

REPUBLIC

v

Sam Nemati

Date of hearing: 8 February 2016

Date of Judgement: 9 February 2016

Mr. Filimoni Lacanivalu of the Prosecution office for the Republic

Mr. Ravunimase Tangivakatini for the defendant

RULING

1. The defendant is charged with attempted suicide contrary to section 312 of the Criminal Code 1899. He was first brought to court on the 27 January 2016 when a bail application was lodged on his behalf. After the prosecution had called its first witness Inspector Ruskin Tsitsi to give evidence and whilst Inspector Illona Dowedia was giving evidence, Mr. Tangivakatini applied to withdraw the bail application and the defendant was remanded in custody and the matter was adjourned to 28 January 2016.
2. On the 28 January 2016, when this matter came before the court, Mr. Tangivakatini informed the court that a plea of guilty will be entered by the defendant in relation to the charge. The matter was then adjourned to the 4 February 2016, to allow the prosecution to prepare the facts to be presented to the court after the defendant enter a guilty plea on the next occasion that this matter come before the court. The defendant was further remanded in custody to the 4 February 2016.
3. On the 4 February 2016, the defendant pleaded guilty and the prosecution presented the brief facts. Submissions on the plea in mitigation were presented by the defence and this matter was adjourned for sentence on the 5 February 2016. On the 5 February 2016 due to other matters raised

in court that are not relevant to this ruling on the bail application this matter was adjourned to the 8 February 2016 for the hearing of the bail application and submissions by the prosecution on the issue which will be the subject of a separate ruling to be given at a later time. This ruling is with regard to the application for bail.

4. The prosecution opposes bail on the following grounds:

- a) Firstly that it is in his interest and for his own safety that he should be remanded in custody.
- b) Secondly the defendant is a violent person and that it is also in the interest of protecting others that the defendant should be refused bail.
- c) Thirdly the prosecution also submits that if released on bail the defendant is likely to re-offend.

5. In *Atto v Director of Public Prosecutions*¹, it was held "that Section 80 of the Criminal Procedure Act 1972 provides that a person may apply for and be granted bail "other than a person accused of murder or treason". This constitutes a presumption against bail in a case of a murder charge, which was the common law position; see *Re Anderson*[1978]VR 322 at 324 per O'Bryan J; *R v Martin* (1980)23SASR 223 at 235-6 per Legoe J. By section 83(3) a judge may grant bail, even on a charge of murder, but with a presumption against bail, the applicant show exceptional circumstances justifying bail..."² As such for offences other than murder or treason the starting point in the hearing of a bail application should be one with a presumption in favour of the granting of bail to the defendant, unless the prosecution can point to an exception or a reason why bail should be refused.

6. "The rights to bail emanate from the right to secure protection of the law, that where a person has been charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court

¹ *Atto v Director of Public Prosecutions* [2011] NRSC 26 (19 July 2011) at paragraph 5 page 2

² *Atto v Director of Public Prosecutions* [2011] NRSC 16 (19 July 2011) at paragraph 5 page 2.

established by law - section 10(1) of the Constitution. That same section provides in paragraph 10(2) (a) that such person shall be presumed innocent until he is proved or has pleaded guilty. That presumption of innocence correlates to the presumption of liberty enshrined in section 5(1) of the same Constitution that a person's liberty may only be removed save for the various circumstances set out in that section. That presumption tilts in favour of an accused who had been charged with an offence by way of a *prima facie* right to bail - see section 5(3) (b) of the Constitution and section 106 of the Criminal Procedure Code ("CPC"); see also the case of **R v. Perfili**¹.³ These were the comments of his Lordship Chief Justice Sir Albert Palmer in *Kwaiga v R.*⁴ when he was commenting on the effects of Section 5 of the Constitution of Solomon Islands and Section 10 of the Constitution of Solomon Islands. Articles 5 of the Constitution of Nauru and Article 10 of the Constitution of Nauru similarly protects the Liberty of the person and the presumption of innocence of the person.

