



IN THE DISTRICT COURT OF NAURU

Criminal Case No 6 of 2020

THE REPUBLIC

-v-

KAUWEN ALIKLIK

RULING ON REMAND

Before: RM P. R. Lomaloma
For the Prosecution: DPP Ronald Talasasa
For the Defendant: Mr. F. Ribauw
Hearing: 19 February 2020
Ruling: 19 February 2020

Catchwords: Bail Act 2018, Public Interest — not to interfere with witnesses; interest of accused to be free, to return to work and to support his family; Balancing the risks in the interests of justice.

Introduction

1. The defendant was arrested by Police on Friday 14 February 2020 following the execution of a search warrant at 09:30 that morning which found some plant, dried leaves and seeds believed to be marijuana or cannabis in the defendant's home. Three plants were also found outside his room, also believed to be marijuana. The police have carried out a presumptive test which returned positive for cannabis on the materials described above.

2. The defendant was brought to Court on Friday afternoon and an application for additional remand under section 21 of the Criminal Procedure Act 1972 was granted for the Police to complete their investigation. On Monday 17 February, the DPP filed 2 counts of illegal possession and 1 count of unlawful cultivation against the defendant and asked for additional remand for 2 weeks to complete their investigation.
3. On Monday 17th February, the DPP filed a motion and an affidavit for further remand of the accused based on section 21 of the CPA. The defendant did not give any evidence. The motion and affidavit in support was only served on the defendant and his pleader in court. On 18th February, the Court ordered a hearing de novo, for the defendant to file any affidavit in opposition and with leave for the DPP to file a fresh affidavit.

The Affidavits

4. The DPP relied on an affidavit in support sworn by Senior Constable Drusky Dabwadauw which stated that the defendant was arrested on Friday 14th February 2020; that he has been in remand since then; that the caution interview statement has been conducted; that police need to speak to a person whose name came up during their investigations; that the defendant is a habitual offender and is being investigated for other allegations; and that the suspected marijuana plants, seeds and leaves seized from the defendant and which forms the basis of the charges have tested positive for cannabis under the presumptive tests carried out by Sgt Iwo Adam, a person qualified to conduct such tests. The affidavit continued that Police investigations are ongoing and they are afraid that if the defendant is released on bail, he might interfere with witnesses.
5. The accused relied on the affidavit sworn by his parents. The facts are that the accused is the oldest of 10 children; that he works with his father at a private construction company called Efficient Company; that he helps to feed his family from his wages; that he catches noddy birds to help support his family; that when the parents are not there, he acts as a fatherly figure for his younger siblings. The accused opposes this application.

The Law

6. The motion has been brought pursuant to Article 5 (3) of the Constitution and section 12 of the Bail Act. Article 5 (1) of the Constitution protects a person's right to his liberty

and only authorizes a few situations where he might lawfully be deprived of that liberty. Art 5(1) (c) allows his liberty to be deprived upon reasonable grounds that he has committed, or being about to commit an offence. Article 5(3)(c) qualifies this by requiring the Police to hold an accused person for no more than 24 hours, after which they are either to release him, or to take him to Court to determine whether he should be remanded further or be bailed. Section 12 of the Bail Act requires the same:

12 Procedure to be followed by police officers if bail not granted

If an accused person is refused bail by a police officer, the police officer who refused bail or another police officer of equal or superior rank shall, as soon as practicable, and in any event within 24 hours, bring the person before a court for a decision on bail by the court.

7. Section 4 of the Act gives the right to every accused person to be released on bail unless it is not in the interests of justice that bail should be granted. The gist of the DPP's arguments is that the Court must give the police in this case time to complete their investigations because of information that they came about in investigating this case. This was not in the affidavit but the DPP did say in arguments that there was information that the police wish to pursue in relation to this offending. The legal basis for this application seems to be *the interests of justice* in section 4(1).
8. Section 4(3) of the Act states that there is a presumption in favour of bail and then goes on to state the situations where that presumption is rebutted. The presumption means that the prosecution, if opposing bail, must bring evidence to the court on which it can base its decision. None of the situations mentioned there is present here so the presumption in favour of bail remains.
9. The prosecution can only rely on section 4(1) of the Act that it is not in the interest of justice that the accused be released.

ANALYSIS

The Likelihood of the accused person not surrendering to custody.

10. It was not the prosecution case that the accused should be remanded because if released, he is unlikely to surrender to custody.

