

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 25 OF 2024

In the matter of an application for Bail Review pursuant to Section 30 (3) of the 2013 Bail Act 2002 in Nadi Magistrate Court Case no. 091 of 2024.

BETWEEN:

THE STATE

APPLICANT

MICHAEL BULEWA PICKERING

RESPONDENT

Date of Hearing : 06 March 2024

Date of Ruling : 27 March 2024

RULING ON PRELEMINARY OBJECTION
(BAIL REVIEW)

1. The Director of Public Prosecution (DPP) filed this application on 15 March 2024 seeking to have the Bail Ruling entered by the Learned Magistrate at Nadi granting bail to the Respondents reviewed and reversed and the Respondent remanded in custody.

2. The impugned Ruling was delivered on 01 February 2024. This application is supported by the affidavits of State Counsel Ms R. Uce and IP-CID, Mr. O. Tunidau.
3. The Information is yet to be filed against the Respondent. Respondent was charged in the Magistrates Court with two counts of Unlawful Possession and Transportation of Illicit Drugs contrary to section 5(a) and 5(b) of the Illicit Drugs Control Act 2004. The Particulars of Offence were that on the 23rd day of December 2023 at Nadi in the Western Division, without lawful authority, the Accused was in possession of 4,800 kilograms (4.5 tonnes) of methamphetamine, an illicit drug, and that he was engaged in dealing for the transfer and transport of 4,800 kilograms (4.5 tonnes) of methamphetamine, an illicit drug, from David's Marine Repairs, Industrial Road, Denarau, Nadi, to Subzero Car Wash/Café yard at Industrial Road, Denarau, Nadi.
4. The relevant provisions of the Bail Act that deal with a bail review are as follows:

Section 30 (3) - The High Court may review any decision made by a magistrate or by a police officer in relation to **bail**.

Section 30 (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.

Section 30 (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.

Section 30 (9) - The power to review a decision under this Part includes the power to confirm, reverse or vary the decision.

Section 30 (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.

5. The Respondent through his Counsel Mr S. Khan filed his objections supported by an affidavit. Mr Khan advanced a preliminary objection at the hearing that this Court does not have jurisdiction to entertain this application, as the Applicant has not exhausted the appeal process. This objection is raised despite the same objection having been overruled by this Court in a connected matter – **State v Justin Ho and others**¹.
6. In that Ruling this Court observed as follows:

There are two schools of thought on the issue of whether the **bail** review is available only where the appeal process has been exhausted or could (not) have been invoked. One school of thought represents the view that the power to review **bail** is independent of the appellate jurisdiction. See: *Gadre v State*¹¹, *Kumar v The State*¹². The other school of thought represents the view that the power to review **bail** is not available where the **bail** decision could have been appealed. *Masirewa v State*¹³, *Abhay Kumar Singh v State*¹⁴.
7. The Learned Counsel for the Respondent strenuously argues that there are no two schools of thought as such and that the only school of thought that represents the correct position of law in respect of bail review is the one that originated in **Abhay Kumar Singh v State**² where the High Court held that *review is only available where, for one reason or the other, the appeal procedured cannot be resorted to*. To this legal pronouncement, Goundar J in *Masirewa v State* gave a slightly different interpretaion where His Lordship said : *In my judgment, review process is unavailabe if the bail decision could have been appealed*.
8. Before coming to the literal interpretation which I see is the correct interpretation of the provisions of the Bail Act concerning bail review, it is my intention to justify my position that there in fact existed in this jurisdiction two schools of thought on this issue and that the position I have taken in **State v Justin Ho and others** (*supra*) should prevail.
9. In **Gadre**³, this Court from paragraphs 6 -13 observed as follows:

¹ HAM 12 of 2024, (2 February 2024)

