

**IN THE MAGISTRATES' COURT OF FIJI AT SUVA**

**CRIMINAL JURISDICTION**

Miscellaneous Application No. 548 of 2023

**STATE**

-v-

**AIYAZ SAYED-KHAIYUM**

Prosecution : Ms Tikoisuva. N of ODPP  
Accused : Mr Sharma. D – R. Patel Lawyers  
Date of hearing : 17/6/2024  
Date of Judgement : 19/6/2024

**RULING ON BAIL VARIATION**

**Introduction**

1. The applicant filed notice of motion seeking the following orders that:
  - a) The Applicants Fiji passport No. P00127089 be released to the Applicant for the purpose to travel out of Fiji for medical review and procedures in Singapore
  - b) To uplift any stop departures lodged with the Immigration.
  - c) The service and hearing of this application to be expediated.
  - d) Any other orders the court deems just and reasonable.

### **Applicants Position**

2. I have taken pertinent excerpts of the Applicants sworn affidavit in this ruling however I have not reproduced the entire affidavits, but have gone through the entire affidavits filed by the Applicant in support to travel abroad for medical evaluation and procedures, together with his affirmed evidence before this court.
3. I have also looked at the supplementary affidavit filed on the 13<sup>th</sup> of June, 2024 by Applicant and have gone through the same.
4. The Applicant in his affidavit has deposed the purposes of his intended trip to Singapore for medical review and evaluation due to excruciating pain in his right kidney where procedures and surgeries were performed during earlier visits, together with certain heart conditions which are interrelated.
5. The Applicant submitted letters from two doctors namely Doctor Chia Sing Jo of Urocare Center at Mount Elizabeth Novena Specialist Centre and from Doctor Dinesh Nair of Heart Matters Medical Center Pte Limited in support of his application to travel for medical evaluation and procedures.
6. The Applicant asserts that the treatment required to be performed is robotic pyeloplasty which is not available in Fiji and this is supported by an affidavit filed by one Doctor Sudisksha Singh, who is a general practitioner in Nadi.
7. The Applicant further asserts that he is not a flight risk since he has families in Fiji, property investments and a law firm in Fiji.
8. The Applicant also stated that he was previously being granted bail variation to travel abroad on medical grounds and that he obliged to all conditions.
9. The Applicant also stated in his affidavit the he will abide by any other bail conditions that court might impose.

### **Respondent State Position**

10. I have taken pertinent excerpts of the Respondents State sworn affidavit in this ruling however I have not reproduced the entire affidavits, but I have gone through the entire affidavit filed by the Respondent in opposing the Applicant to travel abroad for medical evaluation and procedures, together with the investigation officers sworn evidence before this court.
11. I have also directed my mind on the supplementary affidavit filed by State on 17/5/2024 in support of opposing the bail variation.

12. States position through the affidavit of the investigation officer is that the Applicant is a flight risk and once granted permission to travel, the Applicant will not return Fiji to face trial.
13. Respondent State further objects to the bail variation that the despite having properties, investments and businesses in Fiji, the Respondent's presence is not required.
14. Respondent State also submits that they have a strong case against the Applicant.
15. Respondent State also asserts that no tentative dates of departure and arrival was put before by the Applicant.
16. Respondent also asserts that the Applicant have failed to show to court the all required medical treatment on him are not available in Fiji.

#### **The Law on Bail variation – Statutory Position**

17. The 2013 Constitution of Fiji at section 13 (1) (h) stipulates that;  
*“Every person who is arrested or detained has the right –  
  
h) to be released on reasonable terms and conditions, pending a charge or trial unless the interests of justice otherwise require”.*
18. Section 21 (6) (a) (i) of the 2013 Constitution stipulates that;  
*“21. Every person has the right to freedom of movement.  
  
(6) A law, or anything done under the authority of law is not inconsistent with the rights granted by this section to the extent that the law-  
  
(a) Provides for the detention of the person or enables a restraint to be placed on the person's movements, whether –  
  
(i) For the purpose of ensuring his or her appearance before a court for trial or other proceedings”.*
19. Section 30 (8) of the Bail Act of 2002, a Magistrate can only review or vary the existing bail condition upon receiving an application.
20. Section 22 (1) of the Bail Act states that bail can be granted unconditionally or subject to condition imposed by the court.

