



**IN THE DISTRICT COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION**

Criminal Case No. 41 of 2023

BETWEEN: **CARUSO AMWANO**

APPLICANT

AND: **THE REPUBLIC OF NAURU**

RESPONDENT

BEFORE: Acting Resident Magistrate Vinay Sharma

DATE OF HEARING: 15 and 17 January 2024

DATE OF RULING: 19 January 2024

APPEARANCE:

APPLICANT: R Tom

RESPONDENT: K Itsimerea & S Shah

RULING

[Application for Variation of Bail Conditions]

INTRODUCTION

1. The application before me is for the determination for variation of bail conditions.
2. On 6 October 2023 the applicant was granted bail on the following conditions:
 - 1) *Bailed in the sum of \$1500 in his own recognizance;*
 - 2) *The Accused must provide 2 state employee sureties in the sum of \$500 each;*
 - 3) *The accused must surrender his driving licence;*
 - 4) *The accused must not interfere with the possible witnesses of this matter.*
3. On 11 January 2024 the applicant filed a Notice Motion and his Affidavit seeking the following variation:

That the Applicant humbly seeks a bail variation under his bail condition number 3 and is to be granted his driver licence.
4. On 12 January 2024 the matter was listed before the court for mention. The respondent sought time to file its response and the respondent was granted time to file its response by 15 January 2024. The matter was adjourned to 15 January 2024 at 10am for hearing.
5. On 15 January 2024 the respondent filed Affidavit in Reply of Sergeant Danlobendahn Botelanga in objecting to the bail variation.
6. On 15 January 2024 the parties were heard on the application filed. The applicant's main ground for variation is that he needs his driver's licence in order to carry out his business to support his family.
7. The respondent objects to his application submitting that that is no evidence before the court in relation his purported business. The applicant was ordered to file a supplementary affidavit with supporting evidence in relation to the business ownership. The supplementary affidavit was to be filed by close of business on 15 January 2024. The respondent was at liberty to reply to the said affidavit by 17 January 2024. The matter was thereafter adjourned to 17 January 2024 for further hearing.
8. On 16 January 2024 the applicant filed the Affidavit of Jacqueline Duburiya.
9. On 17 January 2024 the respondent filed a second Affidavit in Reply of Sergeant Danlobendahn Botelanga in objecting to the bail variation.
10. On 17 January 2024 the parties were further heard on the application for variation of bail conditions.
11. The applicant is charged as follows:

Statement of Offence

Dangerous Driving Occasioning Grievous Bodily Harm: contrary to Section 67B(1)(d) of the Motor Traffic Act 2014.

Particulars of Offence

Caruso Amwano on the 2nd day of October 2023 at Meneng District, Nauru drove a grey Mazda Tribute with registered license plate TT1130 and was involved in an impact occasioning grievous bodily harm to ***Febriano Baguga*** and ***Caruso Amwano*** was, at the time of the impact, driving the said motor vehicle in a manner that was reckless or negligent.

12. During the hearing on 17 January 2024, the court raised issues in respect to the case authorities that it would rely on later in its ruling with regard to the considerations that this court must take into account before imposing any conditions for bail. The parties did not wish to add further to those case authorities nor did they wish to make any further submissions on it.

APPLICANT'S REASONS FOR BAIL VARIATION

13. The applicant's counsel submits that his client's main ground for the variation is that he wishes to be able to carry out his business. He relies on the business to support his family. His client is seeking to vary bail condition number 3 to allow him to be able to drive any time between 6am to 10pm so that he can be able to carry out his work.
14. The applicant's counsel submitted that his client's defacto partner works from 9am to 5pm and is not able to drive him during her working hours. Further, he submits that there is no guarantee that other family members will be able to drive him on a regular basis.
15. The Affidavit of Caruso Amwano filed on 11 January 2024 contains the following depositions of fact which are pertinent for the determination of this application:
- i. That the applicant and his family live in isolation in Anibare District. They do not have any relatives within their neighbourhood.
 - ii. That the main purpose for the application is to allow the applicant to operate his business which supports his family.
 - iii. That the applicant "runs a private company comprising of a retail shop which is located at Denig District".
 - iv. That the applicant is running the business alone and is finding it difficult to find transport to and from Anibare because there is no public transportation in Nauru.

