IN THE DISTRICT COURT OF NAURU

Criminal Jurisdiction
Criminal Case No. 78/2022

MAMBO QUADINA

-v-

THE REPUBLIC OF NAURU

Before: RM. Neil Rupasinghe
Prosecutor: Ms Francis Puleiwai
Defence: Mr Thomson Lee
Date of Ruling: 12th January 2023

RULING

Catchwords: Entitlement, Determination and Refusal of Bail; Exceptional Circumstances –the burden of proof.

The Facts:

1. On 11th November 2022, the accused was formally charged. Bail was refused as he allegedly committed a limited bailable offence listed under Section 4 of the Bail Act. However, the defendant applied together with affidavits and sought bail under exceptional circumstances.

2. On 12th December 2022, the accused pleaded not guilty to both counts, and the matter was fixed for a bail hearing on 14th and 19th December 2022. Both parties tendered written submissions. I acknowledge the hard work of both counsels.

3. In supporting their bail application, two affidavits by the spouse and sister of the accused were filed. In the bail application, the defendant mentioned that he is employed as a construction worker and maintaining his family because he has been remanding his family facing financial hardships and therefore had prayed to grant bail.

4. In supporting Mr Thomson Lee, has cited ***Scotty Vs Republic*** [[2022] NRSC 6; Miscellaneous Case 51 of 2021] and ***Timothy Vs Republic*** [[2022] NRSC 19; Criminal Case 7 of 2022] and suggested that he is entitled to bail under work commitments as both mentioned case authorities have recognised work commitment as an exceptional ground for bail in limited bailable offences.

5. Objecting to the bail application Ms Pulewai suggested that when granting bail, the Supreme Court had not solely based on work commitments but three months rule mentioned under Section 4 of the Bail Act. At the bail hearing, she indicated that the court granted bail mainly due to the limited schedule, as it was impossible to allocate time for the trial of relevant matters. Therefore she objected to granting bail as there is sufficient time to conclude the present case.

6. Bothe parties agreed that the alleged offences are limited bailable offences. And it is further agreed that the burden of proving the exceptional circumstances is on the defendant's shoulders. Therefore after considering the submissions by both parties, this court concludes **that the main issue before this court** to resolve is;

    A) Whether or not the defendant had sufficiently managed to reach the threshold of exceptional circumstances demanded by law.

The Legal Background:

7. Section 4 of the Bail Act provides that there is a presumption of granting bail, and every accused has the right to be released on bail: Section 4 provided as follows;

"4 Entitlement to bail

(1) Subject to the provisions of this Act, every accused person has a right to be released on bail.
(2) A court may grant bail to an accused person charged with an offence in accordance with the provisions of this Act.
(3) The presumption in favour of the granting of bail to an accused person under subsection (1) may be rebutted by a prosecutor or any other person, where the interests of justice so requires.'

8. As an exception to the general right of bail mentioned above, Section 4 of the Bail Amendment Act 2020 further provided as follows;

" 4A Bail not be granted in certain circumstances

(1) A person shall not be granted bail where:

(a)he or she charged with an offence:
(I) of murder, treason or sedition
(II) under Part 7, Divison 7.2 and 7.3, and part 8 of the Cries Act 2016, Or
.....
(d) he or she is convicted of one or more of the offences in subsection (1)(a) and is appealing such conviction "

(Emphasis added)

9. The Bail Amendment Act 2020 has specifically outlined the law concerning granting bail under exceptional circumstances. Therefore when there is an acceptable exceptional circumstance only limitation for granting bail is the previous conviction of the applicant for offences mentioned under subsection (1) of the same but nothing else.

"4B Bail for certain offences in exceptional circumstances

(1) Subject to subsection (2), a court shall not grant bail, except in exceptional circumstances:
(a) on an application of a person charged with any of the following offences:
(i) .....;

(iii) assaulting a police officer in the execution of the police officer's duties;
(iv) intimidating or threatening a police officer in the execution of the police officer's duties; or
(v) ……..
(b) ……

(2) Subsection (1) shall not apply to an accused person who has been previously convicted by a court for one or more of the offences in subsection (1).
(3) Where an accused person is remanded in custody under this Section, the court shall direct the parties for an ***expeditious trial and conduct the hearing of the cause or matter.***
(4) The ***onus of establishing exceptional circumstances under subsection (1) shall be on the accused person.***
(5) An accused person, who is remanded in custody under this Section, may apply for bail on any grounds or reasons, other than exceptional circumstances under subsection (1), where the ***trial*** *for the offence he or she is charged with* ***has not commenced within three months*** *of the date on which the information or charge was filed in court.*
(6) ……" *(Emphasis added)*

Bail Determination:

10. The applicant's counsel Mr Lee has suggested that the possible chain consequence of his absence from work would result in losses to his employer and hardship faced by 3 of the workers who work under the supervision of the applicant. The applicant's counsel suggests that since the Facts of the current case, ***Scotty Vs Republic*** and therefore the applicant is entitled to bail as District Court is bound by said decision.

