IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 182 OF 2022

BETWEEN: **JOSESE MURIWAQA**

APPLICANT

AND : **STATE**

RESPONDENT

Counsel : Mr. Mark J. Anthoney for Applicant
Ms. R. Uce for Respondent

Date of Hearing : 23 January 2023
Date of Ruling : 27 January 2023

BAIL RULING

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

2. The substantive case involves perhaps the largest haul of hard drugs ever sized by police in Fiji. A quantity of 49.9 k.g. of cocaine had been seized from the car driven by the Applicant. After trial, the Applicant along with another was convicted by the High Court at Lautoka for the offence of Unlawful Possession of Illicit Drugs contrary to Section 5(a) of the Illicit Drugs Control Act 2004. He was sentenced to a term of 14 years' imprisonment.

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

4. He filed an appeal to the Supreme Court. The Supreme Court, by its Judgment dated 28 April 2022, quashed the conviction. The Judgment 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.

5. The Director of Public Prosecution applied for a new trial. A different panel of the Supreme Court ordered what it called a 'limited retrial'.

6. Pursuant to the Judgment dated 28 April 2022 of the Supreme Court, the Applicant has now filed this application seeking bail on the premise that 'there has been an exceptional change of circumstances' since the Supreme Court Judgment that quashed his conviction. He contends that he is no longer a convict but only an accused and therefore, the presumption of innocence and that of granting of bail should be held in favour of him.

7. 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 and the strong case against the Applicant.

8. There is no doubt that 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.

9. 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 has been given to the Director of Public Prosecutions to apply for an order for new trial while keeping the Applicant in remand.

10. An application for an order for new trial filed by the Director of Public Prosecution 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 doing so, the Court, having been satisfied on the strength of evidence led in trial, appears to have taken the view that the Applicant needs to be retried albeit in a limited manner described in the Judgment. By that Judgment also, the Applicant was remanded until the case was mentioned in the High Court at Lautoka for limited re-trial.

11. Having reviewed the said Judgment dated 25 August 2022, the Supreme Court ordered a full fledge new trail. In that Judgment, the High Court Judge to whom the file is assigned is ordered *to hear and decide the case before him expeditiously, and meanwhile the Petitioners are 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 last Supreme Court Judgment.

12. In quashing the conviction, the Supreme Court (in its Judgment dated 28 April 2022) at [36] and [37] observed 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.

13. In view of that 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 is forthcoming from them as the passengers of the vehicle in which a large consignment of hard drugs has been transported.

14. The Applicant as the driver of the vehicle is presumed to be in possession of the illicit drugs under Section 32 of the Illicit Drugs Control Act and, therefore, I agree with the State that there is a strong case against the Applicant in his trial.

15. I agree with the Learned Counsel for the Applicant that the fact that a person is charged with a serious offence is not a ground to refuse bail. However, the circumstances of the substantive case, the sentence the offence entails and the strength of the Prosecution case compel me to believe that there is a strong likelihood of Applicant not appearing in Court to face his trial, if he is released on bail.

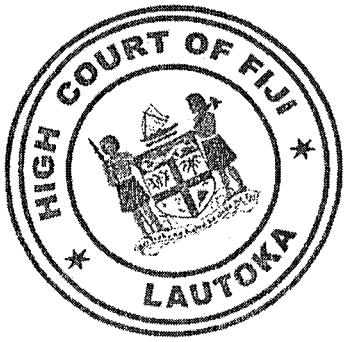
16. As the Supreme Court has directed, this Court fixed the matter for pre-trial on the very first day after the Court vacation in order to give the Applicant an early trial date. Unfortunately, the Applicant and his co-accused were not ready with their counsel to take a trial date. They were given ample time as per their request to secure legal representation of their choice particularly in view of his co-accused's submission that he has already exhausted all his money having gone through the appeal processes.

17. Once the accused are ready for trial with their Counsel, this Court is inclined to try the matter at the earliest possible time. I am unable to accept that Applicant's ability to effectively defend his case will be hindered by him being in remand. He had been in fact in remand during his original trial, still he had successfully secured legal representation from the private Bar and defended the case. Right from the High Court up to the Supreme Court, he has been defended by a private counsel whilst being in the correction facility.

18. There is no Covid threat either in Fiji or in the correction facility at the moment. Therefore, the submission of the learned Counsel for the Applicant is based on mere speculation.

19. I am mindful that the Applicant has already served approximately eight years in prison therefore 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.

20. The Application for Bail is refused.



Aruna Aluthge

Judge

27 January 2023

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for State
- AC Lawyers for Defence