- v. That the applicant needs to be present at the shop on a daily basis to conduct the business operation, and that it is costing him \$3000 to run the business every month.
- vi. That the applicant also delivers roast chicken and other groceries via online orders.
- vii. That the applicant needs to attend routine check-ups at the hospital.
- viii. That the applicant needs to visit his family in Nibok District.
- ix. That the applicant is a candidate for Yaren District for the upcoming elections. He needs transport to visit members of his constituency for campaign purposes.
- x. That the applicant also wishes to attend church every Sunday and needs transportation to be able to do so.
- xi. That bail condition number 3 is causing him and his family hardship.

16. The Affidavit of Jacqueline Duburiya filed on 16 January 2024 contains the following depositions of fact which are pertinent for the determination of this application:

- i. That the applicant's sister is in a defacto relationship with her son.
- ii. That she is the registered owner of retail store business, namely, "Stop & Shop", which is a retail shop which also provides café and catering services. The invoice for the payment of the business licence was annexed to the affidavit.
- iii. That she authorized the applicant to operate and manage the abovementioned business by himself.
- iv. That the applicant is the only employee of her abovementioned business.
- v. That the applicant lives in an isolated area in Anibare District and there is no public transport available in the vicinity of where the applicant resides.
- vi. That the applicant needs to be able to drive so that he can be able to maintain the business operations and his employment for his livelihood.

RESPONDENT'S POSITION WITH REGARD TO THE VARIATION APPLICATION

17. The counsel for the respondent objects to the variation being made. The respondent further submits that the offence with which the applicant is charged is serious in nature, and that alone warrants the condition that he surrenders his driver's license and not be allowed to drive a vehicle.

18. The counsel for the respondent also submits that condition number 3 was sought due to the seriousness of the offence in order to be able to protect the public. That the respondent did not have any evidence in relation to the criminal history of the applicant or any other evidence in relation to the circumstances of the applicant that would justify the imposition of condition number 3, apart from the charge itself.

19. The first Affidavit in Reply of Sergeant Danlobendahn Botelanga in objecting to the bail variation filed on the 15 January 2024 contains the following depositions of fact which are pertinent for the determination of this application:

- i. That during the early hours of 2 October 2023 the applicant whilst driving vehicle registration number TT1130 hit Mr. Minunu Baguga in Meneng District. Mr Baguga was doing his early morning exercise at the time of the incident.
- ii. On 6 October 2023 the applicant was charged with one count of dangerous driving occasioning grievous bodily harm contrary to Section 67B(1)(d) of the Motor Traffic Act 2014.
- iii. On 6 October 2023 the applicant was granted bail with the condition, amongst other conditions, that he surrenders his driver's licence.
- iv. That disclosures have been served and plea has been taken. The applicant has pleaded not guilty.
- v. That the respondent is objecting to the variation "mainly because the Applicant is charged with Dangerous Driving Occasioning Grievous Bodily Harm: contrary to Section 67B(1)(d) of the Motor Traffic Act 2014".
- vi. That the applicant has not provided any prove of ownership of business in Denig District.
- vii. That the applicant's family can visit him in Anibare District or his family can drive him for visitation to his family in Nibok District.
- viii. That the applicant's campaign managers or his family can drive him to his constituency members for campaign purposes.
- ix. That the applicant's partner can drive him to church.
- x. That the only reason for their objection is that the applicant is charged with the one count of dangerous driving occasioning grievous bodily harm contrary to Section 67B(1)(d) of the Motor Traffic Act 2014.

20. The second Affidavit in Reply of Sergeant Danlobendahn Botelanga in objecting to the bail variation filed on the 17 January 2024 contains the following depositions of fact which are pertinent for the determination of this application:

- i. That the affidavit is deposed in reply to the submissions of the applicant's counsel that the business alluded to by the applicant was owned by his sister.
- ii. That Jacqueline Duburiya is the sole owner of retail store business, namely, "Stop & Shop" situated at Denig District.
- iii. That Ursula Amwano (applicant's sister) and Jacqueline Duburiya jointly owned a retail store business namely "Elixir" situated in Nibok District. The business licence was valid until 18 November 2023.

