

Drugs Control Act 2004, namely possession of 2.7 grams of Cannabis Sativa. Count 2 also relates to the same provision, on this occasion the allegation is that Mr Anand was in possession of 0.605 grams of Methamphetamine. Both provisions carry a maximum sentence of life imprisonment and a fine up to \$1 million. The third count is possession of \$2000.00, being reasonably suspected as being proceeds of crime contrary to s 70(1)(a) of the Proceeds of Crimes Act 1997. This offence carries a maximum sentence of two years imprisonment and a fine up to \$12,000. Counts 4 and 5 pertain to a breach of bail conditions arising from counts 1 and 2; the offence here being that Mr Anand offended whilst on bail contrary to s 26(1) & (2) of the Bail Act 2002. The maximum sentence here is 12 months imprisonment and/or a fine up to \$2,000.

- [3] It appears that Mr Anand was arrested at or about the time of the alleged offence on 9 October 2023. The charges were filed in the Navua Magistrates Court on 12 October 2023. I understand Mr Anand to have been remanded since about that time, a period presently of a little over two months.
- [4] On 23 October 2023, an application for bail with a supporting affidavit was made by Mr Anand's then counsel and a hearing conducted before the learned Resident Magistrate on 26 October. The State opposed the application, producing an affidavit from the Investigating Officer, PC 5762 Jenal Narayan. The Investigating Officer stated that Mr Anand faced similar pending charges in the Nasinu Magistrates Court, the Lautoka Magistrates Court and the Suva Magistrates Court. In total, four separate charges for unlawful possession of illicit drugs between 2019 and 2023 (in addition to the present 2023 charge in the Navua Magistrates Court). Add to that, Mr Anand has a charge pending for Absconding Bail in respect to his bail conditions on the Lautoka charge.
- [5] The learned Resident Magistrate issued a decision on 10 November 2023 dismissing the application for bail. It was noted in the decision that the State's primary objection was that Mr Anand '*reoffended whilst on bail and has 3 similar drugs related offences pending*'. Bail was declined on the basis that this evidence demonstrated that it was not in the interests of justice that bail should be granted, one of the three statutory bases that a court may apply to dismiss an application for bail.¹

¹ Section 18(1) of the Bail Act 2002.

Application for review of decision by Resident Magistrate

- [6] Mr Anand, through his new counsel, filed the present application for review on 23 November 2023 along with a supporting affidavit. The application is made under s 30 of the Bail Act.
- [7] The State opposes the application and has filed an affidavit for PC Jenal Narayan dated 11 December 2023. The contents of the affidavit are summarized as follows:
- i. PC Narayan confirms the fact of the four other charges pending against Mr Anand for similar offences as well as the charge of Absconding Bail in the Lautoka Magistrates Court.
 - ii. At the time of the hearing before the learned Resident Magistrate, Mr Anand was only facing three counts on the Navua charge. The State has since added counts 4 and 5 pertaining to the breach of bail conditions. PC Narayan supplied the updated charge.
 - iii. PC Narayan states that Mr Anand has no previous convictions but is '*known*'. I take this to be a reference to Mr Anand's pending charges.
 - iv. PC Narayan opines that given the similar charges in the other Magistrate Courts, Mr Anand '*is very likely*' to commit an arrestable offence if granted bail. Further, given the pending charge for Absconding Bail there is a '*very high likelihood*' Mr Anand will not appear to answer the charge in this matter. Finally, given the current counts of committing arrestable offences in breach of the earlier bail conditions, PC Narayan offers that it is '*not in the interest of the public as well as in the interest of justice and the protection of the community*' that Mr Anand is granted bail.

Bail – the applicable law and principles

- [8] The starting point is s 13(1)(h) of the Constitution 2013, which provides:

Every person who is arrested or detained has the right-

(h) to be released on reasonable terms and conditions, pending a charge or trial, unless the interests of justice otherwise requires.

[9] The legislation regulating the grant of bail is the Bail Act 2002. The courts are bound by this statutory regime when deciding whether to grant or decline bail.

[10] Section 3(1) of the Bail Act reads:

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.

