

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 16 of 2017

BETWEEN : **ETUATE RULADE**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. N. Sharma for the Appellant.
: Mr. J. B. Niudamu for the Respondent.

Date of Hearing : 15 May, 2017

Date of Judgment : 17 May, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellant was charged in the Magistrate's Court at Nadi as follows:-

Count One

Statement of Offence

Obtaining Financial Advantage by Deception: Contrary to section 318 of Crimes Act 2009.

Particulars of Offence

Etuate Rulade on the 20th day of May, 2016 at Nadi in the Western Division, by a deception dishonestly obtained a financial advantage of \$1,975.00 from **Foodhall Supermarket**.

Count Two

Statement of Offence

Obtaining Financial Advantage by Deception: Contrary to section 318 of Crimes Act 2009.

Particulars of Offence

Etuate Rulade on the 23rd day of May, 2016 at Nadi in the Western Division, by a deception dishonestly obtained a financial advantage of \$1,970.00 from **Foodhall Supermarket**.

- [2] The Appellant had pleaded not guilty to the above charges on 18 August 2016 the Appellant's first bail application was refused by the Magistrate's Court. Thereafter the Appellant made a second bail application. On 19 January, 2017 the learned Magistrate refused the second bail application as well.
- [3] The Appellant filed a timely appeal in the High Court against the refusal by the learned Magistrate of his second application for bail pending trial. After the Appellant's application to the Legal Aid Commission was approved, the Commission filed an amended Petition of Appeal with the following amended ground of appeal:-

“1. THE Learned Magistrate in refusing bail had erred in law and fact in the following manner:-

- i. *Failing to consider there were a material change in circumstances from the Appellant’s first bail application;*
- ii. *Misdirecting himself in referring the Appellant as a habitual offender.”*

[4] Both counsel have filed helpful written submissions and also made oral submissions for which the court is grateful.

GROUND OF APPEAL

[5] The Appellant has advanced one ground of appeal which has two limbs. The first limb is:-

“The learned Magistrate failed to consider there was a material change in circumstances from the Appellant’s first bail application.”

[6] Counsel for the Appellant submits that when the Appellant made his second bail application there was a material change of circumstances since the following grounds were not argued in the first bail application namely:-

- (a) *The Appellant’s family circumstances; and*
- (b) *his complaint against the condition of the remand center being unfit for human habitation.*

[7] Section 30 (7) of the Bail Act states that for a second or subsequent bail application the court need only ask whether there had been a material change in circumstances since the original order. If there has been no change, there was no need to look at the facts underlying the previous refusal of bail.

[8] To find out whether there has been a material change in circumstances from the first bail application which was refused by the Magistrate's Court on 18 August, 2016 it is important to look at the reasons deposed by the Appellant when he sought bail in his first application for bail.

[9] In his affidavit in support sworn on 20 July, 2016 the Appellant at paragraph 3 of his affidavit deposed as follows:-

"I urge the Court to grant bail with conditions. That I am able to provide suitable surety and will abide by any conditions the court may impose against me. I do not hold any travel document or passport."

[10] At paragraph 2 of the Bail Ruling dated 18 August, 2016 the learned Magistrate stated the following reasons for the bail application filed by the Appellant:-

"Mr. Maopa, E has filed formal application supported by an affidavit citing the following reasons; he has being on remand for more than 14 days; he does not have any travel documents and denied both offences and he has suitable surety and he seeks strict bail conditions."

[11] When considering the issue of family circumstances put forward by the Appellant in his second bail application the learned Magistrate in his Bail Ruling dated 19 January 2017 at paragraph 19 stated:

“There is no new ground advanced by the applicant to justify reconsideration of the bail. There is no supporting affidavit from his family to confirm the he has deposed. The fact remains that applicant has being convicted for dishonesty related cases and court cannot totally rely on his affidavit, court would require another independent person to come before the court and give evidence.”

