IN THE HIGH COURT OF FIJI AT SUVA
(CRIMINAL JURISDICTION)

Criminal Miscellaneous Case No.: 162 of 2015

BETWEEN : **SIMELI BILI NAISUA**

Applicant

A N D : **THE STATE**

Respondent

Counsel : Ms. M. Tarai for Applicant
Ms. S. Puamau for Respondent

Date of Ruling : 6th November 2015

RULING

1. The Applicant is applying for bail pending his retrial. The Court of Appeal on 02nd October 2015 quashed the Applicant's conviction in HAC 083 of 2010 for one count of Rape contrary to section 207(1)(2)(c) of the Crimes Decree 2009 and ordered a retrial.

2. The Respondent submits that this application should be treated as an application for review of the previous decision of this Court refusing to grant bail to the Applicant. This argument is summarized at paragraph 1.14 of the written submission filed by the Respondent on 02nd November 2015 in the following terms;

   "*Since the Applicant was denied bail by the High Court of Fiji initially in respect of this matter; and since he was subsequently remanded until trial on that order by the Court of Appeal, this application is an application for review of bail.*"

3. According to the Respondent, this Court's previous decision to deny bail still continue to be in operation and therefore the Applicant is required to show some material change in circumstances since that decision to justify (i) the review of the initial decision; and (ii) the grant of fresh bail. Respondent relies on section 30(7) of the Bail Act 2002 ("Bail Act") in this regard.

4. I am unable to agree with the Respondent that this should be regarded as an application to review the previous bail decision of this Court. Section 30 of the Bail Act deals with the *Power of review*. According to section 30(3) of the said Act, the High Court is only given the power to review '*any decision made by a magistrate or by a police officer in relation to bail*'.

5. In the circumstances, the Respondent's contention that this application should be treated as an application for a review is misconceived. This Court lacks jurisdiction to take such a course of action.

6. However, I cannot entirely disagree with the Respondent's submission with regard to the applicability of section 30(7) of the Bail Act to this application. Said section 30(7) reads as follows;

   "*(7) A court which has power to review a bail determination, or to hear a fresh application under section 14(l), may, if not satisfied that there are special facts or circumstances that justify a review, or the making of afresh application, refuse to hear the review or application.*"

7. Section 14(1) of the Bail Act allows an accused person to make any number of applications for bail. Therefore, 'a fresh application under section 14(1)' denotes an application which is not the first bail application.

8. This Applicant's first bail application was made under case no. HAM 090 of 2010. The ruling in that case was given on 30th June 2010 where the bail was refused. The Applicant has made another application for bail under case No. HAM 203 of 2010 which was subsequently withdrawn. Applicant was sentenced on 08th February 2011whilst he was in remand. The aforementioned bail ruling dated 30th June 2010 was not either expressly or impliedly disturbed by the Court of Appeal in its judgment dated 02nd October 2015.

9. By way of the aforementioned ruling dated 30th June 2010, this Court has made a determination on whether or not the Applicant should be granted bail. '*A decision that there are substantial grounds for believing that the accused would abscond, commit offences or interfere with witnesses amounts to a finding of the court, and therefore sets up something akin to a res judicata.*' [Blackstone's Criminal Practice 2007 at page 1341]

10. In my view, the reason for demanding an Applicant who makes an application under section 14(1) of the Bail Act to show that there is a material change in the circumstances is because by that time the Court had already made a finding based on the circumstances previously presented to the Court. This finding has the force of *res judicata* between the parties where those circumstances which were considered in the finding become incapable of being pursued further before the same Court.

11. I turn now to examine the present application of the Applicant. I consider that this application is an application made pursuant to section 14(1) of the Bail Act. Accordingly, pursuant to section 30(7) of the Bail Act this Court may refuse to hear this application if the Court is not satisfied that there are special facts or circumstances that justifies the making of a fresh application. I am mindful to consider that, the 'special facts or circumstances' as required by section 30(7) would include a material change in circumstances.

12. The main ground urged by the Applicant in his application for bail is the fact that he had allegedly spent about 5 years and 6 months in custody. Section 13(4) of the Bail Act which provides for a mandatory release if an Applicant had been in custody for over 2 years is not applicable to this Applicant. As held in ***Maiwaqa v State*** ([2003] FJHC 218), the time he spent as a serving prisoner cannot be taken into account in computing the period in custody in relation to the said section 13(4). Accordingly, the Respondent submits that the period this Court should consider as the time spent in custody in relation to this application is 11 months.

13. It is pertinent to note the following paragraphs of the bail ruling dated 30th June 2010;

> *"[18] It is appropriate in this context to refer to the observations made by Justice Goundar in the case of 'The State vs AV (Criminal Case No 192/2008), Justice Goundar held:*
>
> > *"Children below the age of 14 years are the most vulnerable victims, and therefore, the need for protection of law is greater..... By ratifying the convention, the State is obliged to take all appropriate legislative measures to protect children of this country from all forms of physical or mental violence, injury or abuse or exploitation or sexual abuse. The Convention also allows for judicial involvement to carry out the protective measures for children".*
>
> *[19] I am of the view that this observation of Justice Goundar in conjunction with other factors in the above paragraph constitute elements of 'public interest' and the necessity 'for protection of the community' as stated in Section 19(2)(c) of the Act. In the result, I hold that the State has succeeded in satisfying court to form its opinion as to the likelihood of the accused interfering with the evidence and witnesses under the section 19(2)(c) read with Section 18(1). The presence of such likelihood would have the inefficacy of affecting the administration of justice, which in my opinion, is capable of rebutting the presumption in Section 3(3) in favour of granting bail to the accused. ..."*

14. The Complainant was three years old at the time of the alleged offence which is 05th April 2010. Accordingly, she should be eight years old now. The Complainant still comes under the most vulnerable category of victims as highlighted by Goundar J in ***State v A.V.*** (supra).

15. At paragraph 10 of the Judgment of the Court of Appeal dated 02nd October 2015 which quashed the conviction against the Applicant it is stated thus;

> *"I am however of the view that properly directed the assessors and the learned Trial Judge could have convicted the Appellant on the evidence that was available in this case and therefore ..."*

16. The above view expressed by the Court of Appeal is relevant to consider that there is a very strong case against the Applicant. This in my view increases the flight risk in this case.

17. All in all, I am not satisfied that there are special facts or circumstances that justify the making of this bail application. I find no compelling reason to alter the position of the Applicant with regard to bail at time of his conviction which was subsequently quashed by the Court of Appeal.

18. This application is accordingly refused.

19. However, the trial against the Applicant, HAC 083 of 2010 will be given priority and both parties are hereby directed to take all necessary steps to expedite the said trial.

Vinsent S. Perera
<u>JUDGE</u>

Solicitor for the State	**:**	**Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused	**:**	**Legal Aid Commission, Suva**