CONSIDERATIONS

Applicable Laws

21. Section 31 of the *Bail Act 2018* (“the Act”) provides the following in relation to a Resident Magistrate’s power to review a bail determination:

31 Power of review

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

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

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

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

(5) A court which has power to review a bail determination, or to hear a fresh application under Section 15(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.

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

(a) accused person;

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

(c) Secretary for Justice;

(d) Director of Public Prosecutions; or

(e) victim of the offence.

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

(8) The review shall 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. (emphasis added)

22. Section 22(2)(c) of the Act provides the following with regard to the power of the court to review bail conditions:

22 Conditions of bail

...

(2) *The court shall have jurisdiction to review the conditions of bail where:*

(a) *an accused person breaches the conditions of the bail undertaking;*

(b) *an accused person is charged with or convicted or sentenced for a separate offence;*

(c) *an accused person seeks variation for personal, humane, compassionate or health reasons; or*

(d) *circumstances exist, which in the view of the Resident Magistrate, a Judge or Justice of Appeal, justifies a review of the conditions of bail. (emphasis added)*

23. Section 31(2) of the Act grants the Resident Magistrate the power to review a decision made by another Resident Magistrate in relation to a bail determination. Further, Section 31(5) of the Act provides that where a court has a power to review a bail determination it may refuse to hear the application for review “*if it is not satisfied that there are special facts or circumstances that justify a review, or the making of afresh application*”.
24. Section 22(2)(c) of the Act also provides the court the jurisdiction to review the bail conditions imposed by the court where “*an accused person seeks variation for personal, humane, compassionate or health reasons*”.
25. In relation to an application for review of bail conditions, Section 31(2) & (5) and Section 22(2)(c) of the Act have to be read together because a review of bail conditions entails the review of a bail determination. That is, a review of bail conditions would require a review of the bail determination in which the conditions were made. Therefore, applicant seeking to review bail conditions will have to make an application for a review of a bail determination on personal, humane, compassionate or health reasons.
26. The Honorable Acting Chief Justice Khan in *Denuga v Republic*¹ made the following observations at [11] of his honor’s judgment with regard to a court’s power to review a bail determination under Section 31 of the Act:
- [11] The Bail Act 2018 allows an accused person to make any number of fresh applications if there is change in circumstances, and the effect of the 2 subsections is that it allows the court to review bail conditions if: “there are special facts and circumstances (s.31(5)) and “to vary the bail conditions” (s.31(7)), if the court deems it appropriate.*
27. The High Court of Fiji in *Ho v State*² made the following observations at [6], [7] and [8] of its ruling with regard to an identical provision in Fiji’s Bail Act on the power of the court to review a bail determination:

¹ [2023] NRSC 12; Criminal Appeal 5 of 2021 (18 May 2023), at [11]

² [2019] FJHC 820; HAM146.2019 (23 August 2019), at [6],[7] and[8]

[6] The statutory test for a renewed application for bail is whether there are special facts or circumstances to consider releasing the Accused on bail. This is the test provided by section 30 (7) of the Act. That section states:

A court which has power to review a bail determination, or 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 review or application.

[7] The statutory test appears to be more stringent than the common law test of material change in circumstances applied by this Court in the earlier cases of renewed applications for bail (see, *Nagata v State – Bail Ruling* [2015] FJHC 644; *HAM152.2015* (31 August 2015), *State v Dhamendra* [2016] FJHC 386; *HAM58.2016* (10 May 2016)).

