

FICAC v Benjamin Padarath

Fiji High Court, Suva
16th, 29th, 30th January 2013
7th February 2013

Crim. Revisional Case
No. HAR.019/2012
[from Suva Magistrates Court
Crim. Case No. 737/2011]

Crim. Revisional Case
No. HAR.002/2013
[from Suva Magistrates Court
Crim. Case No. 594/2011]

Gates CJ

JUDGMENT ON REVISION

Mr. V. Perera and Mr R. Aslam for FICAC
Mr. V. Vosarogo for the Respondent

[1] From a report in the media it appeared bail had been granted in a forgery case after the Accused had been charged with stowing away, an offence alleged to have been committed whilst on bail. To resolve the apparent incongruity, this file was called for under powers provided to the High Court by section 260 of the Criminal Procedure Decree. The powers enable the record to be examined as to the correctness of an order, in this case the grant of bail.

[2] Counsel for FICAC had not objected to bail before a Resident Magistrate sitting at Suva when the impugned decision to grant bail was made. Mr. Perera said it was considered sufficient if bail were to be granted with very strict conditions.

[3] In Crim. Case 737/2011 the Accused is charged on the same charge sheet as one other Accused but in a separate count with forgery contrary to section 341(1) of the Penal Code. The offence is alleged to have occurred between 14th October 2009 and the 31st December 2009 at Suva, that is before the coming into law of the Crimes Decree. The allegation is that the Articles of Association of a company had been altered by the Accused so that a share subscriber, namely Adishwar Padarath, had been taken out of the list and instead the name of Voreqe Bainimarama substituted. It was alleged that this alteration had been done with intent to defraud.

[4] On 6th December 2012 appearing before a Resident Magistrate in Suva Mr. Vosarogo for the Accused made his bail application. He had applied by motion and affidavit. These were properly prepared documents suitable for a bail application. They would have carried persuasive weight with both the prosecuting counsel and the presiding magistrate. The Accused revealed to the court in his affidavit that he had been charged with being a stowaway.

[5] It would appear that it was the bringing of the charge of stowaway contrary to section 131(a) and (b) of the Maritime Act 1986 which caused the Accused to lose his right to free movement. He was arrested for this offence at Lautoka on 24th July 2012 [Lautoka Magistrates Court Crim. Case No. 350/2012]. The following day he was brought to court and he has been remanded till now on that matter. The remand order or the refusal of bail on the stowaway charge is not the subject of revisional consideration today.

[6] The stowaway charge was therefore known to the Suva Magistrate before he granted bail on 6th December 2012 on the forgery charge. In his submissions on bail prosecuting counsel urged the court to ensure the Accused's presence at court in future, and to prevent any further attempt at stowing away.

[7] The learned Magistrate granted bail in the following terms:

- “1. To be bailed in the sum of \$5,000 cash bond.
2. Curfew from 7 pm to 6 am daily.
3. Report daily to FICAC office between 6am-4pm.
4. Restricted from entering any point of entry in airport – entering any domestic or international.
5. To stay 100 m away from any port of entry – maritime or airport.
6. Not to interfere with any prosecution witnesses.
7. Travel ban is imposed.
8. Passport to be withheld in court.

Bail is granted in the sum of \$5,000 for each surety.”

[8] Two sureties had been put up by the defence, though the Magistrate did not specifically so order.

Flight Risk and the Judicial Officer's Duty in Ruling

[9] The Accused stated in his affidavit (at para.7) “in my Suva matters the prosecutions have not indicated serious oppositions to bail and I am advised by my solicitors to offer strict bail conditions to the court that should ensure my attendance to the court dates in Suva and Lautoka Magistrates Court.”

[10] That assessment appears to have been correct. Where counsel concedes a legal point in court or does not object to bail as here, that is not the end of the matter so far as the judicial officer is concerned. The judge or magistrate should take the concession into account carefully when deliberating upon his own decision. He or she will consider why the concession has been made, and whether it is correct on the facts and the law. Ultimately however, the responsibility for deciding the pertinent issue lies solely with the judicial officer. There can be no abandonment of that public duty. It is placed upon the Magistrate here and not the prosecutor: *Tevita Sarokoqica v The State* Crim. Misc. Case No. HAM020/11 (1st December 2011); *Timoci Aluseni v The State* Misc. Crim. Case No. HAM08/2013 (22nd January 2013) at para 15, both per Goundar J.

[11] Undoubtedly the Accused was a flight risk [section 19(2)(a)(vi) Bail Act]. The stowaway charge is a sufficient indication and manifestation of that. It goes to the issue always posed in bail matters – will the Accused attend his trial? Or will he or she attend court and surrender to custody when required [section 18(1)(a)]. The forgery and the giving of false information to a public servant charges both come within the definition of serious offences under the Bail Act [section 2(2)].

[12] In the affidavit, the applicant set out his personal circumstances and urged those as additional reasons for seeking bail. No doubt on sensible advice from his counsel he offered, correctly through his affidavit, two suitable sureties and a raft of strict conditions of bail which he stated he was prepared to undergo if granted bail.

The Medical Evidence

[13] Exhibited to his affidavit the applicant had included a medical report, based on an attendance at her clinic on 21.3.11, of Dr Rosemary Mitchell, and a medical report from Dr. S. Narayan of St. Giles Hospital of 17.3.11. There was exhibited also the medical report by Mr I. Waqainabete, the Medical Superintendent of the CWM Hospital of 1.3.13.

[14] The defence medical evidence I am told, will or may, be challenged by the prosecution. Much may depend upon discussions between counsel in arriving at agreed facts for the trial in the giving of false information matter. From this process it will become apparent whether the police interview will need to be adduced in evidence.

