

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

MISCELLANEOUS CASE NO. HAM 156/17

BETWEEN : **HANK ARTS** **APPLICANT**

AND : **THE STATE** **RESPONDENT**

Counsel : **Mr. Haniff F for the Applicant**
: **Mr. Yogesh P. for the Respondent/State**

Date of Hearing : **2nd October 2017**

Date of Ruling : **6th October 2017**

BAIL RULING

Introduction

1. The applicant files this Notice of Motion, seeking the following order, that is;

"The current bail conditions ordered by the Court on 14 October 2016 be varied to allow the fourth accused Hank Arts to travel to Honolulu, United States of America from 6 October 2017 to 17 October 2017"

2. The Notice of Motion is supported by an affidavit of the applicant, stating the grounds for this application. This matter was first called in court on the 25th of September 2017, where the learned counsel for the respondent advised the court that the State does not intend to file any objections in affidavit, but wishes to file submissions in opposition to this application. I accordingly directed the parties to file their respective written submissions, which they filed as per the directions. I must commend the assistance given by the learned counsel for the respondent by filing his written submission within a short period of time, allowing the parties

to expediently conclude this matter before the planned date of travel, proposed by the applicant. The court then heard the oral arguments and submissions of the respective counsel of the applicant and the respondent on the 2nd of October 2017. Subsequently, with the leave of the court, the applicant filed two affidavits of his proposed two sureties.

3. Having carefully considered the respective affidavits and the submissions made by the applicant and the respondent, I now proceed to pronounce my ruling as follows.

Background

4. The applicant has been charged with one count of Sedition, contrary to Section 67 (1) (c) of the Crimes Act. He was first produced before the Magistrate's Court of Suva on the 17th of August 2016. The State did not object for the bail. Hence the applicant with other co-accused persons were granted bail by the learned Magistrate on the following conditions, *inter alia*:

i) Personal bail of \$ 1000.

ii) Not to re-offend,

iii) Not to interfere with the witnesses,

iv) Surrender all travel documents to court and stop departure order is granted,

5. On the 31st of August 2016, the applicant had filed an application in the Magistrate's Court seeking an order to vary the bail condition, enabling him to travel to New Zealand from 20 October 2016 to 30th of October 2016 for a medical review and from 15th of February 2017 to 15th of March 2017 to attend to his step-daughter's wedding. The learned Magistrate refused the said application, concluding that there was no urgency and necessity for a medical review. The learned Magistrate has further concluded that the application to attend to his step-daughter's wedding in February 2017, was premature and the applicant could make that application at the appropriate time in the appropriate court.

6. All four accused persons including the applicant chose to have the hearing in the High Court pursuant to Section 4 (1) (b) of the Criminal Procedure Decree. The learned Magistrate accordingly had transferred the matter to the High Court. The applicant and the co-accused persons appeared before the High Court on the 14th of October 2016. Justice Fernando released the applicant together with other accused persons on the same bail conditions as imposed by the Magistrate's Court. The applicant then made another application on the 22nd of November 2016 seeking an order to vary the bail condition that prevented him to travel outside of Fiji on the ground that he needs to attend the wedding of his step-daughter and also to attend medical review in New Zealand. This court refused that application on the 25th of January 2017.
7. Aggrieved with the said ruling of this court, the applicant appealed to the Fiji Court of Appeal. The Fiji Court of Appeal in its judgment dated 17th of February 2017, dismissed the said appeal.
8. The applicant in this application seeks an order to vary the bail condition, enabling him to travel to Honolulu, United State of America from 6 October 2017 to 17 October 2017 in order to have a vacation with his wife as he needs to get away from Fiji to recharge himself (as the applicant deposed in paragraph 22 of his affidavit).