[8] The Bail Act has not defined the phrase ‘special facts or circumstances’ but has left it to the courts to decide on case by case basis. The word ‘special’ has been given the meaning exceptional or unusual in a number of cases. For the facts to be special they must be “peculiar to the particular case which set it apart from other cases” (*Lyon v Wilcox* [1994] 3 NZLR 422, 431 (CA), following the Full Court in *Re M* [1993] NZFLR 74). For circumstances to be special they must be exceptional, abnormal or unusual (*Crabtree v Hinchliffe (Inspector of Taxes)* [1971] 3 All ER 967,976 (Lord Reid), 983 (Viscount Dilhorne)). (emphasis added)

28. In light of the above, in a review application to vary bail conditions, the applicant needs to establish special facts or circumstances in relation to his or her personal, humane, compassionate or health reasons for seeking the variation.
29. Once the court is satisfied that special facts or circumstances exists that justify review, then the court may confirm, reverse or vary the bail determination. However, it must be noted that the use of the word ‘may’ in Section 31(5) of the Act indicates that there remains a discretion in the court to hear the application for review despite there being no special facts or circumstances that justify a review.
30. There may arise situations in which the circumstances or facts of a particular case do not satisfy the requisite threshold of being “*special*”, however, the nature of the facts or circumstances in that case nonetheless may justify a review. Therefore, it is clear that Section 31(5) of the Act vests a discretion in the court to hear applications for the review of a bail determination, which is to be dealt with on a case by case basis.
31. In *Re Zhang*³ the Supreme Court of Victoria made the following observations at [17] of its judgment with regard to the effect of a successful bail variation application:

...A successful application to vary bail conditions results in the court — in granting the application to vary — making a fresh grant of bail with new conditions.

³ [2023] VSC 8, at [17]

32. Where an application for variation of bail conditions is allowed by a court, a fresh grant of bail with new conditions is entered into.
33. When considering the fresh grant of bail with new conditions, the court needs to reconsider whether the interest of justice requires that bail should not be granted (Section 4(3) of the Act). Further, the factors under Section 17, 18 and 19 of the Act may need to be reconsidered.

Whether there are any special facts and/or circumstances that justify a review of the bail determination made on 6 October 2023?

34. I find that the applicant is employed by Jacqueline Duburiya as the operational manager of the retail store business, namely, “Stop & Shop”. The income earned by the applicant goes towards his livelihood.
35. I also find that the applicant is under hardship due to the bail condition that he surrenders his driver’s licence. He has difficulty travelling to and from his place of employment. This bail condition has restricted his freedom of movement.
36. I have perused the court file and note that the bail granted on 6 October 2023 was done so upon an oral application. My brother Resident Magistrate did not consider whether there was any evidentiary material before the court that would justify the restriction on the freedom of movement of the applicant. The condition is punitive in nature. I will discuss this further in my ruling below.
37. In light of the above, I find that there are special facts and/or circumstances that justify the review of the bail granted by my brother Resident Magistrate.

Whether fresh grant of bail should be refused in the interests of justice?

38. There is no material before the court that suggests that the applicant will not attend court to answer the charge laid against him. On the contrary the applicant has been present during all his court dates. The matter has been set down for trial from 29 January 2024 to 2 February 2024.
39. I find that the interest of justice requires that bail should be granted. However, the only issue that I have been asked to determine is whether condition number 3 of the bail granted on 6 October 2023 should be varied as sought by the applicant.
40. I will consider this below.

Bail Conditions

41. Section 4 of the Act establishes a presumption of bail.
42. Section 5(1) of the Act provides the following rights after grant of bail:

5 Rights following the grant of bail

(1) An accused person who is in custody for an offence and who has been granted bail is entitled to be released, upon giving a bail undertaking, and

subject to Section 26, to remain at liberty until required to appear before a court in accordance with the bail undertaking.

43. Section 16(3) of the Act provides that once a person is granted bail then he or she must reside at the place of residence that he provided to the court or police as the case may be. Further, Section 16(6) of the Act provides that absence of more than 24 hours from the place of residence amounts to change of residence. Leave must be sought before place of residence is changed.
44. Section 17(2) of the Act provides that “*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*”.
45. Section 18(1) of the Act makes the following provision:

18 Refusal of bail

(1) A person making submissions to a court against the presumption in favour of bail shall address the:

(a) likelihood of the accused person not surrendering to custody and not appearing in court;

(b) interests of the accused person; and

(c) public interest and the protection of the community. (emphasis added)

46. For the purpose of this ruling, Section 19(2)(b) & (c) of the Act requires the following:

19 Reasons for refusing bail

...

(2) In forming the opinion required by subsection (1), a police officer or court shall have regard to all the relevant circumstances and in particular:

...

