

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**MISCELLANEOUS JURISDICTION**

**CRIMINAL MISCELLANEOUS CASE NO: HAM 103 OF 2018**

**BETWEEN** : **INOKE GADRE**

**Applicant**

**AND** : **STATE**

**Respondent**

**Counsel** : **K. Vulimainadave for Applicant**

: **Mr. S. Seruvatu for Respondent**

**Date of Ruling** : **5 December, 2018**

**BAIL REVIEW RULING**

1. The Applicant was refused bail by the Learned Magistrate at Nadi by her Ruling dated 6<sup>th</sup> June, 2018. The Applicant was charged under the Crimes Act, 2009 with

one count of Aggravated Burglary, three counts of Burglary and four counts of Theft in four separate files (Criminal Case Nos. 347/18, 330/18, 330/18, 336/18).

2. As per paragraph 2 of the Ruling, the Applicant had sought bail in the Magistrates Court on following grounds.
  - a. Family obligations and sole breadwinner of the family
  - b. To attend to his farm to sustain his family
  - c. Constitutional rights were breached in the remand custody
  - d. He is unrepresented therefore he is seeking bail to occupy himself and to retain a lawyer of his choice.
  - e. He has learnt lesson while he was in prison
  - f. Promising not to reoffend
  
3. The refusal was substantially on the basis that the Applicant had 6 similar previous convictions and 2 similar matters pending in court in addition to 4 matters that were currently under consideration. In view of this history, the learned Magistrate formed the view that there was a likelihood of Applicant re-offending and absconding if bail were granted and therefore the interest of the public was at risk. Considering all these facts, the Learned Magistrate refused bail and remanded the Applicant pending trial.

4. The Respondent filed a written submission in reply seeking a dismissal of the application on the basis of the Ruling of this Court in Masirewa v State [2017] FJHC 956; HAM178.2017 (29 December 2017) where Gounder J stated that:

*“In my judgment the review procedure is unavailable if the bail decision could have been appealed. As was said by Scott J in Abhay Kumar Singh v State Miscellaneous Application 1/2004 (23 June 2004) that ‘review is only available where, for one reason or another, the appeal procedure cannot be resorted to’.*

5. This application for bail review has been made pursuant to Section 30 (3) of the Bail Act 2002. The Section states :

*“The High Court may review any decision made by a magistrate or by a police officer in relation to bail”*

6. This section clearly gives power to the High Court to review a bail decision of a magistrate unless the court is prohibited from making a decision in relation to the grant of bail by any other *written law* [Section 30 (6)] (*emphasis added*).

7. Judgments or orders of a court of law cannot be regarded as “written law”. Therefore one can argue that the power to review a bail determination of the magistrate could be exercised by this court despite the decision in Abhay Kumar Singh (*supra*).

8. In view of clear provision of Section 30(3) of the Bail Act, it seems that Scott J's view in Abhay Kumar Singh v State (*supra*) is not in conformity with law when his Lordship said that '*review is only available where, for one reason or another, the appeal procedure cannot be resorted to*'.
  
9. However, the Applicant is typically entitled to invoke the bail review option in the magistracy. Therefore, by giving effect to Abhay Kumar Singh decision, Applicant will not be prejudiced because he has the right under the Bail Act to file any number of bail applications in the magistracy asking the court to review its previous bail determination subject of course to the provisions of the Bail Act [S.30 (7)] and test for a renewed application for bail that whether there is a change in circumstances from the last decision on bail or are there circumstances which, although they then existed, were not brought to the attention of the court (State v Takiveikata [2008] FJHC 31; HAM 107.2007 (4 March 2008), Nottingham Justices, ex parte Davies [1981] QB 38).
  
10. The Bail Act 2002 provides for two avenues to challenge a bail decision. Section 31 (1) of the Act states that all bail decisions are appealable to the High Court. Section 31 (3) states that this section is in addition to section 30 (as to review of bail decisions). Section 30 (3) of the Act states that the High Court may review any decision by a magistrate in relation to bail. Section 30 (10) of the Act states that a review is a rehearing and the Court may receive evidence before making a decision on bail.

11. The key distinction between an appeal and a review is that on appeal the decision on bail is considered for errors in the exercise of discretion by the lower court, while on review, the decision on bail is considered afresh. Masirewa (supra)
  
12. It's important to realize that the scope of an appeal will be limited because the appellate court is only interested in learning if the court below exhibited an abuse of its discretion. This means that one can expect an appellate court to uphold the original bail decision unless it is obvious that it was erroneous, unreasonable, or arbitrary. If the appellate court determines that the bail decision appears to be supported by facts and the law, then the bail determination will not be changed.
  