² Unreported

³ [2018]FJHC 1154

6. This section clearly gives power to the High Court to review a bail decision of a magistrate unless the court is prohibited from making a decision in relation to the grant of bail by any other *written law* [Section 30 (6)] (*emphasis added*).
 7. Judgments or orders of a court of law cannot be regarded as “written law”. Therefore one can argue that the power to review a bail determination of the magistrate could be exercised by this court despite the decision in *Abhay Kumar Singh* (*supra*).
 8. In view of clear provision of Section 30(3) of the Bail Act, it seems that Scott J’s view in *Abhay Kumar Singh v State* (*supra*) is not in conformity with law when his Lordship said that ‘*review is only available where, for one reason or another, the appeal procedure cannot be resorted to*’.
 9. However, the Applicant is typically entitled to invoke the bail review option in the magistracy. Therefore, by giving effect to *Abhay Kumar Singh* decision, Applicant will not be prejudiced because he has the right under the Bail Act to file any number of bail applications in the magistracy asking the court to review its previous bail determination subject of course to the provisions of the Bail Act [S.30 (7)] and test for a renewed application for bail that whether there is a change in circumstances from the last decision on bail or are there circumstances which, although they then existed, were not brought to the attention of the court (*State v Takiveikata* [2008] FJHC 31; HAM 107.2007 (4 March 2008), *Nottingham Justices, ex parte Davies* [1981] QB 38).
 10. The Bail Act 2002 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 31 (3) states that this section is in addition to section 30 (as to review of bail decisions). 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.
 11. 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. *Masirewa* (*supra*)
 12. It’s important to realize that the scope of an appeal will be limited because the appellate court is only interested in learning if the court below exhibited an abuse of its discretion. This means that one can expect an appellate court to uphold the original bail decision unless it is obvious that it was erroneous, unreasonable, or arbitrary. If the appellate court determines that the bail decision appears to be supported by facts and the law, then the bail determination will not be changed.
 13. A bail decision typically needs to be final for there to be an option to appeal. Orders for bail can be interlocutory, meaning that they are subject to change and may not be subject to appeal. In this jurisdiction, bail orders are generally considered not final, which means that a party aggrieved by a bail determination can ask the court that made the order to review its previous bail determination. When a subsequent bail review application has been refused erroneously, unreasonably, or arbitrarily, the order becomes final and an aggrieved party can come to this court by way of an appeal. Review in High Court is only available where, for one reason or another, the appeal procedure cannot be resorted to for example where the applicant had exhausted the appeal procedure.
 14. There is no evidence that the appeal procedure cannot be resorted to by the Applicant. Therefore, the preliminary objection taken by the State should be upheld.
10. Having conceded that the last sentence of paragraph 13 and paragraph 14 do not agree with the rest of the paragraphs, the court was basically of the view that the High Court has

jurisdiction to review a bail determination independent of its appellate jurisdiction even where the appeal process has not been exhausted by the applicant.

11. This school of thought advocated by the High Court in **Gadre** (supra) was accepted by the Supreme Court in **Kumar v The State**⁴ when it observed as follows:

- 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 to 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.
- 4.13 Refusal of bail obviously affects a person's right to liberty, freedom of movement and right to work, right to have valuable time with family.
- 4.14 Grant of bail may affect the community, or specified person adversely.
- 4.15 These are the reasons Courts, when entertaining bail applications should exercise their discretion judicially, in the interest of justice and ensure that a person's fundamental rights are not curtailed without just or lawful exercise.
- 4.16 This is the reason Bail Act granted superior courts the independent discretion to review lower courts decision.

12. These paragraphs clearly support the view that a school of thought diametrically opposed to that represented by **Marisewa**⁵ is in existence in this jurisdiction. However, the Supreme

⁴ [2021] FJSC 1

⁵ [2017] FJHC 956

Court, contrary to what it stated in the preceding paragraphs, stated at paragraph 4.20 as follows:

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*.

13. This apparent inconsistent approach was picked up recently by Tuiqereqere J in **Anand vs State**⁶ when His Lordship at [31] observed as follows:

There is a certain tension between the Supreme Court's analysis at paragraphs 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.

14. It appears that the Supreme Court's acceptance of the State's submission is based on the premise that if the court entertained the application (for review) then it will open a floodgate whereby accused whose bail application has been refused would seek review of the lower court's ruling on bail straightaway to the Supreme Court (see: paragraph 4.18 and 4.19).
15. I do not think Mr Khan is correct when he submitted that in **Kumar v State** (supra), the Supreme Court entertained the bail review application because the applicant in that case had exhausted the appeal process. As reflected in paragraphs 4.21 and 4.22 of that Ruling, even though the applicant had invoked the process of appeal, he had filed a review application in the Court of Appeal on 4 December 2020 without exhausting the appeal process. The Supreme Court appears to have entertained the review application in the interest of justice because it thought that the delay in assigning a date by the Court of Appeal Registry would hinder the applicant's chances of being heard before the trial date. (See paragraphs 4.23 and 4.24)
16. Invocation of jurisdiction and exhaustion of a right are two different things. Tuiqereqere J's emphasis that '*to exercise and exhaust his rights of appeal*' in the paragraph quoted above

⁶ [2023] FJHC 911 (18 December 2023)

buttresses this position. However, the approach taken by the Supreme Court would have been justified in the circumstance of that case so as to follow Scott J's words in Abhay Kumar Singh that *review is only available where, for one reason or another, the appeal procedure cannot be resorted to*. That does not mean that the invocation of review process is unavailable where the appeal process has not been exhausted.

