IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 76 OF 2023

BETWEEN: **JOSEPH ABOURIZK**

APPLICANT

AND : **STATE**

RESPONDENT

Counsel : Mr. M. Naivalu for Applicant
Ms. R. Uce for Respondent

Date of Hearing : 17 April 2023
Date of Ruling : 27 April 2023

BAIL RULING

1. The Applicant has filed this application seeking bail pending trial.

2. The Applicant along with another is charged with one count of Unlawful Possession of Illicit Drugs contrary to Section 5(a) of the Illicit Drugs Control Act 2004.

3. The substantive case involves the largest haul of hard drugs ever seized by police in Fiji. A quantity of 49.9 k.g. of cocaine had been seized from the car driven by Applicant's co-accused. After trial, the Applicant was convicted by the High Court at Lautoka and was sentenced to a term of 14 years' imprisonment.

4. On appeal, his conviction was affirmed by the Court of Appeal and, on counter appeal by the State, the sentence was enhanced to 25 years' imprisonment.

5. His appeal to the Supreme Court was successful. The Supreme Court, by its Judgment dated 28 April 2022, quashed the conviction. The Court however reserved to the Director of Public Prosecutions (DPP) an option to apply for an order for new trial. In the meantime, the Applicant was remanded in custody. If a new trial were to be ordered, the Supreme Court reserved to the Applicant the right to apply for bail to the High Court. If not, the Applicant to be released.

6. An application for an order for new trial was filed by the Director of Public Prosecution. That application was conditionally granted. In allowing that application, the Supreme Court (a different panel), by its Judgment dated 25 August 2022, ordered what it called a 'limited retrial'. By that Judgment also, the Applicant was remanded until the case was mentioned in the High Court at Lautoka for 'limited re-trial'.

7. Having reviewed its own Judgment dated 25 August 2022 for re-trial, the Supreme Court ordered a full-fledged new trial. In that Judgment, the High Court Judge to whom the file is assigned was ordered to hear and decide the case before him expeditiously, and meanwhile the Applicant was remanded in custody. I believe the right to apply for bail to the High Court granted by its earlier judgment has not been denied to the Applicant by the Supreme Court by its last Judgment. In view of that, this Court decided to entertain this application for bail.

8. Pursuant to the Judgment dated 28 April 2022 of the Supreme Court, the Applicant has now filed this application seeking bail. He has proposed two sureties and indicated his willingness to deposit a cash bail of ten thousand dollars to ensure his presence in Court to face his trial. The Applicant says that he is of good character and has already served over 7 years in the correction facility and that his release on bail would not endanger public interest or make the protection of community more difficult. He argues that since his conviction has been quashed by the Supreme Court he is presumed to be innocent until proven guilty and therefore his right to be released on bail on reasonable bail conditions should be respected.

9. The Respondent (State) filed objections supported by an affidavit of Senior Superintendent of Police Serupepeli Neiko. The objections are mainly based on the fact that, if the application

9. The Respondent (State) filed objections supported by an affidavit of Senior Superintendent of Police Serupepeli Neiko. The objections are mainly based on the fact that, if the application is granted, there is a strong likelihood of Applicant not appearing in Court to stand his trial in view of the seriousness of the charge, the strong case against the Applicant and the fact that he is a foreigner.

10. According to s 13(1) (h) of the Constitution, a person who is arrested or detained has the right to be released on reasonable terms and conditions, pending a charge or trial, unless the interest of justice otherwise require. Section 3(1) of the Bail Act states that every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted. I must therefore be satisfied that the refusal to release the Applicant on bail is warranted in the present case in the interest of justice.

11. According to the Bail Act, the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charges laid against him / her.

12. The charge against the Applicant is serious. It entails life imprisonment. Before his conviction was quashed by the Supreme Court, he was serving the longest imprisonment term ever passed in Fiji for such an offence.

13. Generally, the strength of the prosecution case for the purpose of bail is assessed on a balance of probabilities on the basis of the facts disclosed by the State. This case is an exception in that the strength of the case against the Applicant has already been evidentially assessed by three courts including the highest Court of the land, the Supreme Court. The High Court found the Applicant guilty and the Court of Appeal by its majority judgment affirmed that finding. However, the Supreme Court found various infirmities in the case for Prosecution and held that the trial judge's finding on the credibility of the main prosecution witness Superintendent of Police Neiko is not tenable in law and it quashed the conviction.

