IN THE HIGH COURT OF FIJI
AT SUVA
APPELATE JURISDICTION

CRIMINAL APPEAL NO. HAA 013 of 2018
[Magistrates' Court Case No. 1849 of 2017)

BETWEEN	:	**STATE**	***Appellant***
AND	:	1. **LOIZOS PETRIDIS** 2. **CLEANTHIS PETRIDIS**	***Respondents***
Before	:	**Hon. Mr Justice Daniel Goundar**	
Counsel	:	**Mr S Shah for the Appellant** **Mr M Anthony for the Respondents**	
Date of Hearing	:	**29 March 2018**	
Date of Judgment	:	**12 April 2018**	

JUDGMENT

[1] The respondents are foreign nationals. They are citizens of the Republic of Cyprus. On 19 December 2017, they were arrested in Suva by the Fiji Police Force on suspicion of being involved in fraudulent withdrawal of funds from the Bank of South Pacific. The respondents remained in police custody after the High Court extended their pre-charge detention period beyond 48 hours upon an application by the State. On 28 December 2017, the respondents were produced in the Magistrates' Court and their detention was further extended for police to complete their investigation.

[2] On 29 January 2018, the respondents were jointly charged with a total of 293 counts of money laundering and attempt to obtain property by deception. They remained in custody on remand until 23 February 2018, when the court released them on conditional bail. This is an appeal by the State against grant of bail to the respondents.

[3] The appeal is governed by section 31 of the Bail Act. All bail decisions including orders, conditions or limitations imposed are appealable to the High Court either by an accused or the State. The grant or refusal of bail is a discretionary decision. On appeal that discretion is reviewed for errors of law or fact (*Wakaniyasi v State* [2010] FJHC 20; HAM120.2009 (29 January 2010)).

[4] The State advances four grounds of appeal. The first ground of appeal is that the learned magistrate erred in law in failing to turn his mind to, and properly consider the following:

(a) the respondents' background as foreign nationals and the complete lack of family and community ties in Fiji;
(b) the strength of the prosecution case against the respondents, as well as the seriousness, nature and circumstances of the offending; and
(c) the severity of any likely penalty, including the real possibility of an immediate custodial sentence if convicted.

[5] Section 19 (1) (a) of the Bail Act states that an accused must be granted bail unless the court is of the opinion that the accused is unlikely to surrender to custody and appear in court to answer the charges. In forming that opinion the court must have regard to all the relevant circumstances and in particular the following circumstances provided by subsection (2):

(a) as regards the likelihood of surrender to custody-

(i) the accused person's background and community ties (including residence, employment, family situation, previous criminal history);

(ii) any previous failure by the person to surrender to custody or to observe bail conditions;

(iii) the circumstances, nature and seriousness of the offence;

(iv) the strength of the prosecution case;

(v) the severity of the likely penalty if the person is found guilty;

(vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country).

[6] In the Magistrates' Court, the State objected to bail saying the prosecution evidence against the respondents was strong and given the severity of punishment for money laundering, if convicted, the respondents were unlikely to appear for trial. The prosecution evidence against the respondents was outlined in the affidavit of the investigating officer. The prosecution case is based on both direct and circumstantial evidence.

[7] When the respondents were arrested, they were found with fraudulent credit cards, assorted ID cards and $3,424.00 cash. After arresting the respondents, the police searched their apartment and found $173,150.00 cash, twenty nine fraudulent plastic cards, a credit card reader and writer machine and electronic storage devices such as laptops and USB stored with credit card and PIN numbers. CCTV footage obtained by police shows that the respondents were involved in suspicious transactions at various BSP ATM outlets. There is also paper trail evidence regarding the alleged fraudulent withdrawals of funds from the bank that are subject of the charges. Further, there is an eye witness account of the allegations that eventually led to the respondents' arrests.