13. A bail decision typically needs to be final for there to be an option to appeal. Orders for bail can be interlocutory, meaning that they are subject to change and may not be subject to appeal. In this jurisdiction, bail orders are generally considered not final, which means that a party aggrieved by a bail determination can ask the court that made the order to review its previous bail determination. When a subsequent bail review application has been refused erroneously, unreasonably, or arbitrarily, the order becomes final and an aggrieved party can come to this court by way of an appeal. Review in High Court is only available where, for one reason or another, the appeal procedure cannot be resorted to for example where the applicant had exhausted the appeal procedure.

14. There is no evidence that the appeal procedure cannot be resorted to by the Applicant. Therefore, the preliminary objection taken by the State should be upheld.
  
15. I considered the reasons given by the Learned Magistrate in refusing bail to the Applicant. The Learned Magistrate has not exercised her discretion arbitrarily. Even if this was an appeal, I am not convinced that there is an error in the exercise of discretion of the Learned Magistrate.
  
16. Bail should be granted unless the court is satisfied as to any one or more of the considerations set out in Section 19(1). They are:
  - (a) *That the accused is unlikely to surrender to custody and appear in court.*
  - (b) *The interest of the accused will not be served through granting bail.*
  - (c) *Granting bail would endanger the public interest or make the protection of the community more difficult.*
  
17. The State, in the Magistrates Court, relied on the limbs (a) and (c) above to oppose bail to the Applicant.

18. The Applicant had not disputed that cases of similar nature were pending against him when the charges in the present matters were brought into court. The Applicant has also not disputed that he had 6 previous convictions of similar nature.
19. The Learned Magistrate's finding is justified when she formed the view that the Applicant had a tendency to re-offend and abscond thereby posing a potential threat to the protection of the community.
20. There can be no doubt that the fact that new offences appear to have been committed whilst on bail would be a factor of considerable importance in deciding bail. It was held in R v Crown Court at Harrow [2003] 1 WLR 2756, at 2778 that:

*"the fact that new offences appear to have been committed whilst on bail is likely to be a factor of considerable importance against the defendant when deciding whether there is substantial grounds for believing that, if released, he would commit a further offence while on bail."*

21. All three grounds set out in Section 19(1) of the Bail Act need not to exist and existence of any one ground is sufficient to justify refusal of bail (Isimeli Wakaniyasi v State (2010) FJHC 20 (20<sup>th</sup> January 2010)). Therefore the Learned Magistrate has not fallen into error.

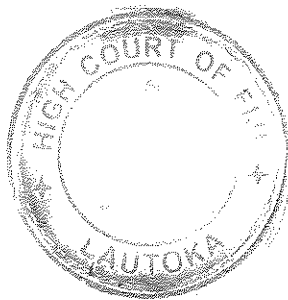
22. Having said that I must also emphasize the need to ensure a speedy trial to the Applicant in view of “indefinite” remand order made by the Learned Magistrate. The Applicant has been in remand for approximately 6 months now. The Learned Magistrate having refused bail remanded the Applicant in custody “**pending trial**”. However, no trial date has yet been fixed. I can understand the difficulties in the magistracy with its unmanageable work load in giving early trial dates. When an accused is remanded in custody, the court must see that an early trial date is assigned adjusting the existing diary. Although judicial officers are possessed of a discretion to order a detention of an accused person in remand for a period of up to two years, that discretion must be exercised judiciously having regard to provisions of the Bail Act and the Constitution. When a court decides, for whatever reason, to refuse bail to an accused, 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.
23. Section 14 (2) (g) of the present Constitution states: *every person charged with an offence has the right to have the case determined within a reasonable time*. When deciding whether to grant bail to an accused person, courts must take into account the time the accused may have to spend in custody before trial if bail is not granted [ Section 17.-(1) of the Bail Act].



24. The Applicant has the right to file a fresh bail application in the Magistrates Court and ask the magistrate to review the previous bail determination if there is an inordinate delay in prosecution or there are other new grounds or circumstances which, although they then existed, were not brought to the attention of the court.

25. Order

Application for bail review is dismissed.



At Lautoka

5<sup>th</sup> December, 2018

A handwritten signature in black ink, appearing to read "Arund Aluthge".

Arund Aluthge

Judge

Solicitors: Legal Aid Commission for Applicant

Office of the Director of Public Prosecution for Respondent