

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 162 OF 2016

BETWEEN : **JOSEFA TALIGA NADRUIBALAVU**
Applicant

AND : **STATE**
Respondent

Counsel : **Applicant in Person**
Ms. L. Latu for Respondent

Date of Hearing : **25th October, 2016**

Date of Ruling : **2nd November, 2016**

BAIL REVIEW RULING

Introduction

1. The Applicant is charged with the following counts in the Magistrates Court at Tavua.

- CF 105/16: One count of Burglary contrary to section 312(a) of the Crimes Decree.
One count of Theft contrary to section 291(1) of the Crimes Decree.
- CF 109/16: One count of Theft contrary to section 291(1) of the Crimes Decree.
- CF 110/16: One count of Theft 291(1) of the Crimes Decree.
- CF 111/16: One count of Breach of Bail condition contrary to section 25(b)(1) and 26(1) of the Bail Act.

2. The bail application filed by the Applicant in the Magistrates Court at Tavua was refused on the 13th June 2016.
3. Being dissatisfied with the decision of the learned Magistrate the the Applicant appearing in person filed this review application.

The law on bail review

4. Section 30 of the Bails Act 2002 states:

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

(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 afresh application, refuse to hear the review or application.

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

(10) The review must be by way of a rehearing, and evidence or information given or tamed on the making of the decision may be given or obtained on review... ..

2.2 Section 31 of the Bails Act is also pertinent which states:-

31 (1) All grants or refusals of bail and all orders, conditions or limitations made or imposed under this Act are appealable to the High Court upon the application either of the person granted or refused bail or of the Director of Public Prosecutions.

(2) The High Court may-

(a) in its original jurisdiction grant or refuse bail upon such terms as it considers just;

(b) on an appeal under subsection (1), confirm, reverse or vary the decision appealed from.

5. The Applicant relies on following grounds for bail:

- a. Personal and family circumstances and obligations
- b. Condition of Remand Centre
- c. Remand Period

6. It appears that the Applicant has made this bail application on the same grounds that he filed before the learned Magistrate except for the ground based on the condition of the Remand Centre.

Personal and family circumstances and obligations

7. The Applicant had submitted his family obligation and circumstances as a ground to seek bail. The learned Magistrate considered personal and family circumstances of the Applicant and stated that 'though deserving I do not think they are exceptional for accused to be released on bail' He has cited authorities to support his finding.

8. The Applicant submits that he has separated from his wife and his daughter is left with his parents who are ageing. However, there is no evidence adduce by the Applicant to confirm that he has a child in urgent need of care or that he or she is being looked after by his aging parents.

9. The Applicant has referred to The Convention on the Rights of the Child and *Devi v State* [2003] FJHC 200; HAM0011D.2003S (5 March 2003), particularly quoting paragraph 14 of the judgment that emphasizes the importance of protecting the best interest of his child.

10. In *Devi* the Applicant and his husband were both in custody and their 4 year old son was left alone with no arrangement for care and custody. Justice Shameem considered not only the best interest of the child, but also other factors to justify granting bail to Devi. In the same paragraph 14 Justice Shameem observed the following:

“The ethos of the Convention is clear. In all acts involving children, a decision must be made after assessing what is in the best interests of the child. The Convention is a valuable guide to the weight that a court must put on section 19(2)(b)(iv) of the Bail Act. Where, for instance, both parents are in custody and there are no arrangements for the care of children of tender years, bail should be granted because it is in the best interests of the children that they are not separated from their parents. One situation where it would not be in their best interests would be where the parents are accused of abusing or neglecting their children. However, this is not to say that bail should always be granted where both parents are in custody. There may be circumstances where public interest considerations or the conduct of the parents themselves, would justify a refusal of bail. Each case must turn on its own facts”.
[emphasis mine].

11. In *Malakai Tuisoba v State* HAA 98 of 2002, the court observed ‘*that it is unfortunate that offenders tend to think so little of their families at the time they offend*’. The accused should have thought of these before committing the offences.

12. In view of the observation in *Malakai Tuisoba* (*supra*), even though the Applicant supported his assertion that he has a child in need of care; the ground advanced by the Applicant itself is not a valid ground for bail. Each case defers on its own facts. The Applicant had been granted bail in one of his pending Tavua Magistrate Court Criminal Cases (6 of 2015 [EJR 1/15], allegedly for Burglary and Theft offences) and after being granted bail by the High Court, he had appearing again for fresh matters. The learned

Magistrate had taken into consideration the previous breach of bail condition where he was required not to re-offend whilst on bail.

13. The presumption in favour of the granting of bail is displaced where the person seeking bail has previously breached a bail undertaking or bail condition; [S 3(4) (a)]. Pursuant to Section 19 of the Bail Act, violation of bail conditions can be considered by a court as a ground to refuse bail in the interest of public. Therefore, this ground fails.

Condition of Remand

14. The Applicant is complaining about the condition of the remand center. There is no evidence adduced by the Applicant to prove that he was denied his basic accommodation facilities, meals, medicine or sanitary facilities. The remand centers across the country are the same and detainees can't expect the same facilities available in developed countries. If bail is granted on this ground, this will definitely open flood gates and all other remandees will want to seek bail on the same ground.
15. There is no impediment whilst being in custody in the remand centre for the Applicant to have access to legal advice by engaging either a counsel from Legal Aid or a private lawyer. The Prison Act provides that there is no obstacle for the Applicant in prison to engage a counsel. There is no evidence that he had been denied his rights to Counsel. His comprehensive bail submission bears testimony to his ability to prepare for his defence. He will not be denied the right to a fair trial. Furthermore, the right to engage a counsel is not an absolute right. *Eliki Mototabua v State CAV 004 of 2005.*, hence this ground fails.

Remand Period

16. The Applicant has been in custody for almost 6 months now. No trial date has been fixed. Section 13 (4) of the Bails Act 2002 allows for an accused to be kept in remand not over 2 years, the provisions states:

'If a person charged for an offence has been in custody for over 2 years or more and the trial of the person has not begun, the court must release the person on bail subject to bail conditions the court thinks fit to impose.'

17. Although a court has discretion to order a detention of an accused person in remand for a period up to two years, that discretion must be exercised judiciously and for a valid reason or reasons that would justify such a detention, having regard to other provisions of the Bail Act and the provisions of the Constitution.


18. The learned Magistrate had taken into consideration the fact that the Applicant had violated bail conditions whilst on bail in a case of similar nature that was pending before him. He is also charged with one count of Breach of Bail condition contrary to section 25(b)(1) and 26(1) of the Bail Act. Whilst on bail, a charge of similar nature had been brought against the Applicant. Therefore, the applicant's claim that he had not violated any of bail condition or bail undertaking cannot be true.

19. There is no change in circumstances that justify a review under Section 30 (7) of the bail Act.

20. Courts are bound to uphold the Constitution and the provisions of the Bail Act when called upon to determine bail. When a court decides, for whatever reason, to refuse bail to an accused person it must expeditiously deal with the matter and ensure a speedy trial. If the court is overburdened with backlogs, the case flow of the court must be managed to give priority to those cases where accused are in remand.

Order

21. For the reasons given, Ruling of the learned Magistrate is affirmed. Application for bail refused. The learned Magistrate is directed to give priority to the Applicant's case and dispose of the same in a reasonable time.


Aruna Aluthge
Judge

At Lautoka

2nd November, 2016

Solicitors: Applicant in Person

Office of the Director of Public Prosecution for Respondent

