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

CRIMINAL APPEAL CASE NO. HAA 30 OF 2019
(Magistrates' Court Case No. 1539 of 2018)

BETWEEN	:	**LAISENIA TORA**
		APPELLANT
AND	:	**THE STATE**
		RESPONDENT
Counsel	:	**Mr E Sailo for the Appellant**
		Mr J Niudamu for the Respondent
Date of Hearing	:	**4 July 2019**
Date of Judgment	:	**2 August 2019**

JUDGMENT

[1] This is an appeal against refusal of bail pending trial. The appellant is charged with unlawful possession of 1101 grams of marijuana contrary to section 5(a) of the Illicit Drugs Control Act. His trial is pending in the Magistrates' Court at Nadi. He has been in custody on remand since 31 December 2018. His oral application for bail was refused when he was presented in court on 31 December 2018.

[2] Subsequently, the appellant applied for bail in writing through his counsel. In a written ruling dated 25 February 2019, the learned magistrate refused bail after noting the appellant's previous convictions for illicit drug offences and a pending case of a similar nature before another court. The learned magistrate concluded that the appellant would endanger the public interest or make the protection of the community more difficult if released on bail.

[3] The appellant made a third application for bail. That application failed as well. In his written reasons dated 11 April 2019, the learned magistrate concluded that there had not been a material change in circumstances since the initial decision to refuse bail.

[4] On 5 May 2019, the appellant filed this timely appeal against the refusal of his third application for bail.

[5] The grounds of appeal are:

a. The Learned Magistrate erred in fact and in law by taking judicial notice of the increase of drugs when remanding the accused.

b. The Learned Magistrate erred in fact and in law by taking into consideration that Nadi is in the center of tourism of Fiji and vulnerable town.

c. The Learned Magistrate erred in fact and in law by taking into consideration that "Dealing with drugs appears to be a hub of an activity in Nadi due to its easy access and close proximity to the hotels".

d. The Learned Magistrate erred in fact and in law by taking into account whilst remanding the accused, his previous dealings with drugs.

e. The Learned Magistrate erred in fact and in law by not accepting and not taking into consideration of the change in the circumstances forwarded by the accused.

Judicial Notice

[6] Grounds one, two and three concern the learned magistrate taking judicial notice of certain facts in the impugned decision dated 11 April 2019. In paragraph 14 of that ruling, the learned magistrate said:

> The court takes judicial note of the increase of drugs cases in Fiji –wide as broadcasted almost every day in the mainstream media. It is not only in marijuana cases but hard drugs likes cocaine and 'ice; or Methamphetamine are becoming prevalent. Police resources are being fully stretched and arrests are frequently made. In this court, almost every day in possession of marijuana cases are being filed. Nadi being center of tourism of Fiji in my view is considered vulnerable town and that includes its habitants, young generation and children. Dealing with drugs appears to

be a hub of an activity in Nadi due to its easy access and close proximity to the hotels.

[7] After taking judicial notice of the prevalence of drug related offences in Fiji and in particular in Nadi, the learned magistrate said at paragraph 15:

> I agree with Counsel that it is not a violent offence however the consequences of dealing with any illicit drugs in our Fijian community is deep rooted and enormous. The protection of the public is paramount to this court.

[8] As a matter of general rule, judicial decisions must be based upon facts proven by evidence. However, there is an exception to the rule. The exception is that the courts can take judicial notice of facts which are so notorious or clearly established that evidence of their existence is deemed unnecessary. The rationale is that judicial notice will expedite hearing by dispensing with the proof of matters that may be costly to prove and that judicial notice of a fact may also lead to uniformity in decisions. A judicial notice can be taken only of a fact that is so well-known as to give rise to the presumption that the public are aware of it.

[9] The prevalence of an offence in a country or in a community cannot be established by judicial notice. Prevalence of an offence is a matter requiring proof based on official statistics and not perceptions of people or media. In the present case, the learned magistrate concluded that the drug related offences is prevalent in Fiji based on the media reports and that Nadi was becoming a hub based on his own personal perception. Neither the media reports nor personal perceptions are official record for crimes committed in a country or community. For that reason, the courts cannot take judicial notice of prevalence of an offence based on the media reports or personal perceptions.

[10] There is an error in the ruling but I am not satisfied that the error resulted in a miscarriage of justice. Section 19 (1) of the Bail Act expressly provides for the court to consider whether granting bail to an accused would endanger the public interest or make the protection of the community more difficult. Section 19(2) (c) states that in forming an opinion whether the accused would endanger the public interest or make the protection of the community more difficult, the court must have regard to all the relevant circumstances and in particular –

(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;

(ii) the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person;

(iii) the likelihood of the accused person committing an arrestable offence while on bail.

[11] The appellant did not dispute that he had two previous convictions for drug related offences in 2017 and one other pending case of a similar nature. In *R v Crown Court at Harrow* [2003] 1 WLR 2756, the court said at 2756:

> The fact that the new offences appears to have been committed whilst on bail is likely to be a factor of considerable importance against the defendant when deciding whether are substantial grounds for believing that, if released, he would commit further offence while on bail.

[12] Further, the appellant is facing another similar allegation before another court. The allegation in the present case is indeed serious. The alleged quantity of the illicit drug indicates commercial use. If convicted, the appellant is potentially looking at a prison sentence.

[13] Given all these factors the appellant would endanger the public interest or make the protection of the community more difficult if he is released. Grounds one to three fail.

Suitability of the proposed surety

[14] The appellant contends that the learned magistrate erred in law and fact by rejecting his daughter-in-law who is a military officer as a suitable surety.

[15] A suitable surety is someone who has a good standing in the community and commands authority over the accused. In paragraph 18 of his ruling, the learned magistrate found that the appellant's daughter-in-law was unsuitable because she did not command any authority over him.

[16] In *Turagabete & Ors v State* Labasa Criminal Miscellaneous Case No HAM001 of 2005, the accused proposed his daughter-in-law who was a police officer as one of his sureties. Shameem J rejected the daughter-in-law as a suitable surety saying:

> Lastly, I am not persuaded that the sureties suggested will be in a position to ensure the presence of the Applicants in court despite the fact that one of them is a police officer. Traditionally, a daughter-in-law is unlikely to be in a position of authority or influence over her male adult relatives. (p 4).

[17] In the present case, the learned magistrate was correct to find that the appellant's daughter-in-law did not command authority over the appellant and therefore was not a suitable surety. Ground four fails.

Whether there was a material change in circumstances to grant bail?

[18] This ground was founded on the fact that the appellant's new proposed surety was his daughter-in-law and a military officer. The learned magistrate correctly found the proposed surety was unsuitable and therefore there was no change in material circumstances to grant bail. This ground fails.

Result

[19] The decision refusing bail is affirmed and the appeal is dismissed.

HIGH COURT OF FIJI
LAUTOKA

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Hon. Mr Justice Daniel Goundar

Solicitors:

K Law Chambers, Barristers & Solicitors for the Appellant
Office of the Director of Public Prosecutions for the Respondent