

**BETWEEN** : ISIAH CATER - Appellant,

**AND** : REX - Respondent.

**BEFORE THE HON. CHIEF JUSTICE WARD in chambers.**

**Counsel:** Mr L. Foliaki for the Appellant  
Mr Kefu for the Respondent

**Date of hearing:** 7<sup>th</sup> April, 1999.

**Date of Judgement:** 9<sup>th</sup> April, 1999.

### Judgement

The appellant is a United States citizen and has been arrested and charged with two offences; obtaining credit by false pretences and, alternatively, aiding and abetting that offence. He was bailed by the magistrate to appear on 14 July 1999 on his own recognisance of \$1,000.00 and two sureties each of \$500.00. The conditions imposed by the magistrate were that he should reside in Tonga and not leave without the consent of the court. He had also to surrender his passport to the court and report to the police station each week.

He appeals against those conditions:

The prosecution opposes the removal of the conditions on the ground that there is not sufficient evidence to satisfy the court that he will attend his trial if he is allowed to leave the country. Counsel for the Crown suggests that there should have been an affidavit in support in order for the court to be satisfied. I do not agree. Under the Bail Act, the accused is entitled to bail unless the court is satisfied there are substantial grounds for believing that, if bailed, he will fail to surrender to custody. I do not read that as meaning the accused has to satisfy the court he will attend but that the prosecution must satisfy the court he will not. That seems clearly to place the burden on the prosecution. Having said that, in any case involving a foreign national with no ties to this country, the court may well feel that he will fail to surrender to his bail unless there is a condition that he should surrender his passport.

Section 4 of the Bail Act as relevant to the present case provides:

"4. (1) A person who is arrested or charged with an offence punishable with imprisonment shall be granted bail unless the Court, or a police officer (in the case of a person arrested) is satisfied that -

- (i) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will
- (a) fail to surrender to custody

(2) In taking the decisions required by subsection (1), the Court ... shall have regard to all the relevant circumstances and in particular -

- (a) the nature or seriousness of the offence (and the probable method of dealing with the defendant for it) ...
- (d) the strength of the evidence of his having committed the offence."

The offence in this case relates to an unpaid hotel bill in excess of \$40,000.00, which was incurred by a Mr Allan who stayed in the hotel for some months until he died unexpectedly in the early part of this year. In about September of last year, when he had been staying in the hotel for some months and incurred a bill in the region of \$20,000.00, it appears the hotel management was becoming perturbed. The hotel staff understood he was involved in American Football.

The accused is the chief executive of an organisation in the United States called, somewhat ponderously, the National Professional Minor Football League Conference Ltd and he wrote to the Hotel on the letterhead of that organisation saying that he was intending to visit Tonga soon and that he would pay Allan's bill together with an additional sum of around \$2,000.00. He asked the hotel not to put Allan out. He did come and also stayed in the hotel. He did not pay Allan's bill but it appears the hotel continued to let Allan add to his bill. After Allan's death, the accused left the hotel. He has paid his own bill in its entirety.

Mr Kefu has told the court that the false pretence upon which the prosecution relies is the letter written by the accused in September last year. That letter, as has already been stated, offers to pay the outstanding bill. Mr Allan had already obtained the credit when the letter was written and so nothing the accused did afterwards could possibly be abetting the obtaining of that credit.

As to the alternative charge, Mr Kefu tells the court his case is that, by the letter, the accused took over the credit and that was only possible because of the false pretence that he would pay.

I have already had this accused before me in a civil application and counsel for the appellant relies on evidence adduced in that hearing and asks that it be considered in this appeal. The accused was sued for the debt by the hotel and prevented from leaving the country when the plaintiff applied for a writ of ne exeat regno. After considering the evidence brought in relation to that, I refused the writ. Counsel for the prosecution tells

me that it was only when the application failed that the hotel laid the criminal complaint. Mr Foliaki, for the accused, points out that there was no allegation of fraud in the original claim.

