127; AAU061 of 2012 (5 December 2013) where

[1] http://odpp.com.fj/wp-content/uploads/2015/03/The-ODPP-Prosecution-Code-2003_Office-of-the-Director-of-Public-Prosecutions_Republic-of-Fiji.pdf
[2] http://www.paclii.org/fj/other/prosecutors-handbook.pdf

the court dealt with an issue in relation to the decision to prefer an appeal against an acquittal by the Magistrates Court, said thus;

> *If **FICAC** or the DPP files an appeal against acquittal by the Magistrates' Court in compliance with their statutory right, then there is a presumption that the official decision to prosecute an appeal is made in a principled manner.*

46. Given the standard of proof applicable to bail applications and the test to be met when a decision is taken to prosecute a person as discussed above, the fact that a person who is on bail for a particular case is charged with a new offence in another fresh case where the date of offence happens to be a date after the date on which bail was granted in the previous case, is sufficient to conclude that the said person has committed an offence whilst on bail, for the purpose of a subsequent bail determination.

47. In the case at hand, the date of offence is 24/02/20 and the appellant had been granted bail in Nadi CF 271/20 on 19/02/20. Though the Learned Magistrate has overlooked to refer to the relevant bail condition, the counsel for the appellant admits that there is a bail condition to the effect that the appellant should not commit an offence whilst on bail. These circumstances are sufficient to conclude on a balance of probability that the appellant had committed an offence whilst on bail for another matter and thereby violated a bail condition in that other matter.

48. Bail is an agreement entered between an accused and the court and it is granted on the trust that the accused will abide by the bail conditions imposed which includes the condition to appear on every court date. By breaching a bail condition, the accused demonstrates that he/she cannot be trusted that he/she would abide by the bail conditions. Therefore, it is not wrong to form a negative view about the likelihood of the appellant not appearing in court for his case based on the finding that he had breached bail conditions in another case.

49. In view of the above, ground (d) should fail.

50. There are two other implications that stems from this finding that it is more probable than not for the appellant to have committed another offence whilst on bail and thereby breached a bail condition, which the Learned Magistrate has failed to appreciate.

51. First is that, because the appellant was found to have breached a bail undertaking, in view of the provisions of section 3(4)(a) of the Bail Act, the presumption in favour of the appellant for the granting of bail is displaced. For this reason, the burden was in fact on the appellant to convince the Learned Magistrate that he should be granted bail notwithstanding the fact that he had breached a previous bail undertaking.

52. Secondly, the finding that the appellant had committed an offence whilst on bail and therefore had failed to observe bail conditions [section 19(2)(c)(i) of the Bail Act] and the fact that the said offence was committed just on the 5th day after he was released on bail which indicates the propensity of the appellant to commit arrestable offences whilst on bail [section 19(2)(c)(iii) of the Bail Act]; are relevant factors in forming an adverse opinion on the appellant in relation to section 19(1)(c) of the Bail Act which concerns the public interest and the protection of the community.

53. At this point, I consider it appropriate to deal with an issue raised by the counsel for the appellant in his written submission in reply that concerns the case of ***Kumar v State*** [2017] FJHC 73; HAM211.2016 (7 February 2017). This case was cited in the respondent's written submissions to highlight the following paragraph quoted in that decision from the judgment of High Court of South Africa in ***S. v Maharaj and Others*** 1976 (3) SA 205;

> *"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.*

54. To briefly comment on the above dictum, it is pertinent to note that the court in the aforementioned case had considered it necessary to shift the burden in bail applications in cases where an accused had committed a similar offence whilst on bail. Section 3(4)(a) of the Bail Act appear to be founded on the same principle. As correctly pointed out by the counsel for the appellant in the submission in reply, the gist of the judgment in ***Kumar*** (supra) does not support the contention of the respondent in this appeal. In my view, it does not support the appellant as anticipated by the counsel for the appellant as well.

55. In ***Kumar*** (supra) the court noted that;

> *". . . 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."*

56. Firstly, it's not clear as to what was meant by the term 'mere allegations' when referring to pending charges. Nevertheless, I have already pointed out in this judgment that the fact that the Police or the Director of Public Prosecutions has decided to charge a person for an offence, is sufficient to conclude on a balance of probability that the person had committed that offence, for the purpose of a bail application.

