IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 33 OF 2016

BETWEEN	:	**NAPOLIONI TUIVAWA**
		Applicant
AND	:	**STATE**
		Respondent
Counsel	:	**Applicant in Person** **Ms. S. Kiran for Respondent**
Date of Hearing	:	**14th April, 2016**
Date of Ruling	:	**19th April, 2016**

BAIL REVIEW RULING

1. The Applicant is charged with Aggravated Burglary and Theft contrary to Sections 313(1) (a) and Section 291(1) of the Crims Decree respectively. He was arrested by police on the 21st of October and has been in remand since 24th October 2014.

2. On 25th November, 2014, the case of the Applicant was transferred by this Court to the Magistrates Court at Lautoka in extended jurisdiction. Case is awaiting trial since then.

3. The applicant made several bail applications in the Magistrates Court. All of which had been refused, last being on 30th November, 2015. It is against the last bail Ruling given by the learned Resident Magistrate (RM) Mr. S.V. Raramasi, Applicant has filed this notice of motion seeking a bail review.

4. A previous bail ruling given by the learned RM on 20th January 2015 was appealed to this court. Appeal was dismissed on 17th April 2015 by this court.

5. After his appeal was dismissed, Applicant, with the co-accused in the case, filed their last bail application in the Magistrates Court on the following grounds:

   Grounds of 1st Applicant (Napolioni Tuivawa)

   - He had been granted bail by the High Court in Criminal Action 269;
   - He has two cases pending in the Magistrates Court after they were remitted from High Court and being refused bail in this matter;
   - He will present in court on all occasions when required;
   - He has two available sureties;
   - He is not a flight risk and able to provide any travel documents;
   - Willing to report to Lautoka Police Station on a weekly basis and any condition deems fit by the court;

   Grounds of 2nd Applicant

   - He had been remanded in custody since 24th October, 2014;
   - There is no trial date being assigned;
   - He is the sole breadwinner for his family;
   - He is presumed innocent;
   - He has the right to arrange for his own counsel;
   - He will reside at Namoli Village if he is granted bail;
   - He can report to Lautoka Police Station for the reporting purpose and
   - He is able to provide one surety.

6. Learned RM referred to Sections 3, 4, 19, 13 (4) 18(1) and Section 30(7) of the Bail Act, 2002 and refused to grant bail to the Applicant.

7. Having acknowledged the fact that Applicant had been in remand for more than one year, the learned RM specifically referred to section 13 (4) of the Bail Act to justify the continued detention of the Applicant. *(Para 10)*

8. Section 13(4) of the Bail Act provides: *"If a person charged for an offence has been in custody for over 2 years or more and the trial of the person has not begun, the court must release the person on bail subject to bail conditions the court thinks fit to impose".*

9. Although a court has discretion to order a detention of an accused person in remand for a period up to two years, that discretion must be exercised judiciously and for a valid reason or reasons that would justify such a detention, having regard to other provisions of the Bail Act and the provisions of the Constitution.

10. Section 3(1) of the Bail Act provides :

    "Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted".

11. Section 13 (1) *(h)*of The Constitution provides:

"Every person who is arrested or detained has the right to be released on reasonable terms and conditions, pending a charge or trial, unless the interests of justice otherwise require"

12. It is clear that the right to liberty guaranteed by the provisions of the Bail Act and the Constitution can be denied to an accused person only when a court is satisfied that interests of justice so require.

13. In paragraph 11 of his Ruling the learned RM referred to Section 3(4) of the Bail Act and stated:

    "The main factor that needs to be considered by the court is the numerous ***criminal offences that were committed*** *by both of the accused when they were on bail.* ***The offences committed were very serious****. Majority of the crimes are indictable offences.* ***The offences were committed by both the accused whilst they were on bail*** *and this is clear breached (sic) of the conditions of their bail. Both of the accused have displaced their right to bail as provided in Section 3(4) of the Bail Act".(emphasis mine)*

14. In paragraph16, the learned RM stated:

    "The release of both of the accused will be endangered for (sic) public interest and for the protection of the community."

15. According to paragraphs quoted above, the learned RM has endeavoured to justify his decision to keep the Applicant in remand on three premises:

    a. That the Applicant had violated a bail condition by committing offences whilst on bail.
    b. That the offences committed by the Applicant are very serious and they carry harsher punishments.
    c. That the release of Applicant on bail will endanger the protection of the community and public interests.

16. The presumption in favour of the granting of bail is displaced where the person seeking bail has previously breached a bail undertaking or bail condition; [S 3(4) (a)]. Pursuant to Section 19 of the Bail Act, violation of bail conditions can be considered by a court as a ground to refuse bail in the interest of public.

17. When the Applicant was arrested on suspicion for other offences whilst on bail, the learned RM had erroneously come to the conclusion that the Applicant had violated a bail condition. If there had been a bail condition or bail undertaking by the Applicant to the effect that he shall not commit or refrain from committing any offence whilst on bail, the learned RM should have analysed evidence placed before him in order to satisfy himself that Applicant, whilst on bail, had committed an offence and therefore there had been a violation of bail condition or bail undertaking. In contrast, learned RM in paragraph 14 stated: ***'there is no information provided in court about the offences that were committed by the Applicants whilst on bail'.***

18. Provisions of the Bail Act must be read and interpreted in such a way that it would give effect to the provisions and spirit of the Constitution. The learned RM apparently prejudged the charge against the Applicant and determined that he had committed very serious offences whilst on bail. By doing so, RM ignored Section 14 (2) *(a)* of the Supreme Law of the land, the Constitution, wherein it is stated:

    "Every person charged with an offence has the right to be presumed innocent until proven guilty according to law;

19. The learned RM had apparently come to the conclusion that presumption of innocence in favour of an accused and presumption in favour of bail had been displaced without Applicant being tried or evidence against him being analysed when he said: *"The main factor that needs to be considered by the court is the numerous criminal* ***offences that were committed*** *by both of the accused when they were on bail". (emphasis mine).*

20. The learned RM also fell into error when he considered the issue of likelihood of him committing an offence whilst on bail to justify concerns of public interests and protection of the community. There was no evidence placed before the learned RM for him to be satisfied that the releasing the Applicant on bail would endanger the interests of the public and protection of the community. There was no record of previous convictions against the Applicant. Learned RM had formed his opinion merely considering the fact that the Applicant had been arrested and charged for other offences whilst on bail.

