IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 6 OF 2017
(High Court HAM 204 of 2016)
(High Court HAC 361 of 2016)

BETWEEN : **HANK ARTS**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Chandra JA
Bandara JA

Counsel : **Mr F Haniff for the Appellant**
Mr M Korovou for the Respondent

Date of Hearing : **16 February 2017**

Date of Decision : **17 February 2017**

DECISION

[1] This is an application for leave to appeal the decision of the High Court refusing an application for a variation of bail conditions. In the event that the Court grants leave the

hearing of the application for leave to appeal doubles as the hearing of the appeal itself. There was some urgency in these proceedings as the Appellant was seeking a bail variation to enable him to travel to New Zealand no later than 17 February 2017. The application for leave was filed on 9 February 2017. Both parties filed helpful written submissions prior to the hearing.

[2] The application for leave to appeal the decision is made pursuant to section 21(3) of the Court of Appeal Act Cap 12(the Act). The section states:

> *"The Court of Appeal may, if it gives leave, entertain an appeal from the High Court against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, upon the application either of the person granted bail _ _ _."*

[3] The Appellant together with four others, has been charged with one count of inciting communal antagonism contrary to section 65(2) (a) (i) of the Crimes Decree 2009. This is a serious offence for which upon conviction there is a maximum penalty of up to 10 years imprisonment. He and the others were first produced before the Magistrates Court at Suva on 17 August 2016. The Respondent did not oppose bail. Bail was granted to the Appellant and the other accused on the same conditions that included, amongst others, that each accused surrender all travel documents to the court and stop departure orders were granted.

[4] An application for variation of bail conditions was filed by the Appellant in the Magistrates Court on 31 August 2016. He sought a bail variation to allow him to travel to New Zealand for a medical review between 20 October 2016 and 30 October 2016 and to travel between 15 February 2017 and 15 March 2017 to attend his step daughter's wedding. The application was refused. When the proceedings were transferred to the High Court on 14 October 2016 with the same bail conditions the Appellant made a further application to the High Court for a variation of bail conditions to travel to New Zealand for the same two purposes but between the dates 11 February and 27 February 2017.

[5] The learned Judge concluded that the Appellant's need to undergo a medical review in New Zealand was neither imperative nor essential. The learned Judge also concluded that the public interest in ensuring that the Appellant attends at court when called upon outweighs any desire on the part of the Appellant to be present at his step daughter's wedding.

[6] The learned Judge's conclusion was based on the fact that the Appellant is a New Zealand citizen whereby he could move freely into New Zealand and remain there indefinitely. The learned Judge also found that the Appellant has family ties in New Zealand. The Judge was not satisfied that the security undertaking given by the Appellant represented sufficient guarantee that he would return to the jurisdiction and honour the bail variation conditions if the application were to be granted.

[7] Being dissatisfied with that decision the Appellant now appeals to this Court. The grounds of appeal upon which the Appellant relies are set out in his Notice of Appeal filed on 9 February 2017 as follows:

> *"1. The Learned Judge wrongly put the burden on the Applicant/Appellant to prove that he would return back to Fiji instead of requiring the State to establish that the Applicant/ Appellant would not return to Fiji.*
>
> *2. The Learned Judge wrongly found the security offered by the Applicant/Appellant to ensure his return to Fiji was insufficient.*
>
> *3. The Learned Judge failed to give any consideration that the Applicant/Appellant had proposed two sureties who were prepared to stay in Fiji during the Applicant/Appellant's absence overseas and abide by any conditions that the Court would deem fit to impose to ensure the Applicant/Appellant's return to Fiji.*
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> *4. The Learned Judge misinterpreted Dr Ivan Connell's opinion by holding that the Applicant/Appellant medical review was not imperative and essential.*

5. *The Applicant/Appellant reserves the right to raise further grounds of appeal at the hearing of this application."*

[8] The Appellant has purported to file two affidavits sworn on 27 January 2017 and 15 February 2017 in support of his appeal. However it must be recalled that under Rule 15(1) of the Court of Appeal Rules (the Rules) an appeal to the Court of Appeal shall be by way of rehearing on the papers. That means that the Court of Appeal has before it, usually in the form of an appeal record, the material that was before the Court below being a transcript of the oral evidence and copies of documentary evidence in the form of exhibits. To the extent that the two affidavits that have been filed in this appeal contain fresh or new evidence, then the leave of the Court is required. To the extent that the affidavits exhibit the decisions of the courts below, they would normally be part of the record and are not in the strict sense of the word "*evidence*."