11. I'm afraid I have to disagree with the above suggestion of Mr Lee, as ACJ Khan granted bail on two grounds that's 1] work commitments and 2] predictable impossibility of complying with three moths rule due to the heavy list of cases. Unfortunately, this court has not fixed any date for a hearing for this matter. Therefore it is baseless for the defendant to assume that the court would not conduct the trial within three months as it is entirely in the hands of the court.

12. In addition to the above, the only opportunity for the defence to raise the issue of 3 months rule would be available only after the expiration of the three months but not

prior. However, the court can anticipate the impossibility of the conclusion of proceedings within the prescribed three months, as in ***Scotty Vs Republic*** and may decide to grant bail before the end of 3 months limit. But this does not give any right for the defence to make such an application at an early stage of proceedings.

13. I noticed that in ***Scotty Vs Republic,*** ACJ Khan considered that there was no alternative for the work the accused did, and there was no replacement for him as an exceptional circumstance. As a direct result of remanding, there were 15 workers about to lose their jobs as the accused was the only person who was supposed to extend the contract with the government. In brief, ACJ Khan has considered "public interest" but not the actual "work commitment of the applicant". In the ***Scotty Vs Republic,*** ACJ Khan stated as follows ;

> *"The applicant's "work commitment" may in itself constitute "exceptional circumstances" as his continued remand has the possibility of him being unable to obtain an extension of his contract with the government, which I stated earlier is due to expire at the end of this month(Feb 2022) and thus leave 15 people unemployed who will not be able to obtain any assistance from the government by way of unemployment benefit and therefore exposing themselves and their family members to grave financial hardship".*
>
> *(Emphasis added)*

14. Above explanation of ACJ Khan affirms that it was not the financial hardship of the applicant. Still, the future financial problem of the workers who depended on the applicant was his honour's primary concern. And Khan J used the word "may" to indicate that it is open to the bench to consider work commitments as an exceptional ground for bail.

15. In ***Republic v Agege*** [2021] NRSC 16; Criminal Case 6 of 2021 (16 April 2021) *Fatiaki CJ stated;*

> *"For instance, family hardship and loss of employment are the usual consequences of the remand of a sole breadwinner; therefore I order to qualify as am "exceptional circumstance", the consequences to the individual and his family must be unusually harsh bordering on destitution*

and starvation. Likewise having a health condition such as chronic asthma or kidney failure requiring regular dialysis several days a week may become exceptional in the absence of appropriate treatment facilities in prison. The unsegregated incarceration of minor offenders with adult remandees or serving inmates in a correctional facility could amount to an "exceptional circumstance" if the minor offenders are victimised or sexually assaulted."

(Emphasis added)

16. On the other hand, in this matter, the applicant is nether hold a unique position which can not replace by another, nor does the remanding have any impact on society in general. In brief, in this case, I can not find any issue of public interest. All the mentioned concerns by the defendant are entirely in private nature and apparent results of a remanding a person. I would call them part and partial of criminal proceedings or "Acts of God".

17. In ***Republic v Agege*** (supra), *Fatiaki CJ Further stated* ;

"Exceptional circumstances" is comprised of two (2) ordinary English words, an adjective (exceptional) and a noun (circumstances) which must be given a meaning. The Oxford English Dictionary defines "exceptional" as unusual, rare, and atypical. It is the opposite of common, ordinary, and typical. In my view, circumstances need not be exceptional "per se"; rather, the expression encompasses a situation where there may be ordinary conditions and factors whose cumulative effect is exceptional in how it affects the applicant and his/her family."

(Emphasis Added)

Conclusion:

18. After considering all the facts tendered, the interests of the accused and the community's interests, this court concludes that Defendant has failed to reach the threshold of exceptional circumstances. Therefore I **refused to grant bail to the accused and dismissed the bail application.**

DISTRICT COURT OF NAURU

.....

Neil Rupasinghe

Resident Magistrate