(b) in relation to the interests of the accused person:

(i) the length of time the accused person is likely to have to remain in custody before the case is heard;

(ii) the conditions of that custody;

(iii) the need for the accused person to obtain legal advice and to prepare a defence;

(iv) the need for the accused person to be at liberty for other lawful purposes such as employment, education, care of dependants;

(v) whether the accused person is a child, in which case Section 4C applies; or

(vi) whether the accused person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection; and

(c) in relation to the public interest and the protection of the community:

(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;

(ii) the likelihood of the accused person interfering with evidence, witnesses or assessors or any specially affected person; or

(iii) the likelihood of the accused person committing an arrestable offence while on bail. (emphasis added)

47. Section 22(3) of the Act provides that the following conditions of bail may be imposed when bail is granted to an accused:

22 Conditions of bail

...

(3) The conditions imposed for the granting of bail under subsection (1) may include:

(a) that the accused person surrender any passports or travel documents in his or her possession to an authorised officer;

(b) that the accused person be barred from applying for or obtaining any passport or travel documents;

(c) that the accused person not commit an offence while released on bail;

(d) that the accused person provide one or more sureties who acknowledge that he or she is acquainted with the accused person and regards the accused person, as a responsible person who is likely to comply with a bail undertaking;

(e) that the accused person not interfere with witnesses;

(f) that the accused person enters into an agreement, without security, to forfeit a specified amount of money into the Courts Trust Fund if the accused person fails to comply with his or her bail undertaking;

(g) that one or more sureties enters into an agreement, without security, to forfeit a specified amount of money into the Courts Trust Fund if the accused person fails to comply with his or her bail undertaking;

(h) that the accused person enters into an agreement, and deposits acceptable security, to forfeit a specified amount of money into the Courts Trust Fund, if the accused person fails to comply with his or her bail undertaking;

(i) that one or more sureties enters into an agreement, and deposits acceptable security, to forfeit a specified amount of money into the Courts Trust Fund, if the accused person fails to comply with his or her bail undertaking;

(j) that the accused person deposits with an authorised officer of the court a specified amount of money in cash and enters into an agreement to forfeit the amount deposited into the Courts Trust Fund, if the accused person fails to comply with his or her bail undertaking;

(k) that one or more sureties deposits with an authorised officer of the court a specified amount of money in cash and enter into an agreement to forfeit the amount deposited into the Courts Trust Fund, if the accused person fails to comply with his or her bail undertaking; or

(l) such other conditions as the court may deem fit.

48. Section 27(1) of the Act makes a breach of a bail condition a criminal offence.
49. Section 23(1) of the Act implies that the “default position” of the court when granting bail is that it must be granted unconditionally, unless there are reasons that justify the imposition of bail conditions to ensure the “*accused person’s surrender into custody and appearance in court*”, the protection “*of the welfare of the community*”, or for the protection “*of the welfare of any specially affected person*”. Section 23(2) goes on further to state that “*a condition shall only be imposed to protect the welfare of the community, to protect the welfare of any specially affected person, or in the interests of the accused person, and may only be imposed if required by the circumstances of the accused person*”. Section 19 and Section 23 of the Act when read together requires that the court must be furnished with evidence with regard to the circumstances of the accused person and any other relevant materials to assist it in making a determination on what bail conditions are to be imposed. Unsupported claims would rarely be entertained, if at all.
50. Very useful observations were made in *R v Zora*⁴ with regard to the principles governing the making of bail conditions. These principles apply in the current circumstances as well. The Supreme Court of Canada in *R v Zora, supra* made the following observations on bail conditions at [81] – [90] of its judgment:

[81] In Antic, this Court set out the proper approach to the Code’s bail provisions when it addressed the overuse of cash bail and sureties. As issues concerning bail are particularly evasive of review (see Penunsi, at para. 11), it has become necessary to build upon the Antic framework and provide guidance on non-monetary conditions of bail and the serious consequences which flow from their breach.

