

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 54 OF 2024

In the matter of an application for bail pending trial
pursuant to Sections 3, 14(1), 14 (2) and Section 30
of Bail Act 2002

BETWEEN:

JUSTIN S. M. HO

APPLICANT

STATE

RESPONDENT

Counsel : Mr I. Khan for Applicant

Mr J. Rabuku (Acting DPP) with Mr J. Nasa for Respondent

Dates of Hearing : 24 May 2024, 3 and 7 June 2024

Date of Ruling : 14 June 2024

BAIL RULING

1. The Applicant filed this fresh application seeking bail pending trial. He was initially granted bail by the Magistrate Court of Nadi by its Ruling dated 30 January 2024. Having considered a review application filed by the State, the Applicant's bail was revoked by this Court on 2 February 2024.

2. In the information filed in the substantive matter, it is alleged that the Applicant unlawfully facilitated with another the importation of 4,800 kilograms (4.8 tones) of methamphetamine, an illicit drug, between 1 November 2023 and 23 December 2023. The Applicant is also alleged to have been in possession of 4,800 kilograms (4.8 tones) of methamphetamine, without lawful authority and that on 23 January 2024, at Taveuni, he was in possession of cash amounting to FJD 21,691.60, AUD 45 and USD 100, properties suspected to be proceeds of crime.
3. According to Section 14(1) of the Bail Act, an accused person can make any number of bail applications. However, the court can refuse to entertain a bail application if it is satisfied that the application is **frivolous or vexatious**¹. According to Section 30 (7) of the Bail Act, a court which has the power to review or hear a fresh application can refuse to hear the review or the fresh application under Section 14(1) if it is not satisfied that there are **special facts or circumstances** to justify a review or the making of a fresh application.
4. I am mindful that this is a fresh bail application. In my previous Ruling, I gave reasons why the Applicant should not have been released on bail by the Learned Magistrate at Nadi. Therefore, I do not intend to repeat everything I have stated in the previous Ruling although the reasons for that refusal are appropriate factors to be taken into consideration in this fresh matter. Nearly five months have elapsed since the previous Ruling. The question is whether there are special facts and circumstances that justify the making of this fresh application or there are circumstances which although then existed were not brought to the attention of the Court². If the Court is not satisfied that there are special facts and circumstances that justify a review, the application should be rejected because it is frivolous or vexatious.
5. The Applicant appears to be relying on the following facts and circumstances to justify the filing of this application.

¹ Section 14 (3) of the Bail Act

² State v Takiveikata [2008] FJHC 31 (4 March 2008) Nottingham Justices, ex parte Davies [1981] QB

- a. The fact that the information has been filed and is ready to be put to the Applicant indicates that the police investigations are complete.
 - b. That some of the accused who were arrested for the same offence have already been released on bail.
6. The State denies that the investigations are over despite the information has been filed. It is submitted that the full disclosures are yet to be served and the investigations are still ongoing. Given that the substantive matter concerns the largest drug bust in Fiji, involving several suspects and plenty of evidentiary material, the Court can understand the complexities involved in the investigation. Until the investigations are fully complete, the risk of witness interferences cannot be ruled out, especially in the circumstance that some of the accused have been granted immunity by the State for them to become State witnesses.
7. Mr. Khan argues that since some of the accused persons who were arrested and brought before this Court for the substantive matter have already been released on bail, the Applicant is also entitled to be released on bail. His argument appears to be based on the right to equal protection, treatment and benefit of the law guaranteed under Section 26 of the Constitution.
8. For three reasons, I would not agree that the Applicant will be discriminated against if his bail application is not granted. First, the accused who were granted bail are not facing the same charges and are not as serious as the charges the Applicant is facing in the substantive matter. Secondly, the Applicant will not be unfairly discriminated against directly or indirectly on any of the grounds prohibited by Section 26(3) of the Constitution. Thirdly, treating one person differently from another is not discrimination if it can be established that the difference in treatment is not unfair in the circumstances³.
9. The main concern and the ground for objection of the State is that the Applicant will not appear in Court to face the charges laid against him. Under the Bail Act, that would be the primary consideration in any bail application.⁴ The State did not object to bail for the other

³ Section 26(7) of the Constitution

⁴ Section 17(2) of the Bail Act

accused on that basis because their cases were factually different from that of the Applicant.. Therefore, treating the Applicant differently is logical and fair in the circumstances of this case.

