IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

LAUTOKA MISCELLANEOUS CASE NO. HAM 69 OF 2021

BETWEEN: **MOHAMMED RAHEESH ISOOF** **APPLICANT**

A N D: **STATE** **RESPONDENT**

Counsel: Mr. I. Khan for the Applicant
Mr. S. Babitu for the Respondent

Date of Hearing: 28th October 2021

Date of Ruling: 03rd November 2021

BAIL RULING

1. The Applicant filed this Notice of Motion for bail, on the following grounds that:

   a) *He has been in custody for over two years pending hearing;*
   b) *He be given adequate time and facilities to prepare his defence;*
   c) *Upon such other terms and conditions as this Honourable Court deems just;*
   d) *The time and service of this Motion be abridged.*

2. The Applicant had filed an affidavit of Tevita Kaloulasulasu, a Barrister & Solicitor of Messrs. Iqbal Khan & Associates, the Applicant's lawyers, stating the factual background of this application.

3. This is the third bail application made by the Applicant in relation to the substantive matter of HAC 161 of 2019. The main contention of the Applicant is that he has been in remand custody for over two years hence, he is entitled to be released on bail pursuant to Section 13 (4) of the Bail Act. The Applicant has been in remand custody since the 13th of September 2019 for this matter.

4. Section 13 (4) of the Bail Act states that:

> *"If 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 subject to bail conditions the court thinks fit to impose."*

5. Accordingly, the Court must release the accused on bail if he has been in remand custody for over two years and the Trial of the accused has not begun. In this case, the Applicant has been in remand custody since the 13th of September 2019, which is over two years. The Trial of the accused is scheduled to be commenced on the 13th of December 2021.

6. However, Section 13 (6) of the Bail Act states that any period of delay caused by the accused should not be considered in computing the two years under Section 13 (4) of the Bail Act.

7. On the 19th of May 2020, the learned Trial Judge had fixed the dates for the hearing of this matter. Accordingly, the Trial was scheduled to commence on the 25th of January 2021 and conclude on the 05th of February 2021. Subsequent to several adjournments, the learned Trial Judge, on the 8th of December 2020, had tried to advance the Trial date, for which the learned Counsel for the Applicant had objected, stating that he was not available. The learned Trial Judge had then vacated the scheduled hearing. Subsequently, the new Trial dates were

fixed from the 19th of July 2021 to the 30th of July 2021. Due to the Covid-19 outbreak, the Trial did not commence on the 19th of July 2021.

8. Accordingly, it appears that if the learned Counsel for the Applicant was available, the substantive matter would have been heard and concluded in December 2020. Due to the non-availability of the Counsel for the Applicant, the hearing was delayed by nearly six months. This delay is a litigating delay caused by the Accused. Accordingly, this period of six months should not be considered in computing two years. Hence, the Applicant's application for bail pursuant to Section 13 (4) of the Bail Act has no merits and fails accordingly.

9. Section 14 (1) of the Bail Act allows an accused person to make any number of bail applications. However, if the Court is of the view that such application is vexatious and frivolous, the Court could refuse to entertain such an application pursuant to Section 14 (3) of the Bail Act.

10. Moreover, Section 30 (7) of the Bail Act states that if the Court is not satisfied that some special facts or circumstances justify making a bail application afresh under Section 14 (1) of the Bail Act, the Court could refuse to hear such application.

11. Accordingly, the rights of the accused under Section 14 (1) of the Bail Act to make any number of bail applications has to be exercised subject to the Section 14 (3) and Section 30 (7) of the Act.

12. Donaldson LJ in **Nottingham Justices ((1980) 2 All ER 775)** had discussed the scope of the subsequent application of bail, where his Lordship found that:

> *"The starting point must always be the finding of the position when the matter was last considered by the court. I would inject only one qualification to the general rule that justices can and should only investigate whether the situation has changed since the last remanded in custody. The finding on that occasion*

that schedule 1 circumstances existed will have been based upon matters known to the court at that time. The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since that last occasion, but also of circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that "has there been a change?" It is "Are there any new considerations which were not before the court when the accused was last remanded in custody?"

13. Accordingly, the Court is required to consider an application of this nature if it satisfies that there are some new facts or circumstances that were not taken into consideration by the Court in the previous application of bail.

14. The Applicant submitted that he had lawfully changed his name; hence, he poses no flight risk. The previous decision of Goundar J, refusing the Applicant bail, is founded on the ground that the Applicant is a flight risk. Goundar J had found that the Applicant's family and employment ties are in New Zealand, and allegation against him is grave. Based on that grounds, Goundar J found that there is a real possibility that the accused will not turn up for his Trial if he is released on bail. The finding of the flight risk of the Applicant was not entirely based on the fact that he had changed his name after he was deported from Australia.

15. Therefore, I am of the view that the Court has already considered his family background, his employment and his permanent residency status in New Zealand in the first bail application. Hence, I am satisfied that there is no special facts or circumstances that justify making a bail application afresh.

16. In view of the reasons discussed above, I refused this bail application.

17. Thirty Days to appeal to the Fiji Court of Appeal.

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Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

03rd November 2021

Solicitors

Iqbal Khan & Associates for the Applicant.

Office of the Director of Public Prosecutions for the State.