57. Secondly, presumption of innocence is a right provided under the Constitution of the Republic of Fiji 2013 ("Constitution") for every charged person until that person is proven guilty. That is, the said right operates in a criminal proceeding until the relevant accused is proven guilty. Section 13 of the Constitution, which deals with the rights of suspects arrested or detained, does not include the right to be presumed innocent. Therefore this right to be presumed innocent operates in a window from the moment a person is charged with an offence and until the decision is made according to law on whether the person is guilty or not. In my view, section 14(2)(a)

of the Constitution which pronounces this right simply reemphasises or reinforces the burden of proof that is applicable in a criminal trial in Fiji. I must place on record that I am unable agree with the contention that the right to be presumed innocent is an 'inalienable right' in the strict sense.

58. On the other hand, it is pertinent to note that the right to be released on bail is not a constitutional right. That right is provided under the Bail Act and it is not an absolute right. It is also important to take note of the fact that there is no reference made in the Bail Act to 'presumption of innocence', which implies that presumption of innocence has no relevance in a bail determination and is not a factor to be taken into account in the decision whether or not to grant bail to an accused. In fact, presumption of innocence conflicts with the entire concept of bail. Because one can argue that, it is a violation of the right to be presumed innocent when an accused is released on conditions pending the trial as the accused should be regarded as innocent until proven guilty; as it would be wrong to impose conditions on an innocent person. A further extension of such argument would be that as soon as a suspect is charged, he/she should be released forthwith because the right to be presumed innocent comes into effect. Therefore, it is manifestly clear that presumption of innocence has no role to play under the Bail Act.

59. Nawana J in the case of ***Waqa v State*** [2010] FJHC 256; HAM122.2010 (23 July 2010) expounded on how should the right to be released on bail under the Bail Act operate, as follows;

> *[10] Section 3 of the Bail Act states that 'an accused person has a right to be released on bail...' and that 'there is a presumption in favour of the granting of bail...'. Such phraseology in the section, in my view, does not invest an absolute right on an accused-person to get released on bail.*
>
> *[11] Conversely, Section 3 contains provisions whereby 'interests of justice' have been declared as a necessary factor to be considered by court in affording '...the right to be released on bail...' to an accused person under the Act. Moreover, the presumption favouring the accused could be rebutted by a person opposing the grant of bail by the criteria laid down in Section 18 (1) of the Act, which include the public*

interest and the protection of community.

[12] While the scheme of the Act provides a basis for a person opposing bail to rebut the presumption favouring an accused-person under Section 18(1) read with section 3 (3) of the Act, I am of the view that court is also invested with power independent of such opposition by a party to consider issues concerning 'interests of justice' and 'public interest' under Section 3(1), Sections 19 (1) and 19 (2) of the Act.

60. I concur with the view of Nawana J alluded to above. All in all, I am at variance with the reasoning in ***Kumar*** (supra) on the significance of new offences appear to have committed by an accused whilst on bail, in subsequent determinations on bail in relation to that accused. I endorse the view expressed in ***R v Crown Court at Harrow*** [2003] 1 WLR 2756, to wit;

> *"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."*

61. Even though bail was only available on exceptional circumstances in the case that was considered in ***Harrow*** (supra) given the application of section 25 of the Criminal Justice and Public Order Act 19 to that case, the above dictum is such that it could be considered as valid in any bail determination in general.

62. Coming back to the case at hand, in view of the discussion on the grounds dealt with thus far, it is clear that it was open for the Learned Magistrate to form the opinion in relation to section 19(1)(a) of the Bail Act as articulated in the impugned decision. Therefore, the Learned Magistrate has not erred in exercising the discretion in refusing bail, for the reason that the Learned Magistrate was required to form an opinion on only one of the three factors outlined in section 19(1) of the Bail Act, against the granting of bail to justify such refusal. Moreover, as alluded to above, it was also open for the Learned Magistrate to form the opinion (although the Learned Magistrate had overlooked) that it is not in the public interest to enlarge the appellant on bail (section 19(1)(c) of the Bail Act), based on the same circumstances

that were considered to form the opinion in relation to section 19(1)(a) of the Act.

63. Therefore, I have decided to be brief in my discussion on the remaining grounds.

Ground (e)

64. On ground (e) the appellant assails the Learned Magistrate's reasoning in relation to section 19(1)(b) of the Bail Act which deals with the interests of the accused.

