IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

MISCELLANEOUS CASE NO: HAM 204 of 2016

BETWEEN	:	**HANK ARTS**	**APPLICANT**
AND	:	**THE STATE**	**RESPONDENT**

Counsel	:	Mr. F. Haniff for the Applicant
	:	Mr. L. Burney for the State
Date of Hearing	:	17th January 2017
Date of Ruling	:	25th January 2017

BAIL RULING

Introduction

1. The Applicant files this Notice of Motion seeking the following order, that is:

> *The current bail conditions ordered by the Court on 14th of October 2016 be varied to allow the Applicant to travel to New Zealand from 11 February 2017 to 27 February 2017.*

2. The Notice of Motion is being supported by affidavits of the Applicant, Cherie Elizabeth Arts, and Jessica Pridegon, stating the grounds of this application.

3. The Applicant in his affidavit has deposed that the purpose of his intended visit to New Zealand is to attend the wedding of his step-daughter and undergo a medical review. The Applicant adopted to this proceedings, the two affidavits that he had filed in his previous bail variation application made in the Magistrate's Court. Cherie Elizabeth, the wife of

the Applicant in her affidavit, adopted to this proceedings, the affidavit she had filed in the Magistrate's Court, where she had deposed that she jointly owns two I-Taukei lease bearing No 8678 and 30771 respectively with the Applicant and has further stated her willingness to forfeit her shares of the said two I-Taukei leases to the State, if the applicant fails to return to Fiji. Jessica Pridegon, the step-daughter of the Applicant has deposed in her affidavit that she has already made substantive arrangements for her wedding that is scheduled to be held in New Zealand on the 18th of February 2017. She has further deposed that the Applicant is her step-father and will walk her down the aisle on her wedding day.

4. The learned counsel for the Respondent informed the court, that the State would adopt to this proceedings the affidavit of Detective Inspector of Police Esili Nadolo, that had previously filed in the bail variation application made in the Magistrate's Court. Subsequently, the parties were directed to file their respective written submissions, which they filed as per the directions. The matter then proceeded to hearing on the 17th of January 2017, where the learned Counsel for the Applicant and the Respondent made their respective oral arguments and submissions. I then adjourned the matter till 25th of January 2017 for the ruling. Meanwhile the court by its own motion invited the counsel of the Applicant and the Respondent on the 20th of January 2017, to make further submissions as to whether the court could consider the same evidence that has already been considered and determined by the learned Magistrate in the previous bail variation application.

5. Having carefully considered the respective affidavits of the parties and the submissions, I now proceed to pronounce my ruling as follows.

Background

6. The Applicant together with four others have been charged with one count of Inciting Communal Antagonism, contrary to Section 65(2) (a) (i) of the Crimes Decree. They were first produced before the Magistrate's Court of Suva on the 17th of August 2016.

The State did not object for the bail. Hence the Applicant with other co-accused persons were granted bail by the learned Magistrate on the following conditions, *inter alia;*

i) Personal bail of $ 1000,
ii) Not to re-offend,
iii) Not to interfere with the witnesses,
iv) Surrender all travel documents to court and stop departure order is granted,

7. On the 31st of August 2016, the Applicant had filed an application in the Magistrate's Court seeking an order to vary the bail condition, enabling him to travel to New Zealand from 20 October 2016 to 30th of October 2016 for a medical review and from 15th of February 2017 to 15th of March 2017 to attend to his step-daughter's wedding. The learned Magistrate refused the said application, concluding that there was no urgency and necessity for a medical review. The learned Magistrate has further concluded that the application to attend to his step-daughter's wedding in February 2017, was premature and the Applicant could make that application at the appropriate time in the appropriate court.

8. All four accused persons including the Applicant chose to have the hearing in the High Court pursuant to Section 4 (1) (b) of the Criminal Procedure Decree. The learned Magistrate accordingly had transferred the matter to the High Court. The Applicant and the co-accused persons appeared before the High Court on the 14th of October 2016. Justice Fernando released the Applicant together with other accused persons on the same bail conditions as imposed by the Magistrate's Court. The Applicant then made this application on the 22nd of November 2016.