14. The said Superintendent of Police Neiko is the deponent of the affidavit failed by the State in opposition to bail in this matter. Mr. Naivalu argues that the facts stated in this affidavit

stated in the affidavit are undisputed. As to the strength of the prosecution case, SP Neiko states that the State is relying on the evidence of the police officers who had been conducting the surveillance on the Applicant and his co-accused and had arrested the two accused in the possession of 49.9 kilograms of cocaine (Paragraph 23 of the affidavit).

15. I have to agree that the State's argument on the strength of the prosecution case in the impending retrial is premised on the credibility of a witness who have been discredited by the Supreme Court. However I have to take cognizance of the fact that, despite its finding on the credibility of the State's main witness, the Supreme Court appears to think that the petitioners should be retried.

16. The basis of the retrial can be gathered from paragraphs [36] and [37] of the Supreme Court Judgment dated 28 April 2022 which are as follows:

> The whole of ASP Neiko's evidence was important. It was his evidence which placed the petitioners in the car with the drugs. But in view of Abourizk's account of how the drugs came to be in the car, it was ASP Neiko's evidence about what he saw the petitioners do with the bags and the suitcases – unpacking and repacking them and then throwing away those suitcases which were no longer of use – which was the critical evidence. That was the evidence which, if true, directly linked the petitioners to the drugs, and completely undermined Abourizk's account of innocently taking the crew's luggage back to the yacht. Its importance in the case as a whole cannot be exaggerated. It was for that reason that counsel for both petitioners say that without that evidence there was absolutely nothing to contradict Abourizk's account of how the drugs came to be in the car. That meant, they say, that the prosecution's case stood or fell on ASP Neiko's truthfulness on this part of his evidence.
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> I do not agree. When a large consignment of drugs is found in a car with two people in it, that fact alone calls for an explanation about how the drugs came to be in the car. The burden of proof is not on a defendant, of course, but if that explanation is implausible, it may not be enough to cause the court to have any doubt about the defendant's knowledge of the presence of drugs in the car – even in the absence of evidence of the kind of repacking which ASP Neiko says he saw the petitioners do. Indeed, the prosecution says that Abourizk's explanation has a real implausibility at the heart of it. Would people who traffic in very large consignments of hard drugs like cocaine really leave such a consignment with people they hardly knew, even for a short time? The fact of the matter is that, unquestionably important though ASP Neiko's evidence was of the unpacking and repacking of the bags and suitcases, it is difficult to assert that it would not have been open to the court to convict the petitioners without it.

17. On the basis of the tenet of the above paragraphs, and in view of undisputed fact that the bag containing a large consignment of illicit drugs was found in the car in which the Applicant was travelling, I agree with the State's contention that the prosecution has a strong case despite its main witness, who is also the deponent of the affidavit in this matter, has been discredited by the Supreme Court. In view of the said observation, the Supreme Court appears to have taken the view that, despite the infirmities in the prosecution case, the petitioners should not be exonerated unless a plausible explanation was forthcoming from the driver / passenger of the vehicle in which a large consignment of hard drugs had been transported.

18. There is no doubt, with the quashing of the conviction, the Applicant is entitled to be treated as an accused like any other accused and that he has all the rights guaranteed to an accused under the Constitution and the Bail Act. However, his status as an accused should in my opinion be distinguished in that the presumption of innocence that was in his favour had been displaced by a judgment of the High Court and that judgment has been affirmed by the Court of Appeal. Even the Supreme Court, the final appellate court of the land, having allowed his appeal and quashed the conviction, has not thought it fit to set the Applicant free, even on bail. Instead, an option was given to the Director of Public Prosecutions to apply for an order for new trial, while keeping the Applicant in remand.

19. The Applicant is a foreigner and has no property/ community connections or fixed address in Fiji. Despite his willingness to deposit a considerable cash bail and his ability to present two sureties, I still consider the Applicant to be a flight risk in the circumstances of this case. The proposed sureties are pastors who have acquainted themselves with the Applicant during their prison visits for faith-based counselling programmes. It is not clear how they are going to take control and assure the presence of the Applicant in court. The fact that the Applicant has been in custody for the past seven years does not provide an assurance that he will appear in Court to face his trial even when he has been released on bail.