[9] The objective of the present appeal proceedings is to obtain a bail variation that would enable the Appellant to leave the jurisdiction and travel to New Zealand to attend his step-daughter's wedding on 18 February 2017 and to attend a medical review a short time thereafter. The grounds of appeal that relate directly to that objective are grounds 2 and 3. Even if the Appellant were to succeed on grounds 1 and 4, that would not necessarily result in the Appellant obtaining a variation of his bail conditions. The principal issue is whether the learned trial Judge failed to give sufficient weight to the evidence concerning the security undertakings and or gave disproportionate weight to the evidence concerning the Appellant's New Zealand citizenship.

[10] In determining an application for variation of bail conditions the learned High Court Judge was exercising a discretion. In exercising that discretion the learned High Court Judge was required to consider the relevant provisions set out in the Bail Act 2002. It is not suggested by the Appellant that the bail conditions initially imposed by the Magistrates Court on 18 August 2016 were inconsistent with the permissible conditions specified in section 22(1) of the Bail Act. Furthermore it is apparent from the material presently before the Court that the bail conditions that were imposed complied with the permissible purposes specified in section 23(1) of the Bail Act. The purpose that is

relevant to this Appeal is to ensure that the accused person surrenders himself into custody and appears in court. The discretion to vary any bail condition could only be exercised by the learned High Court in a manner that ensured that the Appellant surrendered himself into custody and appeared in court on the next date. It is important to recall that the discretion that is exercised when considering a bail variation application is not necessarily the same as the discretion that is exercised when determining whether bail should be granted in the first place. Although both require the discretion to be exercised in a manner that is consistent with the Bail Act, the provisions of the Act that apply to one do not necessarily apply to the other.

[11] This Court has the power, on hearing an appeal relating to bail conditions, to confirm, reverse or vary the decision of the High Court under section 23(4) of the Act. However the Court will interfere with the exercise of the discretion of the High Court Judge and vary the bail conditions under section 23(4) of the Act only if the Appellant can establish that there has been an error in the exercise of that discretion. An Appellate court will not interfere with the exercise of the discretion in such a case unless it is established that there has been an error made on account of acting upon a wrong principle or by taking into account irrelevant considerations or by failing to take into account some relevant considerations.

[12] The first observation that needs to be made is that neither reason for seeking a bail variation to enable the Appellant to travel to New Zealand could be described as necessary or pressing. So far as the medical review is concerned, Dr Ivan Connell in his letter dated 7 November 2016 stated that he needed to personally examine the Appellant for long term management in order to avoid another hip operation. This, so the doctor asserts, could best be achieved by him personally examining the Appellant for accuracy and consistency. It would also be necessary to conduct blood tests to ensure that the post operative infection was under control. There is no other more recent medical evidence to indicate any greater urgency. There was no material before either the learned High Court Judge or this Court to indicate that the purposes of the medical review could not be

performed by appropriate medical practitioners in Fiji once a copy of the Appellant's file or a report had been provided by Dr Connell on the authorization of the Appellant.

[13] As the learned High Court Judge has concluded, the Appellant's personal circumstances are such that the risk of not returning to Fiji and hence the object of the bail condition being frustrated is considerable and cannot be outweighed by the security undertakings to which reference has been made in the Appellant's submissions.

[14] The Appellant is now 68 years of age and for the past 5 years has been the General Manager/Publisher of the Fiji Times. He owns two properties in the sense that he is the owner of two leases over iTaukei Land at Vuda and at Lami. He does not own freehold land and the two leasehold properties appear to be his only assets. They are said to be valued at FJ$728,000.00 (Lami property) and $2,000,000.00 (Vuda property). It does appear that, under the provisions of the iTaukei Land Act Cap 133 and the Transfer of Land Act Cap 131, there are issues as to the effectiveness of those two properties being offered as security undertaking.

[15] More significantly, the Appellant is both a Fiji and a New Zealand citizen. His right to remain indefinitely in New Zealand as a citizen cannot be ignored. It would be irresponsible for any appellate Court to disregard that fact. He has family ties in New Zealand and, admittedly for the wedding on 18 February 2017, his wife and almost all his family who reside in Fiji are presently in New Zealand.

[16] It is not difficult to conclude that the risk of not returning to Fiji and surrendering himself into custody and appearing in court when next called to do so outweighs the desire on the part of the Appellant to attend his step daughter's wedding. Furthermore, neither the sureties nor the security undertakings in this case provide the comfort that is necessary to vary the bail conditions and allow the Appellant to travel to New Zealand.

[17] The Appellant has not demonstrated any error in the exercise of the learned Judge's discretion and there is no material before this Court that would require the Court to disturb the decision of the court below.

[18] The application for leave to appeal is granted but the appeal is dismissed.

Orders:

1. *Leave to appeal granted.*
2. *Appeal dismissed.*

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Hon. Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr Justice Chandra
JUSTICE OF APPEAL

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Hon. Mr. Justice Bandara
JUSTICE OF APPEAL