10. Mr. Khan submitted that the State's concern that the Applicant will not appear in Court to face trial if he was granted bail is speculative, not based on evidence and that any submission made from the Bar table by the State Counsel must be rejected. However, the assertion in support of State's objection was rather made by the investigating officer, Inspector Tunidau, in his affidavit. The Court must accept that the affidavit provides the required evidential basis for the objection and is bound to give it such weight as the Court considers appropriate.
11. According to paragraph 13 of the said affidavit, the Applicant left Nadi and escaped to Taveuni when the investigation began. The Applicant and some other accused persons had then proceeded to Cobia Island, off Taveuni, with the view of escaping to Wallis and Futuna. They have paid boat owners to take them across and were only unsuccessful because of bad weather. The Applicant has been arrested on a tip-off from a villager.
12. The Applicant in his counter affidavit has not denied any of these averments in paragraph 13. He has not denied that he had a large sum of local currency and few foreign currency notes at the time of his arrest although he has denied in paragraph 6 of his counter affidavit that it was unlawfully obtained. He has not provided any explanation as to why he was in Cobia Island when the investigation began and in possession of a large sum of money. He could hardly deny any knowledge of the drug bust and the police investigation as the news about them had hit the headlines of local media. In these circumstances, it is reasonable to assume that the Applicant and his co-accused were arrested when they were attempting to flee this jurisdiction.
13. I agree with the State that the fact that the Applicant has another pending case of a similar nature in Court No.1, the seriousness of the charge he is facing, the likely penalty in the event he is convicted and his awareness of the strength of the State's case will provide him with a strong motivation to abscond court proceedings.

13. I agree with the State that the fact that the Applicant has another pending case of a similar nature in Court No.1, the seriousness of the charge he is facing, the likely penalty in the event he is convicted and his awareness of the strength of the State's case will provide him with a strong motivation to abscond court proceedings.
14. It was argued that the Applicant had ample opportunity to abscond and flee the country when he was released on bail on 30 January 2024 and served with the notice of review application for revocation of bail and that his election to obey the bail conditions indicates that he is a trustworthy person.
15. I am not inclined to agree with this contention. The time the Applicant was free on bail was very short (3 days) and even during that short period he was on strict bail conditions including curfews and movement restrictions. The police surveillance on his movements would have been tightened when the review application was filed by the State in this Court because the Magistrate had made the bail ruling disregarding the State's strict opposition to bail. He admits that the Nadi police officers visited him almost twice a day during that period (Paragraph 12 of the counter affidavit). In these circumstances, I am not inclined to believe that the Applicant's adherence to bail conditions during that short period is a clear manifestation of Applicant's free and genuine determination to stand trial.
16. I agree that the flight risk can almost be eliminated by strict bail conditions such as imposition of stop departure orders and impounding of the passport. However, the Applicant's abortive attempt to flee the country by sea proves the futility of such bail conditions.
17. In response to paragraphs 5 and 6 of the affidavit of the Applicant, the State has not denied that the Applicant was arrested on 23 January 2024 and produced before the Magistrate on 29 January 2024, approximately five days after the arrest. Therefore, the State has admitted that the Applicant's detention was in breach of his constitutional right to be brought before a court within 48 hours of the arrest. Mr. Khan argues that because of the admitted breach of Applicant's constitutional right, the Applicant is entitled to be released on bail. He cited

to remedy the situation immediately. The violation of a citizen's constitutional right for a period of only one day would still be a day too long. The accused is entitled to an immediate release on bail.

18. The above sentiments were expressed in a different context. The issue that confronted the court in that case was whether a contravention of the accused's right to be tried within reasonable time justified his release on bail. The accused had been held in custody for one year and nine months without trial with no fault on his part. The court found the delay to be inordinate, unacceptable, and tantamount to an exceptional circumstance justifying the release of the accused on bail. In the present matter the Applicant has been in remand only for five months thus far.
19. Learned Magistrate, in granting bail heavily relied on the submission that the Applicant was detained in police custody for more than 48 hours and formed the opinion that the violation of the right guaranteed under Section 13(1)(f) of the Constitution *ipso facto* gave rise to the right to be released on bail. However, it must be accepted that the right to be released on bail is not absolute in the sense that it is contingent upon the interests of justice⁷ which encompasses not only the interests of the accused but also those of the State and the public⁸.
20. I agree that the rights of the accused must be protected in the criminal investigation process and that the interests of justice require the suspects to be brought under judicial supervision within 48 hours of the arrest. However, this right had to be balanced with the objective to be achieved by the alleged limitation on the right, namely the wider interest of justice which includes the interests of the public.
21. Malcolm CJ referred to the phrase in Mickelberg v The Queen⁹ and said at p 252¹⁰:

The interests of justice in a particular criminal case are to ensure that a person who is accused of a crime is convicted if guilty and acquitted if innocent after he has had a

⁷ Section 13(h) of the Constitution; Section 3(1) of the Bail Act 2002

⁸ *State v Hurtado* [2016] FJCA 115; AAU00148.2015 (30 September 2016)

⁹ (No 3) (1992) 8 WAR 236

¹⁰ See: *Hurtado* (supra)

fair trial. The interests of justice also extend to the public interest and in due administration of justice.

