

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISC. CASE NO. HAM 32 OF 2022

BETWEEN : **MOHAMMED ASHIK**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. S. Nair and Ms. L. Koroitamudu for the Applicant.

: Mr. T. Tuenuku for the Respondent.

Dates of Hearing : 05, 12 May, 2022

Date of Ruling : 01 June, 2022

RULING

[Application for Review of Bail pending Trial]

1. The applicant in his Notice of Motion dated 10th February, 2022 seeks the following orders:

1. *That there be a review of Bail Ruling dated 24th January, 2022 of the Learned Magistrate on grounds contained in the Affidavit in Support.*

This application is made pursuant to section 30 (3) of the Bail Act.

2. The affidavit in support was sworn by the applicant on 10th February, 2022. When the matter was for hearing on 29th March, 2022 Mr. J. K Singh appeared for the applicant on instructions of Messrs Chetty Law and sought time to file the supplementary affidavit of the applicant. The applicant filed his supplementary affidavit sworn on 7th April, 2022.
3. The application filed by the applicant is opposed by the prosecution. The prosecution in its opposition filed the affidavit of WPC 6998 Joan sworn on 11th March, 2022.
4. Both counsel filed written submissions for which this court is grateful.

BACKGROUND INFORMATION

5. Upon questioning by the court the applicant's counsel informed the court that the applicant has four pending matters in the Magistrate's Court at Lautoka. Unfortunately, the applicant in his affidavits did not give any specific details of his pending cases. This prompted the court to make its own inquiries which revealed that the applicant has four pending cases in Magistrate's Court at Lautoka and two pending cases in Magistrate's Court at Nadi.
6. All the alleged offences in the four files at Magistrate's Court, Lautoka are for unlawful possession of illicit drugs. The applicant is charged either on his own or with another. The dates of the allegations are from 5th July, 2020 in one charge sheet and the most recent one thereafter is dated 14th July, 2021.
7. The substances allegedly found in possession are cannabis sativa, methamphetamine and cocaine of varying weights. In respect of the two charges pending in Magistrate's Court, Nadi the applicant is charged with

another for two counts in each file and the dates of the allegations are 27th May, 2020 and 18th September, 2020. In both files the charges relate to unlawful possession of illicit drugs namely methamphetamine and cannabis sativa.

8. In addition to the above, the applicant was charged for absconding bail. It was alleged that the applicant on the 2nd day of April, 2019 being an accused person vide HAC 40 of 2019 absconded his bail by failing to attend Lautoka High Court without a reasonable cause.
9. In respect of the charge of absconding bail the applicant had pleaded guilty and after hearing mitigation the Magistrate's Court at Lautoka fined him \$200.00 payable within 30 days in default 20 days imprisonment. At this point, I would like to state that the applicant was lucky that the operation period of an earlier suspended sentence was not activated by the court. The applicant has two active previous convictions one dated 11th April, 2018 for found in possession of illicit drugs and the other for absconding bail dated 17th April, 2019.
10. At the outset, I would like to mention that the above facts have not been deposed in any of the affidavits filed by the applicant in court. Even though the applicant's application for a review is based on change in circumstances, however, in a review application the court also has to consider the background information that led to the refusal of the bail application by the lower court.
11. The applicant's counsel and the applicant during the hearing on the 5th did not disclose to this court that the applicant had been charged for absconding bail. It was crucial for the applicant to put all the facts before the court.

APPLICATION BEFORE THE COURT

12. Looking at the affidavits filed by the applicant it is obvious to me that this application has been brought to this court in accordance with section 30 (7) of the Bail Act. The applicant deposes that he is the sole breadwinner of his family which includes his grandmother of 78 years and two children aged 5 and 12 years respectively. The children are going to school and since he is not at home his children and his grandmother who is looking after the two young children are in financial difficulties.
13. His grandmother is in a wheel chair since one of her leg's got amputated and she is in constant need of medical attention as well. Furthermore, the applicant is the only authorized person who can withdraw his grandmother's social welfare money. The applicant further deposes that he is not a public threat and upon release on bail he will be able to provide for his family.
14. The applicant has provided two letters from community leaders namely an Advisory Councillor and a Justice of Peace who knows the family and the applicant well. These community leaders express that the family needs the presence of the applicant who will financially assist and also his presence will be a support for his two young children.
15. Counsel stated that the applicant has been in remand for the past 6 months. If granted bail the applicant will reside at Kara Punja Road, Waiyavi with his grandmother and his two children.
16. The prosecution did not file any response to the supplementary affidavit of the applicant sworn on 7th April, 2022, however, they rely on the affidavit of WPC 6998 Joan in reply to the applicant's affidavit filed in support of the Notice of Motion. WPC Joan deposes that the Magistrate's Court had

refused bail for the applicant twice. In his ruling the Learned Magistrate had mentioned that the applicant was not capable of respecting his bail conditions and there was a risk that the applicant would not surrender to custody given his conviction for absconding bail.