21. 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;

- a) *Ensuring the accused person's surrender into custody and appearance in court,*
- b) *Protecting the welfare of the community,*
- c) *Protecting the welfare of any specially affected person.*

### **Common Law Position**

22. Fiji Court of Appeal in the matter of **Hank Arts v State HAM FJCA 13 AAU 6 of 2017** enunciated some principles to assist when it comes to bail variations, in particular on the issue of accused persons intending to travel abroad for medical treatment.

23. In this matter His Lordship Hon. Mr. Justice W. D. Calanchini upheld the test elucidated in the matter earlier determined in the High Court for bail variation application in the case of **Hank Arts v State HAM 204 OF 2017** on the central issue of whether to travel abroad is necessary or pressing and after review the Fiji Court of Appeal upheld the decision of the high court and stated at paragraph 12 of the Fiji Court of ruling that:

*"[12] 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. So far as the medical review is concerned, Dr Ivan Connell in his letter dated 7 November 2016 stated that he needed to personally examine the Appellant for long term management in order to avoid another hip operation. This, so the doctor asserts, could best be achieved by him personally examining the Appellant for accuracy and consistency. It would also be necessary to conduct blood tests to ensure that the post operative infection was under control. There is no other more recent medical evidence to indicate any greater urgency. There was no material before either the learned High Court Judge or this Court to indicate that the purposes of the medical review could not be performed by appropriate medical practitioners in Fiji once a copy of the Appellant's file or a report had been provided by Dr Connell on the authorization of the Appellant....."*

*"[17] The Appellant has not demonstrated any error in the exercise of the learned Judge's discretion and there is no material before this Court that would require the Court to disturb the decision of the court below."*

*[18] The application for leave to appeal is granted but the appeal is dismissed.*

24. In **Hank Arts v State HAM 156 of 2017** his lordship Justice R.D.R.T Rajahsinghe in rejecting the bail variation for the Applicant in the high court expounded on the issue on the right of movement and stated that;

*"However the right of movement and right to leave Fiji can be restricted or limited for the purpose of ensuring appearance before the court for trial or other proceedings as per section 21 (6) (a) (i) of the 2013 Constitution".*

25. In **Hank Arts v State HAM 204 of 2016** his lordship Justice R.D.R.T Rajahsinghe in rejecting the bail variation stressed at paragraph 24 of his ruling that;

*"I now draw my attention to the issue of the Applicant's medical review. The Applicant has mainly relied on the evidence that he has already presented in the Magistrate's Court. Apart from that, the only evidence that he presented in relation to this application is the letter issued by Dr. Ivan Connell dated 7th of November 2016. This letter is mainly an elaborative version of the previous letter issued by Dr. Connell on the 17th of August 2016. Dr. Connell has stated in the letter dated 7th of November 2016 that the Applicant is now on antibiotics and the treatment appeared to be successful. Dr. Connell has founded his view based on the clear blood count taken in Fiji. According to the said letter, Dr. Connell only wishes to re-examine the Appellant in order to manage the condition and to avoid any further surgeries. The Applicant has failed to provide any information whether Fiji has medical facilities to monitor and review his medical condition locally and that the only option is to undergo such a medical review in overseas."*

26. The applicable scope of imposing the condition of bail has been discussed in **Iliaseri Saqasaqa ( HAM 005.06S)** also 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".*

27. Justice Goundar in **Qarase v Fiji Independent Commission Against Corruption [2009] FJHC 146; HAM038.2009 (22 July 2009)** 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 per-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**

28. In determining any application for bail or bail variation it is important to note that the following principles have been adopted by the High Court when dealing with bail hearing and which lower courts are bound to follow where it is established that the burden of proof is carried by the prosecution on a balance of probabilities as enunciated in the matter of **State v Tuimoata [2008] FJHC 177;HAC. 2008.**
29. The Applicant gave evidence by affirmation that he needs to travel to undergo critically important and mandatory post-surgery review with further examinations and tests and possible surgery depending on the outcome of the examination tests.
30. The Applicant stated that he is not a flight risk as he have families and properties in Fiji and if granted variation he will abide by all the conditions of the court.
31. The Applicant stated in his evidence that he needs to be in Singapore since the specialised surgery required which is known as robotic pyeloplasty is not available in Fiji.
32. The Respondent State objects to bail variation to travel since the circumstances of the Applicant have changed in terms of his political association since the Applicant is no longer a member of the Fiji First Party.
33. Furthermore the Respondent State submits that the Applicant does not have any medical emergency and medical reports submitted appears to be concocted due to different reference numbers with no official stamp and a different signature of the same docto who corresponded previously.
34. Respondent State also submitted that the Applicant have not submitted any evidence of immediate medical emergency and neither a medical report from Fijian Government hospital on his current medical condition other than from a local Private General Practitioner based in Nadi and who is not specialised urologists but a General Practitioner as stated in the Ministry of Health letter dated 14/6/2024 by Doctor Josese Turagava.
35. Respondent State further submits that despite all business and property interest the Respondent could still handle that by staying out of Fiji's jurisdiction.
36. I have carefully reviewed all evidence before me which were sworn affidavits, oral evidence on oath and affirmations, together will documentary evidence. It is not necessary to write verbatim proceedings and all evidence in this bail

variation ruling but that does not mean I have not gone through all the written and oral evidence before me.