17. With respect, I do not believe that a remedy provided by written law should be denied merely because of the fear that a flood gate will be opened if that remedy were made available to the aggrieved party. If the flood gate is already open for appeal, why not for review? As this Court has emphasised in Gadre and by the Supreme Court in Kumar, Section 30 of the the Bail Act provides for a distinct remedy independent of the appeal process whose purpose is to consider the decision on bail for errors in the exercise of discretion by the court below while on review, the decision on bail is considered afresh (Masirewa), sometimes even by the same court which made the decision. This is clear in the reading of Section 30(10) of the Bail Act which states: *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.*
18. I agree with Mr Khan that the ODPP has not been consistent in its approach to bail review. There are many instances where the jurisdictional objection taken by Mr Khan in this case has been advanced by the State (See Kumar v State⁷) while in some cases having invoked the review jurisdiction without resorting to the appeal process⁸. Although in those cases the grounds advanced by the State appeared as if it were appealing the bail decision on the basis that the Magistrates had erred in the exercise his or her discretion, the State was technically invoking the review jurisdiction of the High Court as provided under Section 30 of the Bail Act.
19. The circumstances under which this application came to be filed bear clear testimony as to why the Legislature in its wisdom has provided for a distinct remedy by way of review. According to the State, the substantive case involves the largest drug bust ever detected in

⁷ supra 4

⁸ [see: State v Nagata [2015] FJHC 1043 (13 August 2015)]

Fiji with a foreign involvement. In a case of this magnitude, the application for bail in the Magistrates Court has been made from the Bar table, unsupported by a formal bail application or affidavit. The State had not been afforded an opportunity or time to respond properly to the bail application made from the Bar table. The Learned Magistrate has rushed to his Ruling on the same evening.

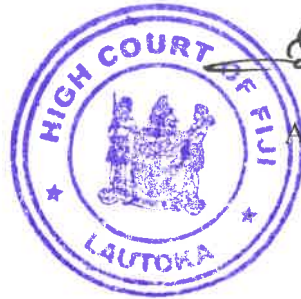
20. While agreeing with Mr Khan that there is no prohibition in law to make any number of bail applications, even from the Bar table, the judicial wisdom requires the parties to adhere to the practice followed by the courts, especially in a case like this, and file a formal bail application preferably supported by an affidavit so that an informed decision could be made on evidence.
21. Mr Khan further argues that the appeal process is available to the State if the Learned Magistrate has made any blunder. I agree that the appeal procedure is available to the State. However, it is time consuming and by the time the appeal process takes its course, and exhausted, the judicial system may well be shutting the stable door after the horse has bolted. Those who are involved in organised crimes for profit will do whatever at their disposal to ensure that the escape routes are wide open in the event of detection, that vital evidence is destroyed and that law enforcement agencies are manipulated. Therefore, review process can be made use of as a quick service provider to address those issues if a bail determination by a court below is likely to hinder the administration of justice.
22. Although the State made submissions impugning the bail decision of the court below, what it is urging this Court is to consider whether the special facts and circumstances that are now before this Court, though they were not before the Learned Magistrate when he made his decision, justify a review. The test for bail review is whether there is a change in circumstances from the last decision on bail or there are circumstances which, although they then existed, were not brought to the attention of the court [**State v Takiveikata**⁹; **Nottingham Justices, ex parte Davies**¹⁰].

⁹ [2008] FJHC 31 HAM 107.2007 (4 March 2008)

¹⁰ [1981] QB 38)

23. Mr Khan further argues that this Court is bound to follow the Supreme Court decision in **Kumar** (supra) because of the *stare decisis* principle. He cited what Tuiqereqere J said in **Anand vs State** where His Lordship observed: *There is certain tension between Supreme Courts analysis in paragraph 4.6 to 4.10 and its conclusion at 4.20, nevertheless, this Court is bound by the Supreme Court's conclusion.*
24. Having conceded that the High Court is bound by the *ratio decidendi* of the decisions of the Supreme Court, there are exceptions to that principle. *Stare decisis* principle does not prevent the courts below from distinguishing the facts before it to justify a deviation, which I have done in this case. Another exception to the *stare decisis* principle is that a court below may not follow the decision of a superior court based on *per incuriam* principle. When the decision of the Court above is found to be inconsistent with the written law the land, the courts below are at liberty to follow the legislation instead of the decision of the superior court.
25. The Bail Act clearly gives power to this Court to review a bail decision of the Magistrates Court. As the Supreme Court said in **Kumar**, *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; that this courts jurisdiction to review a decision is independent of a party's right to appeal to the higher court and that the right to review granted to parties can be exercised by the party irrespective of whether that party appeals the decision or not.* According to Section 30 (6) of the Bail Act, the power of this Court to review a bail decision is curtailed only if and when this court is prohibited from making a decision in relation to the grant of bail by any other **written law**. As to my knowledge, there is no such law in this jurisdiction. The judicial decisions, whether they were from the Supreme Court or the High Court will not make any difference because they do not form part of the written law.
26. For these reasons, I overrule the preliminary objection raised by the Counsel for Respondent. Having dismissed the preliminary objection, I decide to proceed to review the bail determination of the Magistrates Court at Nadi on rehearing. I would base my Ruling on the

evidence and the information obtained on review as is required by Section 30(10) of the Bail Act.



Aruna Aluthge
Judge

27 March 2024

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for Applicant
- Nazeem Lawyers for Respondent