The Law

9. Article 9 (3) of the International Covenant on Civil and Political Rights (ICCPR) has recognized the detention in custody of an accused awaiting trial shall be the exception rather than a rule. However, it has further recognized that the release from such custody

should be subject to guarantee of appearance in the proceedings. Article 9 (3) of the ICCPR states that;

> *"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*

10. The Human Rights Committee of the United Nation has held that the detention pending trial must be based on an individualized determination. In doing that, it is reasonable and necessary to take into account all the circumstances such as flight risk, interference with evidence or the recurrence of crime. **(1502, Marinich v Belarus, para 10.4, 1940/2010, Cedeno v Bolivarian Republic of Venezuela, para 7.10).**

11. Article 5 (3) of the European Convention on Human Rights has stipulated that the release from detention pending trial can be conditioned by guarantees to appear in trial. Article 5(3) of the European Convention on Human Rights states that;

> *"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial"*

12. In agreement with the above international human rights instruments, Section 22 (1) of the Bail Act states that bail can be granted unconditionally or subject to condition imposed by the court. Section 23(1) of the Bail Act has enunciated that the condition as stipulated under Section 22, should be imposed for the following purpose only, that;

i) Ensuring the accused person's surrender into custody and appearance in court,

ii) Protecting the welfare of the community,

iii) Protecting the welfare of any specially affected person,

13. The applicable scope of imposing the condition of bail has been discussed in **Iliaseri Saqasaqa (HAM 005.06S)**, where Justice Gates (as His Lordship then was) held that;

> *"Bail conditions, imposing as they must restrictions on persons awaiting trial, must therefore be reasonable and commensurate with the gravity of the offence and with the individual risks identified as applicable. Bail must not be fixed excessively, in effect, denying the applicant an opportunity to take up the grant of bail. This has been a principle of great antiquity in the common law".*

14. Justice Goundar in **Qarase v Fiji Independent Commission Against Corruption [2009] FJHC 146; HAM038.2009 (22 July 2009)** held that;

> *"The right to liberty is a basic human right. Bail for a person accused of an offence means authorization for the person to be at liberty instead of in custody, on condition that the person appears for trial. Conditional bail is granted as an alternative to per-trial detention. Permissible conditions include the surrendering of travel documents, imposition of a residence requirement and the provision of a survey assessed in relation to the means of the accused. These restrictions on the right to liberty are consistent with international law (Wemholl v Germany (1968) 1 EHRR 550)"*

Analysis

15. This application is neither to review nor to determine the correctness of the bail conditions imposed by the learned Magistrate on the 17th of August 2016 and the order of the High Court to release the Applicant on the same bail conditions on the 14th of October 2016. The scope of this application is to determine whether the court could

temporarily revoke the travel restriction imposed on the Applicant pursuant to Sections 22 and 23 of the Bail Act on the grounds advanced by the Applicant.

16. Accordingly, it is the onus of the Applicant to satisfy the court, the existence of special and imperative circumstances or factors that justify the revocation of conditions of bail. Such special and imperative circumstances or factors should have to be either new or have not already been considered by the court when imposing such bail conditions on the Applicant.

17. Justice Goundar in **Kasim v State [2008] FJHC 6; HAM 106.2007 (25 January 2008)** has discussed the jurisdiction of the High Court in an application of variation of bail conditions imposed by another judge, where His Lordship found that:

> *"At the hearing of the application, counsel for the State raised an issue about the Court's jurisdiction to vary bail conditions which were imposed by another judge. I invited the parties to file submissions on the issue of jurisdiction. I have received helpful submissions from counsel.*
>
> *Ms. Shah submits there is nothing in the Bail Act that gives the Court jurisdiction to hear this application. However, both parties accept that the application can be heard under the inherent jurisdiction of the Court. In the past, the Court has entertained similar applications* ***(see, Seniloli v State Crim. Misc Case HAM 029/04; Macartney v State Misc. Case No. HAM004 of 2008).***
>
> *There can be no doubt that the Bail Act is not a code. It is therefore useful to trace the history of the procedures for bail applications.*
>
> *All bail applications are rooted in the law of habeas corpus (**Sharpe R, The Law of Habeas Corpus, 2nd ed at p.134**)*