65. The appellant had submitted certain personal circumstances in support of his bail application. The Learned Magistrate has assessed those circumstances and had concluded that the 'applicant's chances of bail under this limb too are slim'.

66. Technically, in light of the decision in ***Wakaniyasi*** (supra) it was in fact not required to deliberate on this factor under section 19(1)(b) of the Bail Act because prior to dealing with this factor the Learned Magistrate had already formed the opinion in relation to section 19(1)(a) as highlighted above.

67. The counsel for the appellant submits that the Learned Magistrate had failed to judiciously analyse and consider the affidavit of the appellant and also taken into account irrelevant considerations that were not required in assessing the interests of the appellant. There is no submission found in the written submissions that substantiates the former allegation. The following statement of the Learned Magistrate is highlighted in support of the latter;

> *"Court has the power to hold people in remand for 2 years prior to trial. In any event, time spent in custody while on remand, will be deducted from his final sentence, if found guilty. Applicant has been charged only on the 26th of February 2020 and his trial could be concluded well within the said 2 years' time frame."*

68. It appears that the Learned Magistrate was relying on the provisions of section 13(4) of the Bail Act which provides that "*[i]f a person charged for an offence has been in custody for over 2 years or more and the trial of the person has not begun, the court must*

release the person on bail . . . " to say that the court has the power to keep a person in remand for 2 years. Therefore, whether the person being considered for bail has been in remand for two years is in fact a matter to be considered when deciding whether to grant or refuse bail. On the other hand, what is important to note from the above statement in the impugned decision is the assertion that the trial against the appellant could be completed within two years. The '*the length of time the person is likely to have to remain in custody before the case is heard*' is a matter to be considered under the relevant limb, according to section 19(2)(b)(i) of the Bail Act.

69. Therefore, I would not regard the said statement in question of the Learned Magistrate as one reflecting an error of law or an error of principle.

70. Ground (e) fails.

Ground (f)

71. On ground (f) the appellant assails the Learned Magistrate's reasoning in relation to section 19(1)(c) of the Bail Act which deals with the public interest and the protection of the community.

72. It is plain from the impugned decision that the Learned Magistrate considered the fact that the appellant is charged with the possession of illicit drugs in two cases and the evils caused by drugs to the community in determining that the it is 'in the public interest and the protection of the community' that the appellant be remanded in custody.

73. The counsel for the appellant takes issue with the Learned Magistrate's assertion that '[t]he evilness of drugs in our community is well documented in various publications' stating that such publications were not placed before the court. In my view, the evils caused by drugs on those who consume drugs, their families and the society is common knowledge. Therefore, it was not necessary to call for evidence on that.

74. Nevertheless, I do not find the justification provided by the Learned Magistrate on the opinion reached on this third limb to be faultless. I note that the Learned Magistrate had made more emphasis on the seriousness of the offence in the other case where the appellant was granted bail when forming the opinion concerning this limb.

75. However as I have pointed out earlier, the finding in relation to section 19(1)(a) of the Bail Act that the appellant appear to have committed the offence relevant to the instant case while he was on bail for the case he is charged with the possession of 3.2963g of Methamphetamine clearly establishes that the appellant has failed to observe bail conditions and the propensity for the appellant to commit arrestable and especially drug related offences. This finding justifies the opinion that granting bail to the appellant would endanger the public interest and make the protection of the community more difficult.

76. Therefore, though the issue raised in ground (f) has merit, there is no miscarriage of justice caused.

Ground (i)

77. On this ground the appellant assails the Learned Magistrate's assertion at the end of the impugned decision that appellant had failed all the three tests under section 19(1) of the Bail Act.

78. Given what I have said in relation to ground (f) this ground should also be decided in the appellant's favour. Again, there is no miscarriage of justice caused for the reasons I have already explained.

Conclusion

79. In the light of the above, this appeal should be dismissed.

Orders

a) The appeal is hereby dismissed; and

b) The impugned decision of the Learned Magistrate refusing bail made on 12/03/20 in Nadi Criminal Case No. 316 of 2020 is affirmed.

Solicitors;

Law Solutions for the Appellant
Office of the Director of Public Prosecutions for the State