22. The plain reading of the Constitution suggests that the right guaranteed under Section 13(1)(f) is not absolute. The Section provides:

every person who is arrested or detained has the right to be brought before a court as soon as reasonably possible, but in any case, not later than 48 hours after the time of arrest, **or if that is not reasonably possible, as soon as possible thereafter.**(emphasis added)

23. The highlighted part of this section appears to acknowledge the presence of justifiable causes that may prevent the police from strictly adhering to the stipulated time frame, inherently associated with the due execution of its duties such as Fiji's poor transport facilities, unsophisticated investigation mechanism burdened to handle sophisticated organised trans-border crimes, and the dilemma in living up to the challenge posed by the Constitution to charge the suspect on his/her first appearance in court¹¹.
24. The Applicant has been arrested from Cobia Island off Taveuni. Escorting an accused from Cobia to the main island would have been a time-consuming exercise. This Court is sensitive to the concern that the police within a short time frame are supposed to carry out a lot of work in a drug case of this magnitude before a suspect is brought to court. Therefore, the alleged right violation by itself should not be taken as a reasonable justification to release the Applicant on bail if his release tended to hinder the investigation and fair trial whose ultimate goals would be to ascertain the truth, hold the criminals accountable and set the innocents free.
25. In **Sailasa Naba & Others v State**¹² the court considered the enforcement provisions of the then Constitution and found there was no adequate alternative remedy, except to consider bail, where the Applicants have been remanded for more than 2 years, and were unlikely to

¹¹ Section 13 (1) (g) of the Constitution

¹² HAC 0012/00L (4 July 2001)

be assigned a trial date until a year. Hence the court granted bail on strict conditions. The Court observed:

It is clear that in the applications before the Court no adequate alternative remedy is available given the response of the authorities concerned. The only alternative is to consider bail pending trial.

In considering the issue of remedies, even where none are available, the then Chief Justice in *State v Mool Chand Lal Cr Case No 3 of 1999, Labasa*, stated: *I accept that it is the Court's responsibility to provide remedies for breaches of the Bill of Rights provisions where none exists.* (p 17).

26. Those cases were decided under a repealed Constitution in which no remedy was provided for right violations. However, in the present Constitution, a remedy is provided in Section 44 to challenge constitutional right violations in the High Court. Therefore, it is clear, that even where there is evidence of a right violation, that is a matter to be considered in a constitutional redress application and not in a bail application.
27. It has been held time and again that right violations are given weight in criminal matters when it has been shown that the accused was prejudiced in his right to a fair trial. The constitution affords every accused charged with an offence the right to have the trial begin and conclude without unreasonable delay¹³. The Court, in determining bail, ought to take into account the time the Applicant has to spend in remand before trial¹⁴. The delay defeats a fair trial in many ways and the interests of justice. I concede that in the event this Court fails to ensure a speedy trial, not only the rights of the Applicant but also the interests of justice will be defeated.
28. The State has taken approximately five months to file the information. The State Counsel indicated that it was looking at a trial date somewhere in the middle of next year. The ODPP is still in the process of compiling the additional evidentiary material to be disclosed to the Defence. Having considered the public interest involved in this case, the Court has indicated


¹³ Section 14(2) (g) of the Constitution

¹⁴ Section 17(1) of the bail Act.

to the parties that it is ready to try this matter at any time, once the parties are ready. The Court is hopeful that the ODPP will put extra energy to finalise the PTC issues so that this matter can be fixed for trial within the next three months. This Court will seriously consider granting bail to the Applicant if the trial gets inordinately delayed due to laxity on the part of the State.

29. The Applicant has failed to satisfy the Court that there are special facts or circumstances that justify his release on bail. The application for bail is dismissed.
30. 30 days to appeal to the Court of Appeal.




Aruna Authge
Judge

14 June 2024
At Lautoka

Counsel:

Iqbal Khan & Associates for Applicant

Office of the Director of Public Prosecution for Respondent