- [12] Counsel argues that the evidence adduced by the Appellant was sufficient for the court to rely on since in a bail application the rules of evidence need not apply and there was no requirement for formal evidence to be given. Counsel relies on the Court of Appeal decision in *Eliki Seru vs. The State, Criminal Appeal No. AAU0152 of 2014* in particular paragraph 12:-

“When considering an issue relating to bail, there is no requirement for formal evidence to be given. It is well established that the bail jurisdiction was not equivalent to a criminal charge, the rules of evidence need not apply, and a court may rely on written hearsay evidence provided it was properly evaluated...”

- [13] Counsel finally submitted that the learned Magistrate had not properly evaluated the facts provided by the Appellant towards his family circumstances.

- [14] I note the issue of family circumstances was brought up by the Appellant in reply to the State’s response. The learned Magistrate at paragraph 11 of his Bail Ruling mentions the following:

“Applicant filed a reply to the States response stating that he cares for his 76 years old mother...”

[15] I accept that the learned Magistrate did direct his mind to the issue of family circumstances of the Appellant, however, after evaluating the evidence before him the learned Magistrate did not give any weight to the evidence which he was entitled to do.

[16] I endorse the comments made by Aluthge J. in *Mukesh Naicker vs. State, Criminal Misc. Case No. HAM 134 of 2015 (18 September, 2015)* that difficulties faced by the family, *per se*, whilst an accused was in remand, was not a valid ground for consideration of bail.

[17] In respect of the Appellant's complaint against the condition of the Remand Center the learned Magistrate had considered this complaint at paragraph 17 of his Ruling but was unable to make a determination due to lack of independent evidence by the Appellant to support his contention:

"On the alleged deplorable conditions of the Remand Center, there is no material evidence before me from Correction Authorities to independently assess the assertion of the applicant. In that regard, I will not seriously consider the complainants of the conditions of the Remand Centre."

[18] This limb of the ground of appeal is dismissed due to lack of merits.

[19] The second limb of the ground of appeal is:-

"The learned Magistrate misdirected himself in referring to the Appellant as a habitual offender."

[20] Counsel for the Appellant submits that the learned Magistrate had referred to the Appellant as a habitual offender in his Bail Ruling when the Appellant's declaration as a habitual offender by the High Court was

held to be unlawful by the Court of Appeal since the Appellant was not convicted of offences mentioned under section 10 of the Sentencing and Penalties Act.

[21] The decision of the Court of Appeal was delivered on 5 December, 2014 in *Etuate Suguturaga vs. The State, Criminal Appeal No. AAU 0084 of 2010*. Both counsel have assured the court that the Appellant is also known as Etuate Suguturaga. I also note that the Appellant's previous convictions list at pages 17 and 18 of the copy record mentions the name of Etuate Suguturaga which was accepted by the Appellant as correct in the Magistrate's Court.

[22] At paragraph 20 of the Bail Ruling the learned Magistrate stated as follows:-

"I am minded too that applicant was regarded as a habitual offender in HAC 43 of 2009 and that tips the balance of favor against granting bail to the applicant."

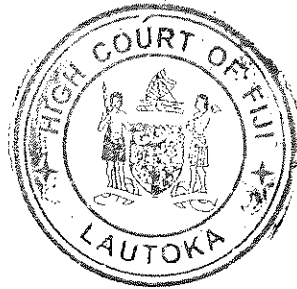
[23] I accept the learned Magistrate erred when he incorrectly relied on the fact that the Appellant had been determined a habitual offender as part of his Bail Ruling. However, in refusing bail to the Applicant this was not the only consideration taken into account.


[24] A perusal of the Ruling will show that the learned Magistrate had taken into account the Appellant's previous convictions, his pending matters in court and the fact that the Appellant reoffends soon after his release from the Corrections Center as considerations in refusing bail.

[25] This limb of the ground of appeal is also dismissed due to lack of merits.

ORDERS

1. The appeal against Bail Ruling dated 19 January, 2017 is dismissed;
2. The Bail Ruling of the Magistrate's Court is affirmed;
3. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

17 May, 2017

Solicitors

Office of the Legal Aid Commission, Nadi for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.