[11] Section 3(3) further provides that there is a presumption in favour of granting bail but this presumption can be rebutted by the party opposing bail. Such presumption may be displaced where, inter alia, the accused person has '*previously breached a bail undertaking or bail condition*', or the accused person has been convicted and has appealed against the conviction, or the accused person has been charged with a domestic violence offence.²

[12] Section 17 sets out the statutory factors that a court must consider when deciding whether to grant bail. These include, '*the time the person may have to spend in custody before trial if bail is not granted*'.³ The primary consideration, however, '*is the likelihood of the accused person appearing in court to answer the charges*'.⁴

[13] Two other important factors for the court to consider are prescribed at s 18(1) as being the interests of the accused person, and the public interest and the protection of the community. Section 19 expands upon these three key factors, identifying the following matters, inter alia, for the court to consider:

- i. The accused person's background and community ties;
- ii. The seriousness of the offence;
- iii. The severity of the likely penalty if found guilty;

² Section 3(4).

³ Section 17(1).

⁴ Section 17(2).

- iv. Whether the person is under the age of 18 years;
- v. With respect to public interest and the protection of the community, two factors given prominence are, a previous failure by the accused to surrender to custody or to observe bail conditions, and the likelihood of the accused person committing an arrestable offence while on bail.

[14] The State carries the burden of establishing, on the balance of probability, that bail should not be granted.⁵ The rules of evidence are relaxed in bail hearings. Affidavit evidence can be produced. Hearsay evidence may be admitted provided it is properly evaluated.⁶

[15] The learned Resident Magistrate applied these provisions when refusing Mr Anand's application for bail. The decision was made applying the third key factor, being the public interest and the protection of the community.

Accused person's options where bail is declined

[16] An accused person has three options where they are denied bail, as has happened to Mr Anand. These are:

- i. The accused person may make a fresh application for bail to the same Magistrate. Section 14(1) of the Bail Act permits an accused person to make any number of applications for bail. Subsection (3) permits the court to refuse an application '*if it is satisfied that the application is frivolous or vexatious*'. It is unlikely that another application for bail before the same Magistrate will succeed unless there is new information and/or a change to the accused person's circumstances.
- ii. The accused person may apply for a review of the Magistrate's decision under s 30 of the Bail Act.
- iii. The accused person may file an appeal from the Magistrate's decision under s 31 of the Bail Act.

⁵ **State v Tuimouta** [2008] FJHC 177, at [8].

⁶ **Singh v State** [2010] FJHC 600, at [7].

Application for review under s 30

[17] Pursuant to s 30(3) of the Bail Act, the High Court may review any decision by a Magistrate in relation to bail.

[18] Subsection (7) reads:

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.

[19] Section 30(8) identifies who may apply for a review. This includes an accused person.

[20] The court, on an application for review, has power to confirm, reverse or vary the bail decision.⁷

[21] Finally, a review must be by way of a rehearing.⁸ That is, the court considers the matter afresh. Evidence may be produced on review.⁹

Submissions of the parties

[22] Mr O'Driscoll made the following arguments for Mr Anand:

- i. The focus of Mr O'Driscoll's written and oral arguments was on Mr Anand's presumption of innocence in respect to the six charges to which he is facing in four separate Magistrate Courts. He emphasized that the

⁷ Section 30(9).

⁸ Section 30(10).

⁹ Ibid

allegations in multiple counts for possession of drugs were simply, as yet, unproven allegations. Moreover, Mr Anand intends to defend the charges.

ii. Mr O'Driscoll accepts that this Court is permitted to take the charges into account for the present review application. He states that the fact of the charges will go to weight when assessing the available evidence.

iii. Mr O'Driscoll similarly downplays the charge of absconding bail for the same reason, namely it is an allegation only. Further, Mr Anand had offered an explanation in his affidavit for failing to attend the court date on the Lautoka charge. Mr Anand deposes at paragraph 12(i) of his affidavit that he had '*inadvertently missed*' the court date and when he became aware of it '*went with one lawyer to Lautoka to take care of that I had been unable to do so and was arrested and charged*'.

iv. Mr O'Driscoll accepts that in order to be entitled to a review under s 30, Mr Anand must show, under subsection (7), that there are '*special facts or circumstances*' that justify a review. Mr O'Driscoll points to a new fact, not brought to the Resident Magistrate's notice in the earlier bail hearing, as satisfying this statutory requirement. The new fact is disclosed in Mr Anand's affidavit at paragraph 12(ii) as follows:

I have one daughter, namely Ivory Anand who is 14 years old and in the USA with her mother. I send money as able to support this daughter of mine. I would not want to abandon my daughter and not be able to send her anything from the small income I make as a caretaker and assisting in my girlfriend's fishing business.

v. The learned Resident Magistrate was not informed of the circumstances of Mr Anand's daughter when bail was declined on 10 November. Mr O'Driscoll argues that this is an important new fact and that Mr Anand is seeking bail in order to continue working to financially support his daughter. According to Mr Anand's affidavit, he is gainfully employed as a caretaker as well as assists his girlfriend with her fishing business.

vi. In terms of potential bail conditions, in the event that bail is granted, Mr Anand offers, inter alia, two sureties, each in the amount of \$1,000, as well as a cash bail of \$1,000.

vii. Finally, Mr O'Driscoll mentions that his client has been granted bail by the Magistrates Court for each of the other five charges. He points out that he had attended a mention the day before this hearing in the Suva Magistrates Court and his client was granted bail. He says his client should be granted bail on this charge as well.

[23] Mr Anand spoke briefly. He stated that his fiancé is pregnant and that he has a number of business/work interests, including exporting cars, and that his fiancé cannot manage these matters herself. He states that he needs to be out of jail so that he can attend to these matters.

[24] Ms Lal provided the following arguments for the State:

- i. In reference to a line of decisions by the High Court and a decision by the Supreme Court, Ms Lal argued that the failure by Mr Anand to exercise his right of appeal was fatal to the present application for review.¹⁰ The net effect of these cases being that a party is required to exercise and exhaust their rights of appeal under s 31 before having an entitlement to apply for a review under s 30.
- ii. Notwithstanding, the requirement under s 30(7) is mandatory and Mr Anand has not established any special facts or circumstances justifying the present application for review.
- iii. The decision by the learned Resident Magistrate to decline bail was correct. The State need only show that one of the three grounds under s 19 is satisfied to justify the declination of bail and, here, the evidence from the charges supports not only the likelihood that Mr Anand will not

¹⁰ The High Court decisions are **Masirewa v State** [2017] FJHC 956, **Gadre v State** [2018] FJHC 1154 & **Ratu v State** [2019] FJHC 316. The Supreme Court decision is **Kumar v State** [2021] FJSC 1.

surrender to custody but also the need to protect the community from his further offending while on bail.

[25] I am grateful to both counsel for their comprehensive written submissions and most helpful oral argument.

Decision

[26] It is apparent that Mr Anand has three significant hurdles to overcome with the present application for review. These are:

- i. Mr Anand must show that his failure to exercise his right of appeal under s 31 is not fatal to the present application for review.
- ii. Mr Anand must show that there are special facts or circumstances justifying the making of this review pursuant to s 30(7).
- iii. Mr Anand must then show, if he satisfies the previous two issues, that he should be granted bail.

Is a review available where an applicant has not availed themselves of their rights of appeal under s 31?

[27] In **Masirewa v State** (supra), Goundar J considered this issue determining at paragraphs [6] and [7]:

[6] The Bail Act 2002 (the Act) provides for two avenues to challenge a bail decision. Section 31(1) of the Act states that all bail decisions are appealable to the High Court. Section 30(3) of the Act states that the High Court may review any decision by a magistrate in relation to bail. Section 30(10) of the Act states that a review is a rehearing and the Court may receive evidence before making a decision on bail. The key distinction between an appeal and a review is that on appeal the

decision on bail is considered for errors in the exercise of discretion by the lower court, while on review, the decision on bail is considered afresh.

*[7] In the present case, the applicant justified invoking the review procedure on the ground that he had exhausted the appeal procedure and was unsuccessful. However, there is no record that an appeal was ever filed in this matter. **In my judgment the review procedure is unavailable if the bail decision could have been appealed. As was said by Scott J in *Abhay Kumar Singh v State Miscellaneous Application 1/2004 (23 June 2004)* that ‘review is only available where, for one reason or another, the appeal procedure cannot be resorted to’.***

(my emphasis)

- [28] This construction has been applied in several decisions of this Court, including, **Gadre v State** (supra) and **Ratu v State** (supra). In the latter, Wimalasena J cited both **Masirewa** and **Gadre** before proceeding to state at paragraph 13:

...a Court will not entertain an application for bail review if the Applicant has not exhausted the appeal procedure. The law is very clear pertaining to bail reviews. The Applicant has not appealed against any of the orders made previously refusing bail. Therefore, this application for bail review is not a tenable application.