7. "The burden of proof however still lies with the Prosecution to show that on the balance of probabilities an accused should not be granted bail.⁵ It is important to appreciate that simply because an accused has been charged with an offence it does not necessarily follow that he should be denied bail. The presumption of innocence and liberty do not permit such presumption to be made.⁶
8. I further point out the comments made by his Lordship in *Kwaiga v R.*,⁷ when he said:

"In considering bail, the court is involved in a risk assessment. This entails assessing how much risk society should bear on one hand by granting bail and how much the accused should bear on the other by being remanded in custody or on conditional bail. If the risks are high such that society should not be exposed to that risk, then bail normally would be refused and the accused made to bear that risk by having his presumption of innocence and liberty curtailed even in the absence of a lawful

³ *Kwaiga v Reginam* [2004]SBHC 93; HC-CRC 333 of 2004 (9 August 2004) at page 1

⁴ *Ibid*

⁵ *Ibid* at page 2.

⁶ *Ibid* at page 2

⁷ Refer to foot note 4 pages 2

conviction in a court of law:

*This risk assessment however is not as easy as it sounds because it entails a prediction of future behaviour, requiring the balancing of and measurement of what the defendant is likely to do in the future; which cannot be 100% accurate. Further much of that prediction is measured by what had happened in the past, which can be quite unreliable and prejudicial against the accused. In many instances as well, much of what is relied on by the prosecution is based on his interpretation of what the police had said had happened. It is important therefore that the courts do not lose sight of the purpose and requirements of bail and what it entails. It is not what the police says which dictates whether bail should or should not be granted. It is the balancing of the risk assessment by the Court after hearing both sides which determines at the end of the day which way the discretion of the court will fall."*⁸

9. Section 80 (1) of the Criminal Procedure Act 1976 reads:

*"Subject to the provisions of section 21 of this Act, where any person, other than a person accused of murder or treason, is arrested or detained without a warrant by a police officer or attends or is brought before the District Court and **is prepared at any time while in the custody of the Police officer or at any stage of the proceedings before the Court to give bail, he may in the discretion of the police officer or the court be admitted to bail without or without sureties**"*⁹ emphasis mine.

10. A clear reading of the 2nd limb of section 80(1) of the Criminal Procedure Act 1976 entails that a defendant at any stage of the proceedings may apply for bail. The issue of whether or not bail is refused is matter for the exercise of the discretion of the court or the Police. So the fact that the defendant had already pleaded guilty, does not bar this

⁸ Ibid at page 2

⁹ Section 80(1) of the Criminal Procedure Act 1976

court from hearing the bail application and determining whether or not bail should be granted, after having taken into account the normal considerations to determine whether or not bail should be granted.

11. The prosecution has called two witnesses, Inspector Ruskin Tsitsi and Inspector Illona Dowedia to give evidence.

12. Inspector Ruskin Tsitsi gave evidence that on the 21 January 2016, the Commissioner of Police called a meeting with the relevant stake holders regarding the defendant who a few weeks before 21 January 2016, without approval from Connect moved out from the house he was allocated at RPC3 (Regional Processing Centre 3) and moved into Room A4 at Nibok Lodge. Inspector Tsitsi gave evidence that the purpose of the meeting was to discuss how to approach the defendant, because the defendant had a child with him. At the meeting of the stakeholders it was concluded that the Australian Border Force officials and Connect Officials were to communicate with the defendant to freely vacate room A4 at Nibok, if not the Australian Border Force will make a formal complaint to the police to charge the defendant.

13. Inspector Tsitsi further gave evidence that on 26.1.2016, he, Inspector Ilona Dowedia and Sergeant Iyo Adams went to Nibok after having received a formal complaint from the Australian Border Force regarding the defendant. The complaint received was in relation to the defendant illegally occupying Room A4 at Nibok. The purpose of going to Nibok was to remove the defendant from Room A4 and to charge him. On arrival at Nibok, Inspector Dowedia then spoke to the defendant and after about 20 to 30 minutes, Inspector Dowedia inform him that the defendant still refused to voluntarily remove himself from Room A4. After having received this information from Inspector Dowedia, Inspector Tsitsi intervened and explained to the defendant about the illegality of his occupation of Room A4 and managed to get the defendant and his child in the Police vehicle and they telephoned members of the connect to retrieve the defendant's belongings.