37. I have thoroughly revisited all the evidence before me and decided to put pertinent and salient features of it in my ruling.
38. I have carefully observed the demeanour and forthrightness of the Applicant whilst giving evidence and later being cross examined and I have directed my mind accordingly.
39. The test enunciated in Hank Arts (Supra) on the issue of essential, imperative, necessary or pressing is an important aspect to be applied in this bail review.
40. From the evidence adduced by the Applicant there is appears to be no evidence of immediate medical emergency. When stating medical emergency, I mean immediate hospitalization in Fiji Government Hospitals with latest tests results indicating any grave situation arising from the pain that the Applicant is stating.
41. Furthermore the Applicant have not satisfied the court or failed to provide any information that Fiji does not have medical facilities, equipment, knowhow, specialists and environment to monitor and evaluate his medical situation locally and the only option for medical review and evaluation is to go to Singapore.
42. On the Doctor Sudishka Singh's report to the Applicant dated 9<sup>th</sup> June outlining medical conditions that requires medical evaluation and treatment, I place no weight to this report since this Doctor Singh as per Doctors Josese Turagava letter dated 14<sup>th</sup> June 2024 who is the Chief Surgeon and Consultant Surgeon Specialists with Ministry of Health clearly stated that Doctor Singh is not a specialised urologists.
43. In furtherance to this, court also notes that there was no clinical management report often commonly known in Fiji as "monthly checking" that the Applicant regularly visited or visits Government Clinics or Hospitals for regular check-up and tests for any grave pre-existing health conditions such as in his heart or kidney functions that he is now advancing for bail variations that he needs an urgent medical evaluation and procedures.
44. On the two letters placed before the court that came from Singapore based Doctors and on which Respondent State allege that it is concocted on the basis of no official stamp of Doctors, different signatures which I have also carefully examined myself and found to be inconsistent from previous correspondences from the same doctors.

45. His Lordship Justice Daniel Goundar in the matter of **Qarase v Fiji Independent Commission Against Corruption [2009] FJHC 146; HAM 38 of 2009 (22 July 2009)** held that:

*"Whilst the need to serve 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 considerations".*

46. Court further notes that the Respondent State through their supplementary affidavit dated 17/6/2024 have presented a letter from Doctor Josese Turagava that whilst Fiji does not have robotic system which is operated by robots, however they do have Doctors who are qualified and specialised urologists and cardiologists who could attend to the Applicants medical needs.

47. Therefore it important to note that the Applicant is not deprived from any medical procedures since he is already on bail in Fiji and is free to move around for his medical treatment without any restrictions.

48. The tests enunciated in **Arts v State (supra)** such as essential, necessary, imperative or pressing to travel overseas is therefore is not satisfied in this court to grant bail variation.

49. Court also notes the issue of flight risk on the basis that the accused is facing a serious charge of abuse of office.

50. The presumption of innocence remains for the accused, this court will expediate the substantive matter so that the accused gets a timely trial by virtue of section 14 (g) under rights of an accused person which stipulates that:

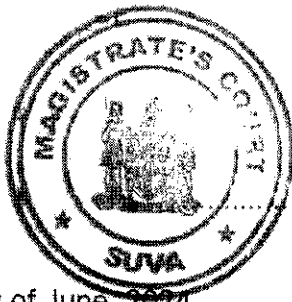
*"to have the trial begin and conclude without unreasonable delay".*

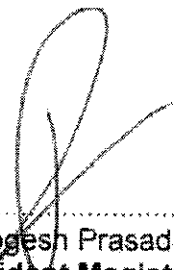
#### **Determination of Court**

51. I find the Applicants application for bail variation motion to travel to Singapore not essential, not necessary or pressing therefore it is dismissed.

52. 30 days to appeal to the High Court.





  
Yogesh Prasad  
Resident Magistrate

Dated at Suva this 19<sup>th</sup> day of June, 2024.

