

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

MISCELLANEOUS CASE NO: HAM 79 of 2018

BETWEEN : **KRITESH KUMAR** **APPLICANT**

AND : **THE STATE** **RESPONDENT**

Counsel : Mr. A. K. Singh for the Applicant
: Ms. J. Fatiaki for the State
Date of Hearing : 25th May 2018
Date of Ruling : 07th June 2018

BAIL RULING

Introduction

1. The Applicant filed this Notice of Motion, seeking following orders, *inter alia*:
 - (i) *The Applicant is released on bail pending trial.*
 - (ii) *The Applicant is allowed to have the substance further tested by Marine Department at the University of the South Pacific Compound to confirm all the substance in it.*
2. This Notice of Motion is being supported by the affidavit of the applicant, stating the grounds for this application.
3. Upon being served with this Notice of Motion, the Respondent filed an affidavit of Detective Constable Eliki Kaumaitotoya, stating the objections of the Respondent. Subsequently, the parties were directed to file their respective written submissions, which they filed as per the direction. The matter was proceed to hearing on the 25th of

May 2018, where the learned Counsel for the Applicant and the Respondent made their respective oral submissions. Having taken into consideration the respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows:

The Law and Analysis

4. The Applicant has not provided any grounds in his affidavit in support for the second order which he has sought in the notice of motion. Neither he made any submissions during the hearing to support the second order which he has sought in the motion. Therefore, I presume that the Applicant has abandoned this ground. I accordingly refuse and dismiss the application to have an order to re-test the substance at the Marine Department of the University of the South Pacific.
5. This is the second application for bail of the applicant. This application is founded on the following grounds that:
 - i) That he has strong community ties.
 - ii) Strength of the prosecution's case.
 - iii) Family circumstances.
6. The Applicant in his affidavit has explained in details about the circumstances prevailed in his previous conviction and blamed the Counsel who appeared for him in that case, which I find has no relevancy to this application.
7. Section 14 (1) of the Bail Act allows an accused person to make any number of bail applications. However, if the Court is of the view that such application is vexatious and frivolous, the Court could refuse to entertain such an application pursuant to Section 14(3) of the Bail Act.
8. Moreover, Section 30 (7) of the Bail Act states that if the Court is not satisfied that there are special facts or circumstances that justify making a bail application afresh under Section 14 (1) of the Bail Act, the Court could refuse to hear such application.

9. Accordingly, the right given to the accused under Section 14 (1) of the Bail Act to make any number of bail applications is subjected to the provisions of Section 14 (3) and Section 30 (7) of the Act.
10. The previous application for bail of the Applicant was refused on the grounds of seriousness of the offence, the severity of possible punishment if the applicant is found guilty, the previous conduct of the applicant, and the public interest and the protection of community.
11. In view of the grounds advance by the applicant in this application, I find that all of these grounds have already been considered by this Court in his previous bail application.
12. Donaldson LJ in **Regina v Nottingham Justices, Ex Parte Davies (1980) 2 All ER 775** has discussed the applicable principles pertaining to the issue of subsequent bail application in an inclusive manner, where his Lordship expounded that:

"However, this does not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. Far from it. On those previous occasions, the court will have been under an obligation to grant bail unless it was satisfied that a schedule 1 exception was made out. If it was so satisfied, it will have recorded the exceptions which in its judgment were applicable. This "satisfaction" is not a personal intellectual conclusion by each justice. It is a finding by the court that schedule 1 circumstance then existed and is to be treated like every other findings of the court. It is res judicata or analogous thereto. It stands as a finding unless and until it is overturned on appeal. An Appeal is not to the same court, whether or not of the same constitution, on a later occasion....."

13. Donaldson LJ in **Nottingham Justices (supra)** went further and discussed the scope of the subsequent application of bail, where his Lordship found that:

"The starting point must always be the finding of the position when the matter was last considered by the court. I would inject only one qualification to the general rule that justices can and should only investigate whether the situation has changed since the last remanded in custody. The finding on that occasion that schedule 1 circumstances existed will have been based upon matters known to the court at that time. The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since that last occasion, but also of circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider than "has there been a change?". It is "Are there any new considerations which were not before the court when the accused was last remanded in custody?""

14. According to Section 30 of the Bail Act, the High Court has no jurisdiction to review its own decision in relation to Bail. Section 30 (7) of the Bail Act states that;

"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."

15. Justice Goundar in **Jone Masirewa v The State (Criminal Miscellaneous Case No Ham 178 of 2017)** has discussed the distinction between bail review and appeal, where his Lordship held that:

"The Bail Act (the Act) 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 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. 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.*¹⁴

16. In view of the reasons discussed above, it is my opinion that a Judge of the High Court is not allowed to revisit or to give a different consideration to the same facts that has previously been considered and determined by the High Court in relation to an application for bail. Accordingly, the Court is required to consider an application of this nature only when the Court satisfies that there are new facts or circumstances that were not brought before the Court in the previous application of bail.
17. In view of Section 14 (3), and Section 30 (7) of the Bail Act, and the above discussed judicial precedents, it is my opinion that the grounds advanced by the Applicant in this application for bail have already been considered by this Court in his previous application of bail.
18. Accordingly I am satisfied that this application for bail is frivolous and vexatious pursuant to Section 14 (3) of the Bail Act. Moreover, it is my opinion that the applicant has failed to satisfy the Court that there are special facts and circumstances to justify the making of a bail application afresh pursuant to Section 30 (7) of the Bail Act. Hence, I refuse and dismiss this notice of motion filed by the applicant.
19. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
07th June 2018

Solicitors

Messrs. A.K. Singh Law for the Applicant
Office of the Director of Public Prosecutions for the Respondent.