20. As regards the interests of the accused, I am unable to agree that the interests of the Applicant will be jeopardized by him having to defend his case whilst in remand. He has either been in remand or correction facility ever since he was arrested. Still he defended his case right from the High Court up to the Supreme Court with the assistance of eminent legal counsel both local and foreign. For the impending trial, he has already retained his former trial counsel who

is well versed with the facts of his case. No prejudice will be caused to the Applicant having to defend his case while in the remand facility. There is no evidence that the Applicant has a medical condition that cannot be attended to in the remand facility.

21. Mr. Naivalu has cited State v Lusaka HAM 280 of 2019 to show that even a foreigner accused of Murder has been released on bail by the High Court. The accused in that case had been released on bail on expiration of two year statutory time limit beyond which an accused is entitled to be released on bail. In State v Konkoen [2002] HAM 25 of 2020, which Mr. Naivalu has cited, the accused who was a foreigner had been released after 7 months in remand in circumstances where a trial date could not be assigned in the immediate future due to Covid 19 pandemic. I am not satisfied in the circumstances of this case that the Applicant will appear to stand trial if he is released on bail.

22. Mr. Naivalu also contends that the Applicant, being an Australian national, should not be discriminated against because of his nationality. I must say that it is not his nationality that prevents him from being released on bail. The Bail Act permits the courts in bail matters to consider whether the accused is a flight risk and whether he has community connections in Fiji. Bail application filed by his co-accused who is a Fijian citizen has already been dismissed by this Court and his nationality had nothing to do with the bail determination. In these circumstances, releasing the Applicant who is almost similarly situated as his co-accused would tantamount to discrimination.

23. Taking cognizance of the direction given by the Supreme Court for speedy retrial, this Court took every effort to fix Applicant's substantive case for trial, at the earliest. After the court vacation in January, Mr. Burney, the trial prosecutor, had flown from England to prosecute the trial. Unfortunately the Applicant and his co-accused were not ready. This court finally managed to fix his case for trial from 30 May 2023 despite Mr. Naivalu's indication that the Applicant has failed a review application in the Supreme Court. (This delayed application was once described by the State as a delaying tactic). Given that the trial date is already fixed in the coming weeks, the time Applicant has to spend in remand before the trial is minimal. That is the main reason that compels me to refuse bail to the Applicant at this stage.

24. Mr. Naivalu has cited Vuniva v The State [2005] FJHC 231 (17 August 2005) to support his contention that an accused had been released on bail even though his trial date was already fixed. The factual matrix that had compelled the court to grant bail in that case is materially different from the facts before me. The circumstances under which bail had been granted in that case is vividly described in the following paragraphs:

> In Ladpeter, I described the process by which judges should approach the question of conditions of custody in bail applications. At page 14 of the judgement I said:
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> > "What is the relationship between section 25 of the Constitution and section 19(2) of the Bail Act? Under the Bail Act, conditions of custody are relevant, and must be balanced with all other factors listed in section 19 in deciding whether or not to grant bail. However, when the conditions have reached a level of severity and humiliation such as to constitute inhuman or degrading treatment, then the deciding court must grant bail. This is because the right under section 25(1) is an absolute and non-derogable right. If a person is subjected to inhuman or degrading conditions of custody, then no reason is acceptable for further detaining him."

25. Bail determination is a highly individualised process whereby each case turns on its own facts.

26. As regards the interest of the public, the substantive matter involves, as I stated earlier, the largest haul of hard illicit drugs ever seized by police in Fiji. There is alarming increase of illicit drug related offences and it is in the interest of justice to determine the guilt or otherwise of the accused expeditiously in a timely passion either by punishing the offender or freeing the innocent specially in a case where the conviction has been quashed in appeal by the highest court of the land.

27. I am unable to agree with Mr. Naivalu's argument that, compared to heinous crimes such as rape and murder, the offence the Applicant is charged with is less harmful to the community. Dealing in illegal drugs is a major social concern and has the capacity to do immeasurable harm to society and its individual citizens.

28. I am mindful that the Applicant has already served approximately eight years in prison and of his right to a speedy trial. At the same time the Court is bound to balance his rights with that of the interests of the public. The Application for Bail should be refused at this stage in view that an early trial is possible.

29. The application for bail is refused.

Aruna Aluthge

Judge

27 April 2023

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for State
- Law Naivalu for Defence