> *In **R v Spilsbury [1898] 2 QB 615, Lord Russel of Killowen CJ** said that it would take unmistakably clear and precise language to abrogate the inherent jurisdiction of a superior court of first instant to grant bail.*
>
> *There is, and remains, a general right to bail at common law, independent of statute (Re Wong Tai (1911) 6 HKLR 67, 69 per Sir Francis Piggott CJ). It is a residual jurisdiction and is not therefore parallel to the Bail Act.*
>
> *In my view, this Court has inherent jurisdiction over all bail applications including an application to vary bail conditions imposed by another judge.*

18. Justice Goundar in **Qarase v Fiji Independent Commission Against Corruption (supra)** has outlined the applicable approach in an application of this nature, where His Lordship held that;

> *"Whilst the need to secure the accused's attendance at hearings is a paramount consideration in this kind of application, the purpose of the overseas visit, the length of time the accused will be abroad and the inconveniences caused to the administration of justice are equally relevant factors for consideration"*

19. This application constitutes two grounds. The first ground is for the Applicant to attend for a medical review in New Zealand. The second ground is for the Applicant to participate for his step-daughter's wedding in New Zealand that is scheduled to be held in February 2017.

20. The learned counsel in his written submissions has specifically submitted in paragraphs 19 and 20, that the preparation for the wedding has begun some months prior to the Applicant been charged. The daughter has sent invitations to her family and friends in May 2016.

21. The letter by Dr. Ivan Connell dated 17th of August 2016, stating the Applicant had planned to have a clinical review with him, had been issued on the same day the Applicant was produced before the Magistrate and granted bail.

22. The learned Counsel for the Applicant during the course of the hearing submitted that the Applicant was aware about his planned medical review and the upcoming wedding of his step-daughter in New Zealand, when he was granted bail by the learned Magistrate, imposing a travel ban on the 17th of August 2016. Having briefly consulted the Applicant in open court, the learned counsel for the Applicant during the course of the hearing, further submitted that the Applicant had in fact informed the learned Magistrate about his planned medical review and the upcoming wedding of his step-daughter in New Zealand. However, upon careful perusal of the transcript of the audio recording of the proceedings of the Magistrate's Court on the 17th of August 2016, I find it otherwise. Accordingly, neither the Applicant nor his counsel has informed the court about his planned medical review and the upcoming wedding of his step-daughter in New Zealand.

23. Accordingly, it appears that when the Applicant was granted bail on the 17th of August 2016, he had already been aware and had planned his visit to New Zealand in order to undergo a medical review and participate for his step- daughter's wedding. However, reasons best known to them, neither the Applicant nor the counsel of the Applicant has informed the court about these planned visits when the court was contemplating of imposing bail conditions restricting his overseas travels pursuant to Sections 22 and 23 of the Bail Act.

24. I now draw my attention to the issue of the Applicant's medical review. The Applicant has mainly relied on the evidence that he has already presented in the Magistrate's Court. Apart from that, the only evidence that he presented in relation to this application is the letter issued by Dr. Ivan Connell dated 7th of November 2016. This letter is mainly an elaborative version of the previous letter issued by Dr. Connell on the 17th of August 2016. Dr. Connell has stated in the letter dated 7th of November 2016 that the Applicant is now on antibiotics and the treatment appeared to be successful. Dr. Connell has

founded his view based on the clear blood count taken in Fiji. According to the said letter, Dr. Connell only wishes to re-examine the Appellant in order to manage the condition and to avoid any further surgeries. The Applicant has failed to provide any information whether Fiji has medical facilities to monitor and review his medical condition locally and that the only option is to undergo such a medical review in overseas.

25. In the absence of such information and the comment of Dr. Connell made in his letter dated 7th of November 2016, I do not find the Applicant to undergo a medical review in New Zealand is imperative and essential.

26. Undoubtedly, it is an emotional moment for a father to walk down his daughter along the wedding isle on her wedding day. However, considering the wider spectrum of interests of justice and proper administration of justice, the court requires to go beyond the emotional aspect of human relationships in an application of this nature. In doing so, the court must consider the community ties of the Applicant in the country that he proposes to visit, the security that he proposes to submit in the event of his permission to travel overseas, the seriousness of the offence, the public interest in the alleged offence, and the possible sentence.