I have used only those matters that were not the subject of dispute in the other proceedings. They were that the accused, as the representative of the NPMFLC had established and equipped American football teams in Tonga, Fiji and the Cook Islands. He has arranged a competition between these teams that is due to start in May of this year. In order to run such a competition he or a member of the NPMFLC will have to come to Tonga. The NPMFLC is a corporation registered in the United States with an office and about six office staff. The members of the Tonga team are included amongst the employees of the NPMFLC and it employs at least three Tongan officials. When the accused first wrote to the hotel, he said that the corporation was interested in buying the hotel. Terms of the sale had been drawn up and included a relatively low purchase price because the hotel was heavily in debt and the purchaser would take those over those debts which would, it must be assumed, have included the bill owed by Allan. At the time of Allan's death, two banking houses in Tonga had offered finance for the purchase. Those offers have since been withdrawn but only after the accused had moved out of the hotel. These matters, as has been said, were not disputed in the civil action although the bona fides of the accused and his ability to carry these plans through were the subjects of fierce challenge by the plaintiff.

I consider the terms of section 4(2)(d) allow me to take all these matters into account in considering the terms of the accused's bail. The magistrate described the offence as very serious and it clearly is, carrying a maximum penalty of three years imprisonment. The amount of credit obtained is substantial but the seriousness of such an offence lies far more in the nature of the false pretence. In this case the hotel appears to have allowed Allan to continue to incur a greater debt but the prosecution are not alleging that is part of the fraud because they only rely on the letter and the debt incurred up to that time.

Defence counsel tells this court that, when explaining to the magistrate that the accused has reason to return to Tonga, he pointed out that the equipment supplied to the team in Tonga is worth a figure in the region of \$50,000.00. The magistrate responded that, as American football is only a minor sport in Tonga, it would not fetch anything approaching that sum if it were to be sold. I think, with respect, the magistrate was confusing the repayment of the debt with the requirement of imposing bail in terms that would ensure the return of the accused. In order to assess the latter, he should consider the value of the equipment to the accused not to a potential buyer in the event of an enforced sale.

Counsel for the prosecution fell into the same trap when he suggested that, should the court allow the accused to leave the country by returning his passport, the two sureties should each increased to \$20,000.00 because of the total sum owed. When the court fixes the sum in which the sureties are to be bound, it is to consider what would be a sufficient sum to ensure the accused will return, not a sum sufficient to cover the debt. This

accused is facing a criminal charge. It is not proper to treat such a charge as a means of pursuing a civil debt and the police should be wary of being used in such a way.

I have considered this case most anxiously and I am conscious of the risk that the accused will abscond. However, I am also concerned that bail conditions that will prevent him leaving the country for another three months at least may be out of proportion to the offence with which he is charged and the penalty likely to be imposed should he be convicted. I also bear in mind the factors the prosecution will have to establish in order to prove such a charge and the strength of the evidence. No grant of bail, even subject to the most stringent conditions, can fully guarantee the accused will attend his trial. The court must balance the risk that he will fail to appear against the restriction on the liberty of an unconvicted man and the strength of the case for which he is being held. I do not feel this is a strong case on the evidence described to me.

As I have already stated, this is a criminal charge. The hotel's right to the money is not an issue and will properly be pursued through the civil courts.

The grant of bail on terms that prevent the accused attending to his business in his home country and rejoining his family is not a true grant of bail but a form of restricted liberty. In many cases involving foreigners it is justified but in this case for the reasons I have outlined, I consider it is out of proportion to the offences he is facing and the likelihood of conviction.

I allow the appeal. The accused is to be bailed on his own recognisance of \$3,000.00 and two sureties each of \$3,000.00 to attend the magistrates' court on 14 July 1999. He is to have his passport returned to him and I do not restrict his right to leave the country.

DATED: 9<sup>th</sup> April, 1999.



*[Handwritten signature]*  
CHIEF JUSTICE