14. Inspector Tsitsi gave evidence that members of connect arrive about 10 minutes later and he then escorted the

defendant back into Room A4 to identify his belongings to be removed. Inspector Tsitsi gave evidence that he was about 5 to 7 meters away from the defendant, when he saw the defendant talking to members of Connect identifying his belonging to be removed and then the next he saw was the defendant grabbed a pink shaver and started to cut himself on both wrists and neck. Inspector Tsitsi, gave evidence that he went disarmed the defendant and then applied the handcuff's to him for the safety of others and his own safety. He then removed the defendant from room A4 and the defendant was taken to the RON Hospital for treatment and the defendant's 8 year old daughter was handed over to Connect and Child Protection.

15. During cross-examination, Inspector Tsitsi gave evidence that it was just himself and the defendant struggling and he managed to disarm the defendant and after that Sergeant Iyo Adams came and assisted him. Inspector Tsitsi gave evidence that the defendant was in a violent state at that time that they were struggling and that he was shouting in his own language. And that the defendant's daughter was in the police vehicle at the time he was struggling with the defendant.

16. Inspector Tsitsi further gave evidence that before being brought to the court on the 27 January 2016, the defendant whilst talking with Sergeant Iyo Adams threatened that if released on bail he will re-offend and that the defendant's anger should be taken into account but gave evidence that he would not be able to comment on whether or not the defendant will re-offend if released on bail.

17. Inspector Tsitsi has given evidence that in his opinion the defendant is a violent person and has anger issues. During cross-examination Inspector Tsitsi agreed that his observation that the defendant is a violent person was made on the basis of the contact he has had with the defendant on the 26 January 2016 and 27 January 2016. Inspector Tsitsi confirmed during cross-examination that since the 27 January 2016 he had not been in contact with the defendant.

18. Inspector Illona Dowedia gave evidence that on the 26 January 2016, she together with Sergeant Desmond Deireregea and Sergeant Iyo Adams went to Nibok to negotiate with the defendant to vacate Room A4 and to inform the defendant that the police are now involved in the matter.

30. Inspector Dowedia gave evidence that she told the defendant that if gets a criminal conviction it would be reflected in his Visa application, but the defendant responded to her saying he doesn't want to come to any agreements and will not accept anything except what he wants for his daughter and that he wanted his daughter to be in a happy environment where she was comfortable and feel safe, and he didn't care and that he wanted to stay in Nauru.

19. During cross-examination, Inspector Dowedia gave evidence that the defendant moved into Room A4 at Nibok because his daughter wanted to live there. Inspector Dowedia further gave evidence that after the defendant moved into Room A4 at Nibok, staff from Connect contacted the defendant asking him to vacate the premises and she further gave evidence that Mr. Sumner had confirmed that the defendant was illegally residing in Room A4 at Nibok. Inspector Dowedia gave evidence that during the negotiations she told the defendant that the Australian Border Force and Connect will waive all criminal proceedings against the defendant if he vacates the room peacefully, but that the defendant refused to listen, insisting that he was right and restating all his grievances.

20. Inspector Dowedia further gave evidence that she informed the defendant that Connect had prioritized his concerns and that the defendant would be given a new module in two weeks' time and that the only option was for the defendant to go back where he live.

21. Inspector Dowedia also gave evidence that during the negotiations each time the defendant came around to reaching an agreement, his daughter would jump up and say she doesn't want to live at Anuijo Camp and that she wants to live at Nibok. At one stage of the negotiations, the defendant offered to live with his daughter at the Police station, further that the defendant kept repeating that he did not trust Connect and kept repeating that he did not want to go back to Anuijo Camp.