- [29] Ms Lal also drew my attention to the Supreme Court decision of **Kumar v State** (supra). The Supreme Court considered ss 30 and 31 and discussed the above mentioned three High Court decisions. The Supreme Court was aware that the ratio from those decisions was that an applicant is required to employ and exhaust their appeal rights under s 31 before being permitted to apply for a review under s 30. Notwithstanding, the Supreme Court appeared to favour a different construction, suggesting that an accused person could, in fact, pursue either or both a review and an appeal.¹¹ The Supreme Court stated, inter alia:

¹¹ From 4.6 to 4.9.

4.6 There is no provision in Bail Act or any other written law to say that a party has to invoke and exhaust the appeal procedure before he/she can seek review of decision of lower court.

4.7 This Court takes into account that in Masirewa, Gadre and Ratu Court noted that pursuant to section 31 of Bail Act a party has right to appeal from Magistrates Court to Court. Hence section 31 has no implication in respect to section 30(5) of Bail Act.

4.8 Courts jurisdiction to review a decision is independent of a party's right to appeal to the higher court.

4.9 This Court is of the view that the right to review granted to parties can be exercised by the party irrespective of whether that party appeals the decision or not.

4.10 This is due the manner and grounds for review is distinct from the manner and grounds of appeal.

4.11 Party applying for review is not legally obliged to appeal against the Order that will require superior court to re-look at the evidence and facts in the ruling delivered by lower court.

4.12 Mere fact that the Legislature enacted section 30 in the Bail Act shows the importance it gives to rights of individuals.

[30] The Supreme Court stopped short of such a conclusion, instead finding merit with the State's argument that permitting accused persons to bring a review and appeal, separately, and simultaneously, could 'open a floodgate'. The Supreme Court proceeded to state at paragraph 4.20:

Even though this Court is of the view that Application for Review is independent the correct approach is that expressed by Justice Scott in

Singh v State Miscellaneous Application 1/2004 (24 June 2004) and adopted in ***Masirewa v State***.

[31] There is a certain tension between the Supreme Court's analysis at 4.6 to 4.12 and its conclusion at 4.20. Nevertheless, this Court is bound by the Supreme Court's conclusion and, therefore, I accept Ms Lal's argument that the failure by Mr Anand to exercise and exhaust his rights of appeal under s 31 is fatal to the present application.

[32] For completeness, I will consider the two other issues in this case.

Can Mr Anand establish 'special facts or circumstances' under s 30(7) justifying a review?

[33] In ***Radrekusa v State*** [2015] FJHC 408, Rajasinghe J considered the phrase 'special facts or circumstances' and stated:

5. *In view of section 30 (7) and (10) of the Bail Act, it appears that the hearing of review of bail application constitute two components. The applicant is first required to satisfy the court that there are special facts or circumstances to justify the making of review application. The court if satisfied the first component, would then proceed to hear the review application as a rehearing as stipulated under section 30 (10) of the Bail Act.*

6. *Donaldson L.J. in Regina v Nottingham Justices (1981) QB 38, 71 Cr.App R 178 DC discussed the scope of 'special facts or circumstances', where His Lordship found that:*

"the court considering afresh the question of bail is both entitled and bound to take account not only of a change of circumstances which has occurred since the 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 impugn the previous decision of the court and it is necessary in justice to the accused. The question is little wider than 'has there been a change'. It is 'are there any new considerations

which were not before the court when the deceased was last remanded in custody?”

7. In view of Donaldson L.J.’s observation and section 30(7) of the Act, it appears that the court is not only required to look into change in circumstance which has occurred since the last decision, but also other special facts and circumstances, which were not presented or had not been considered by the court in previous bail applications.

[34] Mr O’Driscoll points to Mr Anand’s financial support for his 14 year old daughter as being a special fact or circumstance, the same not being brought to the attention of the learned Resident Magistrate. I accept that a material fact not brought to a Magistrates’ attention, where the fact would likely have led to a different outcome, may constitute a special fact or circumstance. I am not, however, satisfied that the facts pertaining to Mr Anand’s daughter is such a special fact or circumstance. There is no evidence that Mr Anand’s daughter relies on or is in need of Mr Anand’s financial support. Indeed, very little detail is given of the situation to permit any reliable conclusion to be drawn.