⁴ 2020 SCC 14, [2020] 2 S.C.R. 3

[82] We can learn a great deal about how to set bail conditions upon seeing how they become criminal offences under s. 145(3). **Each condition added onto a release order not only limits the freedom of someone presumed to be innocent, it creates a new risk of criminal liability, particular to the accused, and may result in the loss of liberty, whether through bail revocation or imprisonment.** The direct connection between the behaviour addressed in bail conditions and the conduct which is criminalized under s. 145(3) flows both ways. The individualized process of setting bail conditions moves forward into and informs the subjective fault standard for breach. Conversely, understanding how s. 145(3) gives rise to potential criminal liability reinforces that the principles of restraint and review must guide the initial decision to impose bail conditions in practice. Section 145(3) therefore provides an essential perspective through which we can consider the general bail principles; concerns over specific conditions; and how all those involved in the bail system have responsibilities in respect of restraint and review.

A. General Principles Governing Bail Conditions

[83] **All those involved in setting bail terms must turn their minds to the general principles for setting bail, which restrain how bail conditions are set. As the default position in the Code is bail without conditions, the first issue is whether a need for any condition has been demonstrated.** Restraint and the ladder principle require anyone proposing to add bail conditions to consider if any of the risks in s. 515(10) are at issue and understand which specific risks might arise if the accused is released without conditions: is this person a flight risk, will their release pose a risk to public protection and safety, or is their release likely to result in a public loss of confidence in the administration of justice?

[84] Only conditions which target those specific s. 515(10) risk(s) are necessary. If an accused is a flight risk, but poses no other risks, only those conditions that minimize their risk of absconding should be imposed. Similarly, if an accused poses a risk to public safety and protection, only the least onerous conditions to address that specific threat should be imposed (*R. v. S.K.*, 1998 CanLII 13344 (Sask. Prov. Ct.), at paras. 16-19). Further, such conditions will not be necessary for public protection and safety merely because an accused poses a risk of committing another offence while on bail, unless they pose a “substantial likelihood” of committing an offence that endangers public protection and safety (*Morales*, at pp. 736-37; s. 515(10)(b)). Any condition imposed to maintain confidence in the administration of justice must be based on a consideration of the combined effect of all the relevant circumstances from the perspective of a reasonable member of the public, especially the four factors set out in s. 515(10)(c): the apparent strength of the prosecution’s case, the gravity of the offence, the circumstances surrounding the commission of the offence, and whether the accused is liable for a potential lengthy term of imprisonment (*St-Cloud*, at paras. 55-71 and 79).

[85] **The requirement of necessity also means that the particular condition must attenuate risks that would otherwise prevent the accused’s release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes** (*Antic*, at para. 67(j); *Birtchnell*, at paras. 27-28; *R. v.*

McDonald, 2010 ABQB 770, at paras. 34-36 (CanLII)). A condition that may be suitable for a sentencing purpose, like rehabilitation, will not be appropriate unless it is directed towards the risks in s. 515(10) (Omeasoo, at para. 31). Conditions should not be behaviourally-based (R. v. K. (R.), 2014 ONCJ 566, at paras. 14-19 (CanLII); J.A.D., at paras. 9 and 11). A condition that merely seems “good to have”, but is not necessary for the accused’s release, is not appropriate (Birtchnell, at para. 40). Even if some condition is thought to be therapeutic, intended to help, or “couldn’t hurt,” the prospect of additional criminal liability under s. 145(3) means any such limits on otherwise lawful behavior may also attract criminal penalties. Restraint was emphasized by the Court in Antic, at para. 67(j):

Terms of release imposed under s. 515(4) may “only be imposed to the extent that they are necessary” to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person’s behaviour or to punish an accused person. [Footnote omitted.]

[86] *Moreover, bail conditions must be sufficiently linked to the defined statutory risks. They should be as narrowly defined as possible to meet their objective of addressing the risks under s. 515(10) (R. v. D.A., 2014 ONSC 2166, [2014] O.J. No. 2059 (QL), at paras. 14-17; R. v. Pammatt, 2014 ONSC 5597, at paras. 10-12 (CanLII); R. v. Clarke, [2000] O.J. No. 5738 (QL) (Sup. Ct.), at paras. 9 and 12; K. (R.), at paras. 14-19; J.A.D., at paras. 9 and 11). As with the setting of probation conditions, the level of connection between a non-enumerated condition and a risk under s. 515(10) should be comparable to the clear linkages between the enumerated conditions in s. 515(4) and the risks under s. 515(10) (R. v. Shoker, 2006 SCC 44, [2006] 2 S.C.R. 399, at paras. 13-14). This Court in Penunsi recently emphasized this in relation to conditions on peace bonds:*

Where the condition is not demonstrably connected to the alleged fear, it may merely set the defendant up for breach . . . Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail. [Citations omitted; para. 80.]