[8] The learned magistrate gave the following reasons for his finding that the respondents were not a flight risk in paragraphs 18-21 of the ruling:

18. The defendants' have deposed affidavits in support of their application. They say they are citizens of Cyprus. They have surrendered their passports and travel documents to the police and therefore are not a flight risk. They have suitable sureties and are willing to post up to $5,000.00

cash bail. They are also willing to abide by any conditions that the Court may impose. They reject the submission of an INTERPOL warrant because there is no evidence of this

19. The prosecution objects to bail and have filed an affidavit deposed by Detective Inspector Aiyaz Ali who is the manager of Fraud Unit. The prosecution submits that the sureties are not suitable since they have not spent enough time with the defendants to become familiar with them. The defendants do not have any links to the community in Fiji or businesses so it is likely that they would abscond bail. Prosecution have also submitted authorities on bail applications by foreign nationals in illicit drugs cases as their authority for the denial of bail to the defendants. The prosecution also submit that there is a warrant for INTERPOL for the defendants but cannot disclose it.

20. Furthermore, the authorities tendered by the prosecution involve offences under the *Illicit Drugs Control Act* where the penalties are life imprisonment and a million dollar fine. Those authorities are distinguished from this matter because the offenders were couriers for cocaine or methamphetamines who were caught at our borders. The defendants in this matter if convicted may be sentenced to a maximum of 20 years and fined a maximum of $120,000.00. However, the Court has found one authority in ***Rimakshni Ranigal v State*** where the applicant/ defendant was charged with a similar offence as these defendants. She was bailed with strict conditions and had married an Australian citizen. She applied for bail variation to spend time with her husband which was dismissed by the High Court because of her strong family ties in Australia and that she had a de facto relationship with the husband after she was indicted.

21. The Court has considered the arguments by prosecution and the defence and finds no evidence of the defendants absconding bail. There is no evidence from INTERPOL regarding a warrant for the defendants. The court will examine the sureties to determine their suitability before making a final decision on bail.

[9] Except for noting that the maximum penalty prescribed for money laundering is 20 years' imprisonment, the learned magistrate did not carry out an independent assessment of the individual factors outlined in section 19(2) of the Bail Act to

determine whether the respondents were likely to appear in court to answer the charges against them.

[10] The main reason the learned magistrate gave for finding that the respondents were not a flight risk was that there was no evidence of absconding or an INTERPOL warrant. However, there was evidence of a National Warrant from Cyprus. In his affidavit, the investigating officer had stated that he had been informed by INTERPOL that the respondent Cleanthis Petridis has a National Warrant of Arrest from Cyprus. The investigating officer's sworn affidavit was sufficient to put the information before the court without requiring proof of the actual warrant from Cyprus.

[11] In my judgment, the learned magistrate made an error of law in not accepting the investigating officer's affidavit evidence regarding the National Warrant of Arrest from Cyprus. As the Court of Appeal said in *Seru v State* Cr App No. AAU0152 of 201 at [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. In **In re Moles** [1981] Crim LR 170 the Divisional Court stated that strict rules of evidence were inherently inappropriate when deciding a bail issue. In **R v Mansfield Justices, Ex p Sharkey** [1985] QB 613, 626, Lord Lane CJ stated that in a bail hearing the relevant material can be presented by a police officer. Also, under the Bail Act 2002 Forms have been prescribed to provide the relevant information to the courts from the Bar table."

[12] Further, the learned magistrate determined that the respondents were not a flight risk without considering all the relevant circumstances and in particular the factors outlined in section 19(2) of the Bail Act. The respondents have no employment or family ties in Fiji. They are accused of committing a sophisticated financial crime involving a large sum of money shortly after arriving in Fiji. The prosecution case is strong. The likely punishment is a custodial sentence if convicted. The respondents were arrested after a

tip off by an eye witness. They were found in possession of a large amount of cash, which the prosecution says is proceeds of crime, and instruments such as plastic cards, credit card reader and writer machine, which the prosecution says were used to commit the alleged financial crime. If the learned magistrate had considered all these factors, he would have come to the conclusion that there was a real possibility that the respondents would not appear for trial. Ground one succeeds.

[13] The second ground of appeal alleges that the learned magistrate made an error of law in accepting the respondents' sureties. When the respondents applied for bail, they did not disclose the identity of their proposed sureties in their affidavits. But they claimed that their proposed sureties were mature and respected members of their community and were capable of exercising a degree of control over them to ensure that they appeared in court when required.

[14] At the hearing, the State objected to the proposed sureties saying they were not a family member or an individual who had authority or control over the respondents to ensure compliance with bail conditions. The learned magistrate adjourned his ruling on bail to 23 February 2018.