11. The Interest of the Accused person
12. It is in the interest of the accused person to be bailed where he can continue to work and help support his family. We can infer that if he remains on remand, his job might be at risk and the longer the remand, the greater the risk.

The Public Interest and the protection of the community

13. Section 18(1)(c) tells the court to address the ~~(a)~~ public interest and the protection of the community. Section 19(1)(c) clarifies that ⁱⁿ considering the public interest and protection of the community, the court must consider if granting bail to the accused person would endanger the public interest or make the protection of the community more difficult. Section 19(2)(c) then lists the matters that the court must take into account in deciding the public interest and the protection of the community. I will turn to these from the evidence.
14. There was no evidence adduced by the prosecution that the accused would pose a danger to the community if he were released on bail. The DPP said that his offending was serious. I agree but the question for the court to answer is, does a person charged with possession and cultivation of drugs pose an immediate danger to the public such that he should not be released on bail? Given that the drugs have been confiscated by the police, I would answer this question in the negative.
15. Section 19(2)(c) requires the Court in assessing the public interest and protection of the community to consider 3 things which I discuss next.

Any previous failure by the accused to surrender to custody or observe bail conditions.

16. The accused has no previous convictions and there was no evidence he had been charged or bailed before.

The likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person.

17. This was the gist of the prosecution case but there was no evidence except assertions as to what interference the accused is likely to do, what evidence he is likely to interfere with and how this interference is likely to be carried out. Interference with evidence may be relevant where there is credible evidence that the drugs allegedly found on the accused is a part of a larger cache which the police have not found. There would therefore be a risk that if the accused was released, the drugs will disappear and

evidence would therefore have been interfered with for the purpose of section 19(2)(c)(ii). There is no evidence that this is the case here.

Interfering with a Witness

18. There is always a risk that an accused released will interfere with a witness. However, in this case, the accused was arrested after a search warrant executed on his room discovered dried plant, 47 seeds in his room and 2 live plants outside which tested positive for cannabis under the presumptive test. The testimony of the police officers who were involved in the raid and the analyst who carries out the confirmatory test in a laboratory, probably in Fiji would be relevant. I do not see the risk of the accused being able to interfere with these witnesses as high at all. I assess this risk as minimal.
19. There is also the possibility that there might be others involved with the accused in the cultivation and perhaps selling of illicit drugs. This is always a possibility in view of the quantity of "marijuana" involved. I can infer, that the fact that the accused's home was raided and he is under arrest to have been known to his friends and any potential witnesses. Nauru is a small island and the accused has been in remand for 5 days. Any witnesses either for the police or the accused has had more than enough time to do what they think in their best interest. Likewise, the police have had more than enough time to act on the information they obtained in their investigations.
20. It follows that the release of the accused on bail is unlikely to cause such significant interference with any potential witnesses as to require his continued remand.

The likelihood of the accused person committing an arrestable offence while on bail.

21. There is no evidence before the court, nor were there arguments that the accused is likely to commit an arrestable offence if he is released on bail.
22. A bail decision will always involve the balancing of competing risks in the interests of justice. I have analyzed the interests of the accused to be free on bail. They are valid reasons. The Constitution itself gives this right to him with exceptions as already discussed. It did not give the police the powers to remand and then require an accused to try and find an exception to allow him to be free. The Bail Act gives effect to the Constitutional right by giving the accused the presumption in favour of bail in section 4

of the Act. These are weighty matters, reflecting as they do the importance that Nauru gives to individual rights.

23. These rights of course have limitations and the interest of justice imbedded in section 4(1) of the Act requires that the court carry out a balancing act. What is important to realise is that in this case, we are talking about future risks. We are not talking of certainties but in the analysis of risks, good precise evidence should be made available to the Court so that it can perform its analysis better. Care should be taken in compiling the affidavits so that the interest of justice is served.

Conclusions

24. I have taken account of the interests of the accused as discussed above, I have taken account of the likelihood of the accused interfering with witnesses in the charges he is facing and potential witness in related offence; and I have taken account of the public interest and protection of the community and I conclude that the interests of justice require that the accused be released on bail on suitable conditions to address the concerns of the police.
25. The application is therefore dismissed.


Penijamini R Lomaloma
Resident Magistrate



The seal of the District Court of Nauru is circular, featuring a central emblem with a scale of justice and a book. The text 'DISTRICT COURT OF NAURU' is inscribed around the perimeter of the seal.