17. Furthermore, the applicant has pending cases in the Magistrate's Court and all the allegations are similar in nature that is unlawful possession of illicit drugs. The officer did agree that the grandmother is looking after the welfare of the applicant's children.
18. After hearing the applicant's counsel on day one and in the interest of justice this court ordered the Social Welfare Department to provide a report on the welfare of the applicant's grandmother and the two children of the applicant.
19. The Social Welfare Department, Lautoka compiled a report for which this court is grateful. The report of the Social Welfare Department was given to both counsel for their perusal and they were given the opportunity to address the court on any issues raised by the Social Welfare Officer if they wished.

SOCIAL WELFARE REPORT

20. This court wishes to express its gratitude to Ms. Melaiia Simpson from the Social Welfare Department for urgently compiling a comprehensive report after a home visitation. None of the counsel raised any objections to the contents of the report, however, Mr. Nair told the court that the applicant did not have any knowledge that the 5 year old daughter of his defacto had left his house with her mother since he was in remand.
21. When this court referred the counsel to the supplementary affidavit of the applicant that there was no such fact about his defacto relationship

deposed, the counsel said those were the instructions given by the applicant. The supplementary affidavit of the applicant states that the two children of the applicant aged 5 and 12 were looked after by the applicant's grandmother and there was no mention of the applicant being in a defacto relationship.

22. The Social Welfare Officer in her report dated 10th May, 2022 stated the following:

Summary:

- *Mohammed Ashik's youngest and only son, Mohammed Arzalaan Ashik resides at the family's residence, 49 Kara Punjas Road, Waiyavi with Mohammed's seventy four (74) year old grandmother.*
- *Arzlaan Ashik attends school daily with the assistance of his paternal uncle who provides transport to and fro. His elder sister Tammana Jannat lives with her maternal grandmother at Saweni, Vuda. She is year nine (9) and attends Vishnu Deo College.*
- *Mohammed Ashik's grandmother is a recipient of the Department of Social Welfare receiving one hundred dollars (\$100.00) a month under the Social Pension Scheme.*
- *Financial and moral supports are provided by the immediate family members and neighbours in Fiji and abroad.*

Conclusion:

At this stage, Mohammed Ashik appears to have a consistent and effective support from the families and his neighbours therefore the Department of Social Welfare will henceforth work with the family if the need arises.

This report is submitted for the information of the Honourable Court.

23. The applicant's counsel also argued that the presumption of innocence is in favour of the applicant. Counsel submits that strict bail conditions can be imposed by the court which the applicant will be obliged to follow. Moreover, the applicant has a young family and an elderly grandmother who require the applicant's support and assistance as the sole bread winner.
24. The state counsel argued that the presumption in favour of granting bail has been displaced due to his breach of bail conditions. The applicant was granted bail but he did not follow the terms and conditions. The charges pending are serious and all are similar in nature being drugs related offending.
25. Counsel further submitted that the learned Magistrate took into account public interest and protection of the community when he refused the applicant's bail application twice. Counsel stated that the learned Magistrate was justified in saying that the applicant's appearance in court cannot be guaranteed due to his breach of bail conditions and conviction of absconding bail.
26. Counsel further states that the applicant should have been careful and obeyed all his bail conditions and the applicant should have thought of his family hardships before breaching his bail conditions. Due to the applicant's breach of bail conditions there is a likelihood and a real possibility that if granted bail the applicant will not abide by his bail conditions.

LAW

APPLICATION FOR REVIEW

27. The applicant relies on section 30 (3) and (7) of the Bail Act in seeking a review of the learned Magistrate's refusal to grant the applicant bail.

Section 30 reads as follows:

"(1) A Magistrate may review any decision made by a police officer in relation to bail.

(2) A Magistrate may review a decision made by another Magistrate, including a reviewing Magistrate, in relation to bail.

(3) The High Court may review any decision made by a Magistrate or by a police officer in relation to bail.

(4) The Court of Appeal may review any decision made by the High Court in relation to bail.

(5) The Supreme Court may review any decision of a Magistrate, the High Court or the Court of Appeal, in relation to bail."

(6) A court may not review a decision under this Part if the court is prohibited from making a decision in relation to the grant of bail by any other written law.

(7) A court which has 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 a fresh application, refuse to hear the review or application.

