

**IN THE HIGH COURT OF FIJI**  
**CRIMINAL JURISDICTION**  
**AT LAUTOKA**

**CRIMINAL MISCELLANEOUS NO. HAM 146 OF 2019**

**BETWEEN** : JUSTIN HO

**AND** : STATE

**Counsel** : Mr M Anthony for Accused  
: Ms P Lata for State

**Date of Hearing** : 31<sup>st</sup> July 2019

**Date of Ruling** : 23<sup>rd</sup> August 2019

**RULING**

- [1] The Accused is charged with one count of an attempt to export about 2 kilograms of cocaine on 23 December 2018. The prosecution case is based on joint enterprise with another co-accused. Both the Accused and his co-accused are in custody on remand since their arrest. The case has attracted significant public interest. The Accused is a sports celebrity. In the past, he has represented Fiji as a competitor on a number of occasions.
- [2] He applied for bail in the High Court. That application was refused by Wimalasena J on 6 June 2019. His lordship found that the Accused posed a flight risk and that it was not in the interests of justice which included the public interest and the protection of the community, to release him on bail. Following that decision, the Accused was admitted at Lautoka Hospital on 12 June 2019. He has remained at the hospital since that date under police guard. His initial diagnosis was that he was suffering from lower back pain affecting his mobility. The clinical diagnosis of the medical condition is unclear at this stage. That is pending availability of a MIR Report. Without the MIR Report the doctors are unable to propose any rehabilitation plan for the Accused.

[3] On 20 June 2019, this second application for bail was filed by the Accused through a new counsel on the basis that there are now change in circumstances to justify releasing the Accused on bail. The application is supported by an affidavit sworn by the Accused. The Accused relies upon two circumstances. The first circumstance is his medical condition. The second is an alleged error made by Wimalasena J in finding that the Accused had previously not complied with his bail condition in an unrelated matter by not surrendering his passport to court.

[4] The State opposes this application for bail.

[5] Section 14 of the Bail Act (the Act) provides for numerous applications for bail provided they are not frivolous or vexatious. The court has power to summarily dismiss frivolous or vexatious applications pursuant to section 14(2) of the Act. It was not suggested that the present application is frivolous or vexatious.

[6] The statutory test for a renewed application for bail is whether there are special facts or circumstances to consider releasing the Accused on bail. This is the test provided by section 30 (7) of the Act. That section states:

A court which has power to review a bail determination, or 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 a fresh application, refuse to hear review or application.

[7] The statutory test appears to be more stringent than the common law test of material change in circumstances applied by this Court in the earlier cases of renewed applications for bail (see, *Nagata v State* - Bail Ruling [2015] FJHC 644; HAM152.2015 (31 August 2015), *State v Dhamendra* [2016] FJHC 386; HAM58.2016 (10 May 2016)).

[8] The Bail Act has not defined the phrase 'special facts or circumstances' but has left it to the courts to decide on case by case basis. The word 'special' has been given the meaning exceptional or unusual in a number of cases. For the facts to be special they must be "peculiar to the particular case which set it apart from other cases" (*Lyon v*

*Wilcox* [1994] 3 NZLR 422, 431 (CA), following the Full Court in *Re M* [1993] NZFLR 74). For circumstances to be special they must be exceptional, abnormal or unusual (*Crabtree v Hinchliffe (Inspector of Taxes)* [1971] 3 All ER 967,976 (Lord Reid), 983 (Viscount Dilhorne)).

- [9] The charge that the Accused is facing is serious. The prosecution case is potentially strong and if convicted, the Accused is potentially facing a prison sentence. The Accused is a frequent overseas traveller. There is no suggestion that he is indigent. He has financial means. He has one pending case (not drug related) in the Magistrates' Court since 2014. He allegedly committed a fresh offence while on bail. His first application for bail was refused because he posed a flight risk. This Court will only upset that finding if there is a change in facts or circumstances that are exceptional or unusual.
- [10] The current medical condition of the Accused in my judgment is not so unusual or exceptional to eliminate the risk of absconding. The Accused was able to instruct a new counsel and swear an affidavit in support of his renewed application for bail. There is no suggestion that the condition has affected his mental health. As for his physical health, there is some evidence that his mobility has been affected but there is no evidence that the condition is permanent or that his condition will create inhumane circumstances for him in the remand centre. When the Accused was hospitalized he was put under a 24 hour police guard. The risk of absconding remains if the Accused is realised on bail.
- [11] In his ruling Wimalasena J expressed concern that the Accused may be in breach of his bail condition in the Magistrates' Court case that required him to surrender his passport. That concern arose from the affidavit of the Accused in which he had stated that he was holding an expired passport which he was willing to surrender to the court. Wimalasena J ruled that the expired passport should have been in the custody of the court in compliance with his condition of bail imposed by the Magistrate. While his lordship expressed some reservations regarding the Accused complying with his earlier bail condition to surrender his passport, his lordship did not expressly find that the Accused was in breach of his bail condition.

[12] In any event, the Accused has a right of appeal to the Court of Appeal based on alleged errors in the exercise of discretion refusing bail. A renewed application is not a proper mechanism to correct alleged errors in the exercise of discretion in granting or refusing bail. The proper avenue to correct errors in bail discretion is an appeal. Appeal grounds are not facts or circumstances that are so exceptional or unusual to justify releasing the Accused on bail.

[13] The second application for bail is refused.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Messrs. A. C. Law for the Appellant

Office of the Director of Public Prosecutions for the Respondent