The Law

9. Having briefly discussed the background of this application, I now draw my attention to the applicable law relating to imposing of bail conditions and also laws pertaining to variation of bail conditions.
10. Article 9 (3) of the International Covenant on Civil and Political Rights (ICCPR) has recognized the detention in custody of an accused awaiting trial shall be the exception rather than a rule. However, it has further recognized that the release from such custody should be subject to guarantee of appearance in the proceedings. Article 9 (3) of the ICCPR states that;

“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

11. The Human Rights Committee of the United Nation has held that the detention pending trial must be based on an individualized determination. In doing that, it is reasonable and necessary to take into account all the circumstances such as flight risk, interference with evidence or the recurrence of crime. **(1502, Marinich v Belarus, para 10.4, 1940/2010, Cedeno v Bolivarian Republic of Venezuela, para 7.10).**

12. Article 5(3) of the European Convention on Human Rights has stipulated that the release from detention pending trial can be conditioned by guarantees to appear in trial. Article 5(3) of the European Convention on Human Rights states that;

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”

13. The Section 9 of the Constitution of Republic of Fiji 2013 has recognized that every person has right to personal liberty. However, pursuant to Section 9 (e) of the Constitution, the right to personal liberty can be deprived if the person is reasonably suspected of committing an offence.
14. Moreover, Section 21 of the Constitution of Republic of Fiji 2013, has stipulated that every citizen and every other person lawfully in Fiji have the right to move freely throughout Fiji and the right to leave Fiji.

15. However, the right of movement and right to leave Fiji can be restricted or limited for the purpose of ensuring the appearance before a court for trial or other proceedings. (**vide Section 21 (6) (a) (i) of the Constitution**).

16. In agreement with the above discussed international human rights instruments and the provisions of the Constitution of Republic of Fiji 2013, Section 22 (1) of the Bail Act states that bail can be granted unconditionally or subject to condition imposed by the court. Section 23(1) of the Bail Act has enunciated that the condition as stipulated under Section 22, should be imposed for the following purpose only, that;

i) Ensuring the accused person's surrender into custody and appearance in court.

ii) Protecting the welfare of the community.

iii) Protecting the welfare of any specially affected person.

17. The applicable scope of imposing the condition of bail has been discussed in **Iliaseri Saqasaqa (HAM 005.06S)**, where Justice Gates (as His Lordship then was) held that;

"Bail conditions, imposing as they must restrictions on persons awaiting trial, must therefore be reasonable and commensurate with the gravity of the offence and with the individual risks identified as applicable. Bail must not be fixed excessively, in effect, denying the applicant an opportunity to take up the grant of bail. This has been a principle of great antiquity in the common law".

18. Justice Goundar in **Qarase v Fiji Independent Commission Against Corruption [2009] FJHC 146; HAM038.2009 (22 July 2009)** found that bail conditions of surrendering of travel document and imposition of residence requirements are consistent with international law, where his lordship held that;

"The right to liberty is a basic human right. Bail for a person accused of an offence means authorization for the person to be at liberty instead of in custody, on condition

that the person appears for trial. Conditional bail is granted as an alternative to pre-trial detention. Permissible conditions include the surrendering of travel documents, imposition of a residence requirement and the provision of a survey assessed in relation to the means of the accused. These restrictions on the right to liberty are consistent with international law (Wemholl v Germany (1968) 1 EHRR 550) ”

Analysis

19. The applicant, in this application, neither seeks to review nor determine the correctness of the travel restriction imposed by the court on the 14th of October 2016. The applicant only seeks to temporarily revoke the travel restriction for him to travel to Honolulu for a vacation from 6th of October 2017 to 17 October 2017.
20. The learned counsel for the applicant forcefully submitted that the purpose of the proposed overseas travel is immaterial and the court is only required to consider whether the applicant is a flight risk and will return to Fiji in order to attend the hearing of this matter. I find the learned counsel has misunderstood the law pertaining to variation of bail.
21. Winter J in Sitiveni Ligamamada Rabuka v State (Misc Case No; HAM 62 of 2006) found that the purpose of the travel must be essential and imperative in order to allow the accused, who is on bail facing serious charges, to travel overseas. Justice Winter held that:

*“There is a precedent in respect of allowing accused on bail facing serious charges to travel overseas for necessary and imperative purposes. I refer to the case of **The State v Rakuita Vakalalabure**, where an application was made to allow this accused, the Deputy Speaker of Parliament, to attend a Forum Presiding Officers Conference in Tuvalu as part of his official duties. There is also the case of **The State v Ratu Jone Seniloli**, where my brother Justice gates granted bail variation to allow that accuse to travel overseas for urgent medical treatment.*

The common features of those two cases are that the proposed travel could genuinely be described as essential and imperative”

22. The main purpose of the proposed travel in **Rabuka (supra)** was to attend in an annual golfing challenge tournament between Fiji and Papua New Guinea. The court found that purpose is not an essential and imperative and refused the application for variation of bail condition accordingly.

23. Justice Goundar in **Qarase v Fiji Independent Commission Against Corruption (supra)** held that:

“Whilst the need to secure the accused’s attendance at hearings is a paramount consideration in this kind of application, the purpose of the overseas visit, the length of time the accused will be abroad and the inconveniences caused to the administration of justice are equally relevant factors for consideration”

24. The Fiji Court of Appeal in **Arts v State [2017] FJCA 13; AAU6.2017 (17 February 2017)** held that the purpose of the travel must be essential and pressing. Calanchini J in paragraphs 10 and 12 of the Judgment found that;

“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.....

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”

25. According to these judicial precedents, it is clear that the court is required to consider the purpose of travel in order to determine whether it is essential and imperative.
26. The applicant in his affidavit has stated that, considering the pressure of having a criminal proceedings against him and the pressure of his work, he needs to get away from Fiji to recharge himself. (**vide paragraph 22 of the affidavit**). That is the reason he wants to have a vacation in Honolulu with his wife from 6th of October to 17 of October 2017.
27. According to the bail condition imposed on him, there is no restriction for the applicant to freely move around Fiji. Neither he is prevented to enjoy a vacation in Fiji. There is no evidence before this court to suggest that the applicant cannot have a vacation as he planned, unless he travels to Honolulu.
28. The applicant has been charged with a serious count of Sedition, contrary to Section 67 (1) (c) of the Crimes Act, which carries a maximum penalty of seven years of imprisonment if he is found guilty. Hence, the court has to consider the greater public interest in such a serious offence when it takes into consideration an application of this nature.
29. In view of these reasons, I do not find the purpose of this travel is essential or imperative.
30. The applicant has adopted the affidavits that he had relied on in his previous application for bail variation in respect of the security that he proposed to furnish if he is granted leave to travel overseas. According to these affidavits, the applicant agrees to provide two native leases that are under his and his wife`s names as security for his return if he is granted leave to travel

overseas. The suitability and the appropriateness of these two lease properties as security, has already been determined by this court in HAM 204 of 2016. The said decision was affirmed by the Fiji Court of Appeal in **Arts v State (supra)**, where Calanchini P held that;


“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.

31. Accordingly, I do not think it is appropriate to discuss any further about the suitability and appropriateness of these two proposed securities by the applicant.
32. The applicant holds dual citizenship in Fiji and New Zealand. He undertakes in the affidavit that he would travel with his Fijian passport, keeping his New Zealand passport in the custody of the Court. However, this court has no jurisdiction to restrain or prevent the applicant in applying visa in Honolulu in order to travel to New Zealand using his Fiji passport. Therefore, his undertaking of traveling with Fijian passport could not provide sufficient safeguard or guarantee that he will return and surrender into custody, and appear in court if he is granted leave to travel overseas.
33. In view of these reasons discussed above, I refuse this notice of motion and dismiss it accordingly.
34. Thirty (30) days to appeal to the Fiji Court of Appeal.

At Suva

6th October 2017




R.D.R.T. Rajasinghe
Judge

Solicitors

Haniff Tuitoga for the Applicant

Office of the Director of the Prosecutions for the Respondent