(8) The power to review a decision under this Part in relation to an accused person may be exercised only at the request of –

(a) the accused person;

(b) the police officer who instituted the proceedings for the offence of which the person is accused;

(c) the Attorney-General;

(d) the Director of Public Prosecutions; or

(e) the victim of the offence.

(9) The power to review a decision under this Part includes the power to confirm, reverse or vary the decision.

(10) The review must be by way of a rehearing, and evidence or information given or obtained on the making of the decision may be given or obtained on review.”

28. This court has also taken into consideration section 3 of the Bail Act which 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 granting of bail but the person who opposes may seek to rebut this presumption. The presumption in favour of 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.

29. 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 charges laid against him or her.

30. 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.
31. There is no doubt that the applicant has two active previous convictions one for unlawful possession of illicit drugs and the other for absconding bail.
32. The issue before this court is whether there are special facts or circumstances that justify a review or the making of a fresh application. The applicant's counsel vehemently argued that if the applicant is not granted bail his elderly grandmother and his two young children will suffer. According to counsel the evidence before the court is obvious that there is an urgent need for the applicant to be released on strict bail conditions.

DETERMINATION

33. This court agrees that the current allegations against the applicant are yet to be proven beyond reasonable doubt hence the presumption of innocence is very much in favour of the applicant (*see Bechu and Another v R, 8 FLR 240*).

34. The charges against the applicant are serious which carries an immediate custodial sentence if convicted, however, no matter how serious the allegations are, it is not a sufficient ground to refuse bail pending trial (*see Nazeem Sheraz Ali v State, Criminal Misc. Case No. HAM 101 of 2016 (06/07/2016)*).
35. 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 favourably the making of a fresh application.
36. For completeness, the change in circumstances put forward by the applicant has to be examined in the context it has been raised. The applicant argues that he is required by his elderly grandmother and his young children to be at home and not at the Remand Centre. The rights of the child have an overriding priority that this court cannot ignore.
37. Whilst this court agrees that in certain cases the family situation and circumstances can be one of the factors to release an applicant on bail. However, the facts and circumstances have to be compelling. Here the applicant was released on bail under strict conditions but he opted to breach those strict conditions by committing other offences of similar nature. The applicant has been charged for absconding bail in 2019 yet the Magistrate’s Court had granted the applicant bail after his conviction. By breaching his bail conditions the applicant has shown utter disregard to the court orders.

38. In my view the applicant has brought to the forefront the situation of his grandmother and his son to divert attention away from the fact that it is his doing that has brought him to this situation. When an applicant is granted bail the court bestows trust on that person therefore any breach of the conditions ordered will not be forgiven. The learned Magistrate had correctly refused bail to the applicant after considering the evidence placed before him.
39. The Social Welfare Department in its report has mentioned that the grandmother of the applicant and the son of the applicant are properly looked. The grandmother is receiving her social welfare allowance contrary to what the applicant told the court through his counsel. It is an undisputed fact which came out from the social welfare report that the family is supported financially and in kind by neighbours, local and overseas families. In view of the social welfare report, I give no weight to the letters written by the Justice of Peace and the Advisory Councillor.
40. 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.
41. Before I leave, I would like to state that there is an urgent need for counsel to exercise care and diligence when obtaining instructions from his or her client. This is a case where the applicant has misled the court on three occasions. Firstly, the applicant despite this court's questioning whether he had been charged for absconding bail denied the same. The counsel was also not helpful in this regard.

42. Secondly, the applicant in his supplementary affidavit deposed that his two children aged 5 years and 12 years were looked after his grandmother, however, in court during the hearing on the 12th counsel quickly retracted his submission based upon the Social Welfare Report that the applicant did not have a 5 year old child taken care of by the elderly grandmother of the applicant. Finally, the applicant did not disclose that he has additional two pending matters for unlawful possession of illicit drugs in Magistrate's Court at Nadi whilst counsel from the same law firm appears for the applicant.

CONCLUSION

43. Upon reviewing the ruling of the Magistrate's Court the subject of this application and upon considering the evidence put before this court, and the submissions made by both counsel, this court is satisfied that there is no merits in the application for bail review pending trial. The special facts and circumstances relied on by the applicant is also not sufficient for this court to grant the applicant bail.
44. The applicant's counsel informed this court that they have received the disclosures for the matters pending in the Magistrate's Court. Based on this, this court recommends that the pending cases in the Magistrate's Court be assigned a hearing date as soon as practicable.

ORDERS

- a) The application for review of the Magistrate's Court decision to refuse bail is dismissed due to lack of merits;

- b) The Magistrate's Court order to refuse bail is confirmed.



Sunil Sharma
Judge



At Lautoka

01 June, 2022

Solicitors

Messrs Chetty Law and Associates, Nadi for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.