22. Inspector Dowedia gave evidence that after all negotiations failed and the defendant's belonging were going to be removed, but when the defendant saw the two members from Connect he went into a rage, inflicting self-harm by way of cutting his arms and wrists with an uncapped razor blade and at the same time he was shouting at the Connect Staff speaking

in his own language and that at that time, the daughter of the defendant was sitting outside one of the module houses eating a sandwich. After the defendant was arrested and handcuffed, he was taken to the Hospital and then later taken to the police station. According to the evidence of Inspector Dowedia, it took her about two to three hours to negotiate with the defendant.

23. In terms of the welfare of the daughter of the defendant, Inspector Dowedia gave evidence that she is with another family at Nibok Lodge and that she believed Child protection are monitoring her welfare. Inspector Dowedia further gave evidence that the police would like the court to remand the defendant in custody for a further 14 days, that one of the reasons being that at the time of the incident the defendant was adamant that even if he were to return to Anuijo he would return to Nibok with his daughter and reside there in a tent. In support of the application for remand Inspector Dowedia gave further evidence that during his time in detention, the defendant has further refused to sign a document that would give consent to Connect staff to look after his daughter unless the Connect case managers are willing to look after her at his own house.

24. During cross-examination Inspector Dowedia agreed that no interpreter was available during the negation she conducted with the defendant. Inspector Dowedia further agreed that the defendant would be able to get proper accommodation if released on bail. Inspector Dowedia further confirmed during cross-examination that recently she had not followed up on the progress of the defendant's daughter and she is not aware if the defendant's daughter has been struggling since the defendant was remanded in custody.

WHETHER OR NOT THE DEFENDANT WILL RE-OFFEND IF RELEASED ON BAIL

25. Mr. Lacanivalu has submitted that it is more probable than not that if released on bail the defendant will re-offend. Inspector Tsitsi during cross-examination gave evidence that he had nothing to say about the defendant's evidence that he will not re-offend if released on bail. Inspector Tsitsi further gave evidence that before being brought to court, the defendant told Sergeant Iyo Adams that if released on bail he will re-offend. This aspect of Inspector Tsitsi's evidence raises distinct but important questions that must be asked and

answered on the evidence. Firstly what were the words spoken by the defendant to Sergeant Iyo Adams? Secondly when the defendant said he will re-offend, what exactly was he referring to? Was he referring to going back to Room A4 at Nibok or was he referring to inflicting self-harm on his person? When conversing with Sergeant Iyo Adams, what language were they conversing in? How did Inspector Ruskin Tsitsi become aware of the conversation he said took place between the defendant and Sergeant Iyo Adams? Was he present or did Sergeant Iyo Adams inform him. No evidence had been elicited to show how Inspector Tsitsi came to know about the conversation between the defendant and Sergeant Iyo Adams. No evidence was elicited from Inspector Tsitsi to ascertain the nature of the words spoken by the defendant to Sergeant Adams. The other person who could have been called to give evidence to clarify the issues raised by the court is Sergeant Iyo Adams. Sergeant Iyo Adams has not given evidence. On the evidence presented, the only reasonable conclusion that could be drawn is that the assertion by the prosecution that the defendant will re-offend if granted bail remains an assertion not supported by evidence.

SERIOUSNESS OF THE OFFENCE CHARGED.

26. Mr. Lacanivalu further submitted to the court that court should look at the seriousness of the charge, further submitting that the charge is serious and that from the evidence presented this is not a one off situation. Mr. Lacanivalu pointed to the evidence that the police were informed on the 21 January 2016, about the defendant staying at Room A4 without any approval. That a meeting of all stakeholders was convened and as a result Police Negotiator Inspector Dowedia was authorized to negotiate with the defendant. Mr. Lacanivalu also submits that the court should look at the circumstances surrounding the charge.