21. Remand prisons should not be used as a means to protect the public due to the fear of the accused re-offending. In ***State v Tak Sang Hao*** HAM 3/2001s Justice Fatiaki observed:

    "Needless to say the laying of criminal charges ought not to be allowed to become any easy means of depriving or prejudicing a person's liberty.

22. Before coming to a decision to deprive personal liberty, interests of public and concerns for public protection must be rightly balanced with the interests of the Accused. The Appellate Courts in Fiji have described on numerous occasions interests which the constitutional rights were designed to protect as comprising both individual and societal rights. The former were the presumption of innocence, right to security of the person, the right to liberty, and the right to a fair trial. As to the latter, rights of the public not to be deprived of their security and property. Further, there is a societal interest in bringing to trial those accused of offending against the law. Here there is a tension between the accused's interests and those of the community. In balancing those competing interests, courts must also be mindful of the primary consideration in determining bail; that is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.

23. Having given due consideration to the above, judicial officer determining bail must be satisfied that the deprivation of personal liberty is the only option available and resorting to that option is not disproportionate to the objective that is to be achieved thereby. If the concerns of public interests and protection of the community can be addressed by imposing stringent bail conditions, courts must not resort to curtail personal liberty, since the primary consideration in determining bail is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.

24. It is natural, with the rising crime wave, for magistrates to think in terms of controlling the crime situation by remanding the suspects and accused brought before them. However, it is not the duty or responsibility of judicial officers to control the crime rate. Judicial offices in Fiji are not social engineers. The solution lies elsewhere. It is the duty of police and other law enforcement agencies of the State to control the crime wave. Of course the judicial arm of the State can help them to ease or control the situation by expediting trials of those who are brought before courts. In this case, the judiciary has failed to do that.

25. The charges against the Applicant have been hanging over his head like a *sword of Damocles* for a period of nearly one and half years, since October 2014, without trial. Adding insult to injury, his personal liberty had been deprived for that whole period. State Counsel informed this Court that his trial was again vacated on the last hearing date and a trial within this year is impossible.

26. Learned RM in paragraph 14 stated:

> *"This is the second application by the Applicants before this court however there is not much progress into the matter. The delay in this case had been caused by the Applicants in this case and additionally there is no information provided in court about the offences that were committed by the applicants whilst on bail".*

27. Case of the Applicant was transferred to the Magistrates Court at Lautoka on 25th November, 2014. It is not clear how the Applicant contributed to the delay whilst being in remand.

28. In ***Seru v State*** *[2003] FJCA 26; AAU0041.99S & AAU0042.99S (30 May 2003)* having referred to Section 29 (3) of the then Constitution, Court of Appeal observed:

> *"..this country has adopted s29(3) thus confirming that one of the fundamental rights of all citizens is to have a charge disposed of within a reasonable time. If the court fails to acknowledge unreasonable delay when it occurs, the constitutional right will become a dead letter".*

29. Section 14 (2) (g) of the present Constitution states: *every person charged with an offence has the right to have the case determined within a reasonable time. When deciding whether to grant bail to an accused person, Courts must take into account the time the accused may have to spend in custody before trial if bail is not granted [Section 17.-(1) of the Bail Act].*

30. Courts are bound to uphold the Constitution and the provisions of the Bail Act when called upon to determine bail. When a court decides, for whatever reason, to refuse bail to an accused person it must expeditiously deal with the matter and ensure a speedy trial. If the court is overburdened with backlogs, the case flow of the court must be managed to give priority to those cases where accused are in remand.

31. The learned RM referred to Section 30 (7) of the bail Act and cited ***Kotobalavu v The State*** [2015] FJHC HAM 018.2015 (9 March 2015) and stated that there is no change in circumstances that justify a review.

32. The previous bail ruling which was appealed to this court was given by the learned RM on 20th January 2015. Appeal was dismissed by this Court on 17th April 2015. Almost one year has elapsed since then. According to learned RM's own observation "*This is the second application by the Applicants before this court however* ***there is not much progress into the matter".***

33. **I hold that the long and inordinate delay in starting and disposal of a trial since the last bail determination in itself is a change in circumstances giving rise to a new ground for bail.**

34. In refusing bail to the Applicant, the learned RM has then considered the seriousness of the offences with which the Applicant was charged and the potential sentences to be imposed on the Applicant in the event he is found guilty.

35. Seriousness of the offence in itself is not a valid reason to refuse bail.

Order

36. For the reasons given, Ruling of the learned RM dated 30th November 2015 is rescinded and reversed.

37. Applicant is granted bail forthwith on following bail conditions.

    [1]. Personal bail bond for $1000.
    [2]. Surety bail bond for $1000 with two sureties.
    [3]. Not to reoffend whilst on bail.
    [4]. Not to interfere with witnesses.
    [5]. Reporting to the nearest Police Station on every Saturday of the month between 8 a.m. and 4 p.m.

Aruna Aluthge
Judge

At Lautoka
21st April 2016

Solicitors: **Applicant in Person**
Office of the Director of Public Prosecution for Respondent