[15] For the medical reports tend to confirm allegations from the Accused that he was ill-treated in custody. The assessment of those reports may form a litigation issue at the trial. They will prove relevant if the trial is conducted in a certain way.

[16] There was no answering affidavit filed for FICAC originally. I was concerned with the strength of the prosecution case, a factor to be considered when considering the applicant's likelihood of surrender to custody [section 19(2)(a)(iv)] for if the prosecution evidence were strong, the applicant would have a greater incentive to abscond and not to attend his trial.

[17] Dr. Narayan said that the applicant was showing signs of post-traumatic stress disorder and met diagnostic criteria A, B, C, and D for that condition. He claimed to have been assaulted and tortured by men wearing balaclavas. These assaults consisted of punches, kicks, having his head banged against a wall, and having hot water poured over him.

[18] He complained of poor sleep, headaches, nightmares and flashback. He had become very apprehensive, irritable, and easily angered or startled. He was diagnosed as suffering intense psychological distress. He felt isolated and had become withdrawn.

[19] Dr. Waqainabete at the CWM said the applicant was admitted to the hospital on 11th February 2011. It was recorded that he had partial thickness burns on his thighs bilaterally and on his legs. Those burns were treated with pain relief, anti-biotics and dressings. He was

discharged from hospital some 12 days later. He had complained of pains to his lower chest wall and abdomen.

[20] From the hospital he went for a further assessment to the clinic of Dr. Rosemary Mitchell. He had braces on his left wrist and left ankle. He appeared to be in pain and walked with some discomfort. He had bandages to his legs, chest and lower back.

[21] He related what had happened to him in custody. His head was down and he appeared depressed, anxious, and was tearful. Besides the partially healed burns, he related burning by cigarettes to his back. Suffice to say there was a very detailed and careful examination noted in the report of injuries all suggestive of improper handling of a suspect in custody. The doctor considered the marks and condition confirmatory of assaults.

[22] The medical evidence is relevant in his bail application because it tends to weaken the likelihood of the interview evidence being held voluntary and therefore admissible. Second, though all of this incident was some distance in the past from the stowaway charge, it may partially explain the irrationality of such conduct. If that were the case the motive for stowing away may be fuelled from irrational or genuine fears rather than from a deliberate intention to avoid his trial. However, at this stage, such opinions can only be speculation and not greatly determinative of the present bail issue.

[23] The prosecution filed the supplementary affidavit of Ilaisa Bacau on 30th January 2013. This was done at my invitation since I required some evidence in relation to the strength of the prosecution case in the giving of false information matter. Presently there is a *voire dire* set down for hearing in the Magistrates Court for 18th-22nd February 2013, when the learned Magistrate will consider whether the caution interview conducted by the police of the applicant was voluntary on his part and therefore admissible.

[24] Mr. Vosarogo, perhaps in marked contrast to the approach of previous counsel, has sought to narrow down the issues in dispute and to proceed with the trial as soon as possible. He is handicapped in obtaining detailed instructions because his client is held on remand away from Suva at Lautoka at Natabua Corrections Centre.

[25] As a result of the more detailed summary of evidence set out by Mr. Bacau as available for each element of proof required for the charge, it would appear the litigation issue in dispute is whether the applicant knew or believed the text message sent to have been false. The witnesses on that issue appear to be one prosecution witness and, if he so wishes, the Accused. The caution interview may not need to be adduced and the trial within a trial on admissibility may prove a superfluous procedure. The trial itself might therefore proceed on 22nd February 2013, and this matter be sooner concluded.

[26] The position is different on the forgery matter, and no confessional material is sought to be adduced in that trial.

Conclusion

[27] Bail must be approached as a separate consideration on each file, irrespective of whether it can be taken up by the Accused because of remand orders on other files.

[28] The stowaway matter is not before me for revision on the bail issue.

[29] When a case file is called for consideration of revision it will inevitably transpire that the circumstances of the case turn out to be far more involved and complex than a mere newspaper headline or short account may suggest. Perhaps here, because of the apparent breach of principle, the grant of bail after the stowing away incident (albeit only an allegation at this stage) it would have been wise to have provided short reasons as to why bail was being granted. For the issue of flight risk is most serious.

[30] In the circumstances of this case the grant of bail, with very restrictive conditions, was correct. It was unusual in view of the stowing away charge. I had called for the forgery case matter also, since bail had been refused in that matter.

[31] I make minor variations to the bail granted in the forgery case and grant bail in the same terms in the giving of false information matter as follows:

The Accused Benjamin Padarath

1. Is bailed on his own cash bond of F\$5,000.
2. With two sureties of F\$5,000 each.
3. To reside at a given address and not change that address without the prior leave of the court and of the Deputy Commissioner or his delegate of FICAC.
4. To remain at his residence in curfew daily from 7 pm to 6 am.
5. To report to FICAC's office daily between 6 am-4 pm.
6. Not to travel overseas or to visit any airport or port of entry, or to travel in any boat or plane within or without Fiji.
7. Surrender any passport held to the court.
8. Not to approach any prosecution witnesses directly or indirectly, or to interfere with them in any way.

[32] These bail orders now apply to Suva Magistrates Court Criminal Cases 594/11 and 737/11. The applicant will have to apply to the Resident Magistrate at Lautoka to secure similar bail in his Lautoka matter Crim. Case No. 350/2012.

Orders accordingly.

A.H.C.T. Gates
Chief Justice

Solicitors for the Prosecution	:	Office of the Deputy Director, FICAC, Suva
Solicitors for the Respondent	:	Mamlakah Lawyers, Suva

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