[87] *A bail condition must be reasonable. As with probation conditions, bail conditions cannot contravene federal or provincial legislation or the Charter (Shoker, at para. 14). The enumerated bail conditions in s. 515(4) to (4.2) help inform the extent of discretion a judicial official has in imposing other reasonable non-enumerated bail conditions (Shoker, at para. 14). Conditions must be clear, minimally intrusive, and proportionate to any risk. Conditions will also only be reasonable if they realistically can and will be met by the accused, as “[r]equiring the accused to perform the impossible is simply another means of denying judicial interim release” by setting them up to fail, as well as adding the risk that the accused will be criminally charged for failing to comply (Omeasoo, at paras. 33 and 37-38; see also Penunsi, at para. 80). As noted by Rosborough J. in Omeasoo, removing an unreasonable condition will not cause any more risk to the community than imposing a condition that is impossible for the accused to respect (para. 39). Reasonable conditions also must not limit the Charter rights of an accused, such as their freedom of*

expression or association, unless that condition is reasonably connected and necessary to address the accused's risk of absconding, harming public safety, or causing loss of confidence in the administration of justice (R. v. Manseau, [1997] AZ-51286266 (Que. Sup. Ct.); Clarke).

[88] Bail conditions are to be tailored to the individual risks posed by the accused. There should not be a list of conditions inserted by rote. The only bail condition that should be routinely added is the condition to attend court (Birtchnell, at para. 6), as well as those conditions that must be considered for certain offences under s. 515(4.1) to (4.3). There is no problem with referring to checklists to canvass available conditions. The problem arises if conditions are simply added, not because they are strictly necessary, but merely out of habit, because the accused agreed to it, or because some behavior modification is viewed as desirable. Bail conditions may be easy to list, but hard to live.

[89] In summary, to ensure the principles of restraint and review are firmly grounded in how people think about appropriate bail conditions, these questions may help structure the analysis:

- If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice?*
- Is this condition necessary? If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions?*
- Is this condition reasonable? Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition?*
- Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)? Is it narrowly focussed on addressing that specific risk posed by the accused's release?*
- What is the cumulative effect of all the conditions? Taken together, are they the fewest and least onerous conditions required in the circumstances?*

These questions are inter-related and they do not have to be addressed in any particular order, nor do they have to be asked and answered about every condition in every case. The practicalities of a busy bail court do not make it realistic or desirable to require that the judicial official inquire into conditions which do not raise red flags. What is important is that all those involved in the

setting of bail use these types of organizing questions to guide policy and to assess which bail conditions should be sought and imposed.

[90] When considering the appropriateness of bail conditions, the criminal offence created by s. 145(3) not only counsels restraint and review, but provides an additional frame of reference which incorporates considerations of proportionality into the assessment. Given the direct relationship between imposition and breach, the assessments of necessity and reasonableness discussed in *Antic* should also take into account that failures to comply with imposed conditions become separate crimes against the administration of justice. Accordingly, the question becomes: is it necessary and reasonable to impose this condition as a personal source of potential criminal liability knowing that a breach may result in a deprivation of liberty because of a charge or conviction under s. 145(3)? In short, when considering whether a proposed condition meets a demonstrated and specific risk, is it proportionate that a breach of this condition would be a criminal offence or become a reason to revoke the bail? (emphasis added)

51. Bail conditions must not be “gratuitous or punitive” in nature and the Supreme Court of British Columbia in *R. v Baker*⁵ also made the following observations with this regard at [85] and [86] of its judgment:

[85] The requirement of necessity also means that the particular condition must attenuate risks that would otherwise prevent the accused’s release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes (Antic, at para. 67(j); Birtchnell, at paras. 27-28; R. v. McDonald, 2010 ABQB 770, at paras. 34-36 (CanLII)). A condition that may be suitable for a sentencing purpose, like rehabilitation, will not be appropriate unless it is directed towards the risks in s. 515(10) (Omeasoo, at para. 31). Conditions should not be behaviourally-based (R. v. K. (R.), 2014 ONCJ 566, at paras. 14-19; J.A.D., at paras. 9 and 11 (CanLII)). A condition that merely seems “good to have”, but is not necessary for the accused’s release, is not appropriate (Birtchnell, at para. 40). Even if some condition is thought to be therapeutic, intended to help, or “couldn’t hurt,” the prospect of additional criminal liability under s. 145(3) means any such limits on otherwise lawful behavior may also attract criminal penalties. Restraint was emphasized by the Court in Antic, at para. 67(j):

Terms of release imposed under s. 515(4) may “only be imposed to the extent that they are necessary” to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person’s behaviour or to punish an accused person. [Footnote omitted.]

[86] Moreover, bail conditions must be sufficiently linked to the defined statutory risks. They should be as narrowly defined as possible to meet their objective of addressing the risks under s. 515(10) (R. v. D.A., 2014 ONSC 2166, [2014] O.J. No. 2059, at paras. 14-17 (QL); R. v. Pammatt, 2014 ONSC 5597, at paras. 10-12 (CanLII); R. v. Clarke, [2000] O.J. No. 5738 (Sup. Ct.), at

⁵ 2021 BCSC 1103 (CanLII)

paras. 9 and 12 (QL); K. (R.), at paras. 14-19; J.A.D., at paras. 9 and 11). As with the setting of probation conditions, the level of connection between a non-enumerated condition and a risk under s. 515(10) should be comparable to the clear linkages between the enumerated conditions in s. 515(4) and the risks under s. 515(10) (R. v. Shoker, 2006 SCC 44, [2006] 2 S.C.R. 39, at paras. 13-14). This Court in Penunsi recently emphasized this in relation to conditions on peace bonds:

Where the condition is not demonstrably connected to the alleged fear, it may merely set the defendant up for breach . . . Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail. [Citations omitted; para. 80.] (emphasis added)

52. I do not need to restate the above principle. I adopt them in this matter. However, I note that the case authorities also indicate that the parties may consent to the imposition of standard bail conditions in certain circumstances.
53. The respondent has not satisfied to this court the Section 19(2)(c) of the Act. Therefore, I find that there are no materials before the court to justify the imposition of the bail condition that the applicant surrenders his driver's licence. I also find that in the circumstances of this case the bail condition that the applicant surrenders his driver's licence is punitive in nature.
54. The review application was limited to the bail condition requiring the applicant to surrender his driver's licence. As such, there is no need to consider the appropriateness of the other bail conditions, which seems to have been consented to. In light of this, I make no orders in relation to bail conditions number 1, 2 and 4.

CONCLUSION

55. I am satisfied that the circumstances and/or facts in this matter justify:
- i. a review of the bail determination made on 6 October 2023;
 - ii. a variation of the bail conditions of the bail granted on 6 October 2023;
 - iii. setting aside of the bail granted on 6 October 2023; and
 - iv. granting of fresh bail with new conditions.
56. Therefore, I allow the variation application made filed on 11 January 2024 accordingly and make necessary orders below.

ORDERS

57. The orders of the court are as follows:
- i. That the bail granted on 6 October 2023 is set aside and fresh bail is granted in the sum of \$1500 in the applicant's own recognizance.
 - ii. That the applicant is to provide two sureties, namely, Romina Amwano and Rebecca Amwano in the sum of \$500 each.

- iii. That the additional conditions of the fresh bail are:
- a. That the applicant shall reside at his current place of residence in Anibare District and shall not change his place of residence without the leave of this court.
 - b. That the applicant must stay away from the victim and must not contact him or any other potential witnesses of this case; and
 - c. The applicant shall personally attend at the Court House, District Court on the 29th day of January 2024.
- iv. That the applicant's driver's licence is to be released to him forthwith.

Dated this 19th day of January 2024.



**Acting Resident Magistrate
Vinay Sharma**