



**SUPREME COURT OF NAURU**

**AT YAREN MISCELLANEOUS CAUSE Case No.80 of 2016**

**SPRENT DABWIDO DEFENDANT/APPLICANT**

**AND**

**THE REPUBLIC DIRECTOR OF PUBLIC PROSECUTION**

**Before: Khan J**  
**Date of Hearing: 23 August 2016**  
**Date of Ruling: 23 August 2016**

**Case maybe cited as: DABWIDO v THE REPUBLIC**

**CATCHWORDS:** Application for variation of bail – No provision under the Criminal Procedure Act 1972 to appeal against the decision of the District Court on bail matters – Section 80(3) of Criminal Procedure Act 1972 allows Supreme Court to review District Court decisions when there is change in circumstances.

**APPEARANCES**

**For the Applicant: Mr V Clodumar (Pleader)**  
**For the Republic: Mr L Savau**

**RULING**

1. The defendant filed a notice of motion on 22 August 2016 to vary his bail conditions for the release of his passport to enable him to travel to Australia for medical treatment.

2. The defendant, together with 18 others have been charged for a series of offences including Unlawful Assembly, Disturbing Legislature and other offences which allegedly took place on 18 June 2015.
3. After the charges were filed, they appeared before the District Court on 18 June 2015 and were granted conditional bail.
4. Subsequently, the District Court stated the case to this court pursuant to Section 38 of the Courts Act 1972 as certain Constitutional issues had arisen. Whilst this matter was pending before this court the defendant made a fresh application for variation of bail on 10 July 2015 which was heard by Madraiwiwi CJ. In his ruling, His Honour stated at [11] and [21] as follows:

*“[11] It is the prosecution’s case that circumstances have not changed since the refusal by the learned Resident Magistrate of bail on 23 June 2015 in which she concluded thus after assessing the evidence placed before her...”*

*“[21] Accordingly, the Court is respectfully of the opinion that there has been a change in the circumstances since 23 June 2015 that justifies the exercise of its discretion to direct that bail be granted pursuant to Section 80 (3) of the Criminal Procedure Act 1972...”*

#### APPLICATION FOR VARIATION OF BAIL IN THE MAGISTRATE’S COURT

5. On 15 August 2015, the defendant filed an application in the District Court to vary his bail condition for the release of his passport to enable him to travel to Australia for medical treatment.
6. The application was opposed by the DPP and the Magistrate in her ruling on 17 August 2016, declined to vary the bail conditions. She stated at paragraph [17], [18] and [19] as follows:

*“[17] There are stark inconsistencies between the evidence of Dr. Motufaga given in her affidavit and the evidence given by Dr. Timeon in court. The inconsistencies between these two doctor’s evidence goes to the heart of the issue for the court to determine. Whether there is urgency in situation of the defendants medical condition so as to enable him to travel overseas at his own expense. Dr. Timeon’s evidence is that the defendant should be sent overseas for referral treatment and that these should be done as soon as possible. A failure to do this would border on negligence. On the other hand Dr. Motufaga’s evidence is that the defendant could wait for the Cardiac team she has organized to come in October of 2016 to obtain specialist advice to check seriousness and urgency in the treatment of his heart condition.*

*[18] The evidence before me from two experts both Medical Doctors regarding their assessment of the medical condition of the defendant are two opposing views. Mr Clodumar did not cross-examine Dr. Motufaga on the issues and views raised by Dr.*

*Patrick Timeon that are inconsistent with her views as expressed in paragraphs 8, 9, 10 and 11 of her affidavit filed with the court on 16 August 2016. The defense did not put its expert witness's views and conclusions to Dr. Motufaga during cross-examination. Equally the prosecution did not put Dr. Motufaga's views as expressed in paragraphs 7, 8, 9, 10 and 11 to Dr. Timeon. The effect of this is that her evidence is uncontested. And the evidence of Dr. Timeon is uncontested. The court cannot accept both views. The failure by the defence to cross-examine Dr. Motufaga and the failure by the prosecution to cross-examine Dr. Timeon on the matters which his views are in conflict with that of Dr. Motufaga must result in the court's inability to decide with version to accept.*

*[19] At this stage I am unable to make a finding on whether or not the defendant's medical condition justifies this court's exercise of its discretion to vary the bail condition of the defendant to enable the defendant to travel overseas for medical treatment."*

### PRELIMINARY OBJECTION


7. Mr. Savou has raised a preliminary objection to the application for the variation of bail. He submitted that the application is brought under Section 80(3) of the Criminal Procedure Act 1972 and it is on the same grounds on which the Magistrate gave her ruling. He also raised the issue as to whether the defendant should have filed an appeal pursuant to Section 5 of the Appeals Act 1972.
8. Mr. Clodumar in response submitted that the only provision for appeal is under Section 89 of the Criminal Procedure Act 1972 which deals with the issue of forfeiture of bail. He also submitted that Section 80(3) gives this court jurisdiction to hear the application. He further submitted that this is a fresh application and not by way of an appeal, as there is no provision to appeal against the decision of the Magistrate.
9. Unfortunately, the Criminal Procedure Act 1972 does not make any provision for appeal to be filed against the decision of the District Court when it deals with the bail applications. Section 80(3) is the only section which gives this court some powers to review the Magistrate's decision on the issue of bail.
10. There has been no change in the circumstances so this court cannot entertain this application.
11. It is unfortunate that the defendant seems to be going in circles without the matter being resolved, and it is also unfortunate that Dr. Patrick Timeon and Dr. Selina Motufaga have different medical opinion which is understandable. However, Dr. Selina Motufaga in her affidavit at [8] dated 16 August 2016, stated that : "the applicant should undergo another medical examination with Dr. Patrick Timeon and get a current assessment on his health as the medication provided by Dr. Timeon in 2015 should stabilize his condition and possibly improve his condition if he adheres to the medication.

12. So, it is in the defendant's interest to obtain a fresh assessment from Dr. Timeon and depending on his report there may well be a change in the circumstances which would allow the conditions of the bail to be varied.

#### ADDITIONAL SUBMISSIONS

13. After I delivered this ruling, Mr. Clodumar advised me that the defendant had seen Dr. Timeon on 4 August 2016 and this evidence was adduced before the District Court but unfortunately, the Magistrate did not refer to this in her ruling. He also informed me that the defendant consulted an eye specialist from Taiwan who advised that the treatment for his eyes was not available in Nauru and he should go to Australia for the treatment. This report was not put before the District Court nor was it produced before me.
14. In light of these new material put before me by Mr. Clodumar, I set aside my earlier ruling and at this stage I am satisfied that there is a change in circumstances. I shall therefore deal with the application for variation of bail and I order the defendant to obtain a medical report from Dr. Timeon of his consultation on 4 August 2016 and also a medical report from the eye specialist and file copies thereof in court and serve the same on the DPP.

DATED this 23 day of August 2016.



**Mohammed Shafiullah Khan**  
**Judge**