[15] Before the learned magistrate pronounced his ruling on 23 February 2018, he assessed the suitability of the proposed sureties under oath. The two sureties were Mr Ilai Saivau and Mr Apenisa Naivau. Mr Saivau is 43 years old. He works as a Hapkido instructor with RFMF. Mr Naivau is 31 years old and works at Fiji Golf Club as a caddy. Both Mr Saivau and Mr Naivau met the respondents at the Golf Club. Otherwise, they had no other association with the respondents. Both claimed to have authority and control over the respondents. According to the court records, counsel for the State who appeared on this day for the bail ruling did not have an objection to Mr Saivau and Mr Naivau to stand as sureties for the respondents.

[16] It is the court's obligation to determine whether a proposed surety is suitable. Section 2 (1) of the Bail Act defines 'surety' as a person, other than the accused person or a person under 18 years, whom a police officer or court determines to be acceptable to provide confirmation of the accused person's bail undertaking, or security that such undertaking will be complied with. One of the conditions of bail was that the respondents provide a surety with a security bond of $500.00 each. If surety is required as a condition for bail, section 22(3) requires the court to ascertain under oath if necessary, the ability to provide the security bond.

[17] In paragraph 25 of the ruling, the learned magistrate gave the following reasons to find Mr Saivau and Mr Naivau as suitable sureties:

> "The sureties are friends and have no previous convictions and are outstanding members of their communities."

[18] While the State did not dispute that Mr Saivau and Mr Naivau had a good standing in the community, they opposed them being the sureties on the ground that they had no authority or control over the respondents. That was the issue that the learned magistrate was required to determine before accepting the proposed sureties. Counsel for the respondents have brought to the attention of this court a decision of Gates J (as he then was) in *Kumar v State* [2005] FJHC 726; HAM008.2005S (12 April 2005) where his Lordship accepted sureties who had very little acquaintance with a foreign national charged with fraud related offences. But in that case, the accused had returned to his home country and after learning of criminal allegation, voluntarily returned to Fiji and surrendered to police. The court took the circumstances as exceptional and accepted the sureties with limited acquaintance with the accused with caution.

[19] In the present case, the learned magistrate did not make any express finding that the proposed sureties with their little acquaintance could ensure compliance with bail

undertakings and conditions. Without that determination, the learned magistrate erred in law in accepting the sureties. Ground two succeeds.

[20] The third ground of appeal alleges that the learned magistrate gave undue weight to the assertion that the remand centre is not a suitable venue for the respondents' or indeed any accused person to prepare adequately for trial, particularly in the light of any evidence to support that finding of fact.

[21] One of the grounds for seeking bail was that the conditions of the remand centre were not conducive to prepare for trial of this magnitude involving 293 charges. In paragraph 24 of the ruling, the learned magistrate said:

> "The Court is aware of the task at hand with 293 counts which will involve a lot of work from all the stakeholders to ensure the trial is expedited. While having counsel is not an absolute right, the defendants are entitled to their counsel given the amount of charges they will have to answer for. The remand centre is therefore not a suitable venue for preparing for a case like this."

[22] There was no evidence put before the court that the conditions of the remand facility were such that the respondents could not adequately consult their counsel of choice or prepare their defence in order to receive a fair trial. Without that evidence the learned magistrate erred in concluding that the remand facility was not a suitable venue to prepare for the trial.

[23] The fourth ground of appeal alleges that the learned magistrate erred in law in that he failed to articulate the standard of proof that must be needed to be met by the party seeking to obtain bail; and in failing to find that the appellant had rebutted that presumption on the balance of probabilities in all the circumstances of this case.

[24] In *State v Tuimouta* [2008] FJHC 177; HAC078.2008 (18 August 2008), the Court said at [8]:

> A bail hearing is not a trial. In a trial the prosecution carries the burden of proof to satisfy the guilt of an accused beyond a reasonable doubt. In a bail hearing the prosecution carries the burden of proof on balance of probability that the accused should not be granted bail.

[25] In his ruling the learned magistrate did not refer to the standard of proof. If he had done so and directed himself accordingly, he would not have granted bail to the respondents.

[26] For the reasons given in this judgment, the State's appeal is allowed. The decision granting bail is reversed pursuant to section 31 (2) (b) of the Bail Act. The respondents to remain in custody while on remand pending trial. Mr Ilai Saivou and Mr Apenisa Naivau are discharged as sureties.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the Appellant
Messrs AC Law for the Respondents