27. The Offence of Inciting Communal Antagonism is a serious offence that relates to communal and religious relationship of the community. Hence, public has a greater interest in an offence in this nature. The maximum penalty of this offence is ten years of imprisonment.

28. I now turn onto the proposed security undertaking given by the Applicant. The Applicant proposes to forfeit two properties that he owns jointly with his wife, in the event of his failure to return to Fiji. One of the properties is located at Vuda, Lautoka and other one is located at Lami, Suva. The Appellant claims that the present market value of the property at Lami is FJ$ 728,000 and the market value of the property at Vuda is FJ$ 2,000,000.

29. In fact, the Applicant is not the owner of these properties. The two properties are native lands. The Applicant has obtained these two properties on the basis of lease under the provisions of Native Land Trust Act. Hence, the owners of the properties are native *"mataqali"*, and not the Applicant. He is merely a lessee of the two properties for a certain period as prescribed in the two respective lease agreements No 8678 and 30771.

30. Section 5(1) of the Native Land Trust Act states that;

> *"Native land shall not be alienated by Fijian owners whether by sale, grant, transfer or exchange except to the Crown, and shall not be charged or encumbered by native owners, and any native Fijian to whom any land has been transferred heretofore by virtue of a native grant shall not transfer such land or any estate or interest therein or charge or encumber the same without the consent of the Board"*

31. Accordingly, the Section 5(1) of the Native Land Trust Act has specifically prevented the alienation of the ownership of I-Taukei land from its' customary owners. The statuary protection on the native land has further been strengthen by Section 28 (1) of the Constitution of the Republic of Fiji, where it states that;

> *"The ownership of all I-Taukei land shall remain with the customary owners of that land and I-Taukei land shall not be permanently alienated, whether by sale, grant, transfer or exchange, except to the State in accordance with Section 27".*

32. The Native Land Trust Act has established the Native Land Trust Board in order to manage and to administer the native lands in the county. Section 8(1) of the Native Land Trust Act has empowered the Native Land Trust Board to grant leases or licenses, where it states that;

> *"Subject to the provisions of section 9, it shall be lawful for the Board to grant leases or licences of portions of native land not included in a native*

reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed"

33. The two Native Leases bearing No 8678 and 30771 have been granted to the Applicant by the Native Land Trust Board for a certain period of time to possess it for residential purpose. Hence, the Applicant is not entitled to alienate the ownership of the land to any person under the provisions of the Native Land Trust Act. In respect of Lease No 30771, the Applicant is required to pay a yearly rent of $500 to the Native Land Trust Board. The annexed copy of the Lease No 8678, is not clear and visible. Hence, I am not in a position to ascertain the main conditions stipulated in Lease No 8678.

34. The Applicant has not specified whether he intends to forfeit the land as described in the two Native Leases or whether the remaining period of the two lease agreements. If he intends to forfeit the remaining period of the two lease agreements, he is required to obtain the consent of the Native Land Trust Board pursuant to Section 12 (1) of the Native Land Trust Act, which he has not provided in this matter. Accordingly, I do not find the proposed security by the Applicant sufficient enough to permit him to travel overseas.

35. The Applicant further proposes to forfeit his accrued balance in the Fiji National Provident Fund as a security. However, Part V of the Fiji National Provident Fund Decree has specifically allowed payment from the fund only to certain designated purposes. Hence, the proposed security of accrued balance of the Applicant's FNPF funds is not a sufficient security in this application.

36. The Applicant has a dual citizenship in Fiji and New Zealand, which enables him to stay in New Zealand indefinitely without the requirement of a valid visa. He has his family members living in New Zealand. Actually in his first application for variation of bail, he had intended to visit his grandchildren living in New Zealand. Therefore, I find the Applicant has strong community and family ties in New Zealand.

37. In view of the reasons discussed above, it is my opinion that the public interest and other considerations which I have taken into account overweights the emotional and sentimental significance of being present at the step-daughter's wedding.

38. In conclusion, I refuse this Notice of Motion and dismiss it accordingly.

39. Thirty (30) days to appeal to the Fiji Court of Appeal.

R.D.R.T. Ragasinghe
Judge

At Suva
25th January 2017

Solicitors
Haniff Tuitoga Lawyers for the Applicant
Office of the Director of Prosecutions for the Respondent