

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

Criminal Miscellaneous Case No. HAM 38 of 2019

BETWEEN : MOHAMMED AZAM

AND : STATE

Counsel : Mr Nazeem S. Khan for the Applicant
Ms Navia for the State

Date of Hearing : 18 March 2019

Date of Ruling : 10 April 2019

RULING

1. The Applicant filed a notice of motion on 01 March 2019 seeking the following orders;
 1. That bail pending trial be granted to the Accused Mohammed Azam.

2. That the bail ruling delivered by Sigatoka Magistrate's Court on 26th February 2019 be reviewed and be reversed and/ or set aside by this Honourable Court.
3. That the bail ruling delivered by the Sigatoka Magistrate's Court on 26th February 2019 be reviewed by way of a re-hearing and/or their [sic] be a rehearing of the bail application by the Accused.
4. That time for service of this application be abridged.
5. Such further and/or other order that may seem just and proper to this Honourable Court.

2. This application is filed by the Applicant through his legal representative. It is stated in the notice of motion that the application is made pursuant to the Bail Act and the inherent jurisdiction of the High Court. Further it is stated that "the Accused will rely on the affidavit of Mohammed Azam filed in support of the Notice of Motion".
3. At the very outset it should be noted that Mohammed Azam is the Applicant in this application and no one else. Secondly, it should be noted that it is always preferable to state the specific provision or provisions under which a particular application is made for the purposes of clarity.
4. Be that as it may, I have considered the affidavit of the Applicant. The Applicant has stated the following among other things;
 - a) He was charged for breach of bail conditions contrary to section 25(1)(b) of the bail Act and criminal trespass contrary to section 387(1)(a) of the Crimes Act.
 - b) He was produced to Sigatoka Magistrate's Court on 18 February 2019 and a counsel from Legal Aid appeared for him and made an application for bail.
 - c) On the day of the bail ruling his present counsel wanted to make submissions on bail and the Magistrate refused to hear him saying that the bail ruling is ready, and he will hear the counsel after delivering the bail ruling.
 - d) The Applicant denies the allegations against him.

- e) He has cooperated with the police. He has to support his father.
- f) He is willing to abide by strict bail conditions.
- g) He invites the Court to revisit and give a different consideration to the bail application.
- h) He states that there are changes in circumstances that have occurred since his last bail application.
- i) Therefore, he pleads that he may be granted bail.

5. The State opposed the application on the following grounds;

- a) An application for review can be made only after exhausting avenues for appeal.
- b) The Applicant has not appealed the decision of the Magistrate.
- c) There is no change in circumstances warranting a review.
- d) The application for review is procedurally incorrect.

6. Although in the notice of motion the Applicant has sought the bail ruling of the Magistrate to be reviewed, at the hearing of this application the counsel for the Applicant submitted that the Applicant is not challenging the bail ruling of the Magistrate. He said that they challenge the discretion exercised by the Magistrate where the counsel was not allowed to make submissions. Further the counsel submitted that the principle of *audi alteram partem* was breached. He further submitted that the Magistrate was not *functus officio* and the ruling could have been delivered after hearing him.

7. The counsel for the Applicant submitted a few case authorities to support his contention. I have perused the submitted decisions. The decisions in **R v Arens** 2016 ABCA 20, **Jione v The State** [2006] FJSC 9; MISC.0013.06S (10 October 2006) , and **House v R** [1936] HCA 40; (1936) 55 CLR 499 (17 August 1936) are all relating to appeals where exercise of discretion and breach of legal principles were discussed. There is no doubt that procedural errors or issues relating to exercise of discretion by a lower court can be the subject of an appeal.

8. However, the Applicant in the present case has brought this application in the form of a review and not as an appeal. If the main contention of the Applicant is that his

counsel was not afforded a proper hearing and thereby the Magistrate has breached any legal principles, that is clearly a matter to be considered in an appeal.

9. This position is very clearly enunciated by Justice Goundar in **Masirewa v State** [2017] FJHC 956; HAM178.2017 (29 December 2017) as follows;

“The key distinction between an appeal and a review is that on appeal the decision on bail is considered for errors in the exercise of discretion by the lower court, while on review, the decision on bail is considered afresh.”


10. The law on bail reviews and appeals is well settled, and in *Masirewa v State* (supra) it was observed by Justice Goundar that review procedure is unavailable if the bail decision could have been appealed, while quoting Scott J in *Abhay Kumar Singh v State* Misc. Application 1/2004 (23 June 2004) that “review is only available where, for one reason or another, the appeal procedure cannot be resorted to”.

11. The Applicant in the present case has not appealed the bail ruling of the Magistrate. Instead he has chosen to file this review. Further he has deposed in his affidavit that there is change in circumstances since his last bail application. However, no evidence was placed before this court of such change in circumstances.

12. May it be the bail ruling of the Magistrate or the exercise of the discretion of the Magistrate that the Applicant intends to challenge, this application cannot succeed for the reasons discussed above. I am of the view that this application is not tenable as the Applicant has not exhausted the remedy of an appeal.

13. In the circumstances I decide to refuse this application.




Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the Applicant : Nazeem Lawyers

Solicitors for the Respondent : The Office of the Director of Public Prosecutions