[35] I have given some thought to whether the fact that Mr Anand has been granted bail on his five other charges, and continues as recently as the day before this hearing to have his bail extended, could constitute a special fact or circumstance justifying a review. However, each bail application must be considered on its own merits and the only matter before this Court is Mr Anand’s review from the bail decision by the Navua Magistrates Court.

[36] Accordingly, I find that Mr Anand has not demonstrated that there is a special fact or circumstance justifying a review.

Is Mr Anand able to demonstrate he is entitled to bail on a fresh consideration of the matter?

[37] This issue only requires determination if Mr Anand is able to establish, which he cannot, that he was entitled to bring this review. Nevertheless, I have considered whether Mr Anand has made out a case for the grant of bail on a rehearing; that is, considering the matter afresh. I find that he has not, and, moreover, that the learned Resident Magistrate correctly applied the provisions in the Bail Act to

decline bail, such that, even if Mr Anand had pursued an appeal under s 31 he would not have succeeded.

[38] My reasons are, briefly, these:

- i. Mr Anand is entitled to a presumption of innocence with respect to the pending charges. However, for the purposes of a bail application the charges can be taken as evidence of offending (in the absence of any cogent evidence to the contrary). In the present matter, the four other charges are evidence of offending of a similar nature to which Mr Anand has been charged in the Navua case and, most concerningly for the purposes of the present bail application, offending whilst on bail in breach of his bail conditions. In **Singh v State** [2020] FJHC 263, Perera J stated at paragraph 56:

...its not clear as to what is 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.

- ii. This Court is permitted to take account of pending charges when considering the matters under ss 17 to 19. That said, in my view the evidence before this Court does not support the State's concern that Mr Anand will fail to appear in court. The one charge of Absconding Bail in 2021 for the Lautoka case does not of itself demonstrate that it is likely that Mr Anand will abscond in the Navua case. As against that one instance, which Mr Anand provides an explanation for in his affidavit, is the fact that Mr Anand has, it appears, attended every other scheduled court date for his five other charges since 2019.
- iii. The larger concern must, in fact, pertain to Mr Anand's charges for similar offences in 2019, 2020, 2022 and 2023. These charges are evidence that Mr Anand has engaged in offending of a similar nature to which he is charged in the Navua case and did so while on bail under conditions not to reoffend. As Aluthge J stated in **Gadre v State** (supra), at paragraph 20:

There can be no doubt that the fact that new offences appear to have been committed whilst on bail would be a factor of considerable importance in deciding bail. It was held in R v Crown Court at Harrow [2003] 1 WLR 2756, at 2778 that:

‘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.’

- iv. I asked both counsel for guidance on whether Mr Anand faced the prospect of a custodial sentence for the Navua charge. There appears to be some common ground that this was not likely for counts 1, 3, 4 or 5. Both counsel appear to have agreed that possession of methamphetamine presented a greater risk for Mr Anand, although Mr O’Driscoll argued that imprisonment was unlikely for this count as well. Ms Lal advised that there is currently a trial date scheduled for this case for 29 January 2024. Mr O’Driscoll is skeptical whether this date will proceed as he states that there will be a new Magistrate at Navua shortly. Notwithstanding, there is currently a date fixed which is only a little more than a month away.

Conclusion

[39] Mr Anand’s application for review fails to overcome both the legal and factual obstacles in this case. He has not availed himself of his right of appeal under s 31 which is fatal to his application for review. Even if he had filed an appeal, he would not have succeeded.

[40] Mr Anand will have an opportunity in a little over a month to defend the Navua charge and if found not guilty he will gain his liberty. If Mr O’Driscoll is correct and the trial date is vacated, this may provide Mr Anand with a basis for making a new application to the Magistrate for bail under s 14.

[41] Accordingly, and for the aforementioned reasons, Mr Anand's application for review under s 30 is dismissed.




D.K.L Tuiqereqere
Judge

At Suva this 18th day of December 2023.

Solicitors:

To: O'Driscoll & Co for Applicant
Office of Director of Public Prosecutions for Respondent