27. The evidence of Inspector Ruskin Tsitsi and Inspector Dowedia could be summed up as follows; that the defendant with his daughter, prior to 21 January 2016 had moved out from where they were residing and moved in to occupy Room A4 at Nibok lodge without authority. Attempts by officers from Connect to have him voluntarily vacate room A4 at Nibok lodge and move back to where he was residing at Anuijo Camp failed. Attempts by Police negotiator Inspector Dowedia to convince him to move out from Room A4 at Nibok and to return to where he previously

resided with his daughter failed as well. Inspector Ruskin Tsitsi intervened and the defendant agreed and was escorted into the police vehicle with his daughter. After Connect members were contacted and they arrived, and the defendant was identifying his belongings to be removed that the defendant in Inspector Dowedia's words got into a rage by committing self-harm.

28. The defendant is not charged with illegal occupation of the Room A4 at Nibok or criminal trespass into Room A4 at Nibok. If he had been charged with any offence directly associated with his occupation of Room A4 then the submission by Mr. Lacanivalu that the court should not see his offending as a spur of the moment action can be accepted on the evidence at this stage of the proceedings.

32. The defendant is charged with attempted suicide contrary to section 312 of the Criminal Code 1899. The evidence supports the view at this stage of the proceedings that the defendant inflicted self-harm as a spur of the moment reaction to the circumstances that he got and found himself in on the 26 January 2016. The defendant himself gave evidence that he did what he did because whilst his daughter was there he was being removed. Inspector Dowedia gave evidence that goes to show that he inflicted self-harm more as a spur of the moment reaction.

NO FIXED ADDRESS

29. Mr. Lacanivalu has submitted that the defendant has not provided evidence to show that he has a fixed address. Inspector Ruskin Tsitsi gave evidence that the defendant was given the opportunity to voluntarily vacate Room A4 and return to Anuijo camp where he was residing before moving into Room A4 without permission. Inspector Dowedia gave evidence that she was negotiating with the defendant to voluntarily vacate room A4 at Nibok lodge and to return to Anuijo camp. For the prosecution to now turn around and say that the defendant has provided no evidence to show that he has no fixed address or place to stay if released on bail is inconsistent with the evidence of prosecution witnesses Inspector Ruskin Tsitsi and Inspector Illona Dowedia. The submission by the prosecution that the defendant has no place to stay or fixed address is inconsistent with the evidence of Inspector Ruskin Tsitsi and Inspector Illona Dowedia and the history of this matter.

PUBLIC INTEREST AND SAFETY

30. Mr. Lacanivalu has submitted that the defendant should be refused bail because of Public Interest for the safety of others. Inspector Tsitsi's evidence is that when the defendant started kicking the fridge and shouting in his language the two Connect members ran away. And he thought that they were in terrified that's why they ran away. Inspector Dowedia's evidence is that after he saw the Connect Workers he went into a rage and started inflicting self-harm. The evidence at its highest is that he inflicted self-harm. There is no evidence to show that the defendant on prior occasions has been violent to others or inflicted harm on others. The prosecution has failed on the balance of probabilities to show that the defendant is at a risk of being violent to others.

DEFENDANTS INTEREST

31. Mr. Lacanivalu has further submitted that the defendant is a danger to himself and as such should be further remanded in custody. There is clear evidence that the defendant inflicted self-harm. Inspector Ruskin Tsitsi gave evidence that 'he had cut himself in front of me. So he is a threat to himself'. On the other hand the defendant gave evidence that he understands that he is in court for self-harm and further gave evidence that inflicting self-harm is no longer an issue for him and further explaining that for him it was an emotional time. The defendant further gave evidence that if released he will not cause any further harm and that he is a good father.

32. Inspector Tsitsi agreed during cross-examination that his observation of the defendant were based on the contacts he had with the defendant on the 26 January 2016 and 27 January 2016. It would have been different had evidence been presented that the police have had prior dealings and contacts with the defendant regarding attempted suicide. If such evidence had been provided, it would have been open to the court even at this stage of the proceedings to draw an inference that the defendant is a danger to himself. There is no report from a Doctor or Psychiatrist that the defendant is a risk and danger to himself. The prosecution has failed to provide evidence to support their contention that the defendant is a danger to himself in terms of inflicting self-harm.


33. The defendant is a sole parent with an 8 year old female child to care for. The only evidence that has been presented

to the court by the prosecution on this issue is that at the time of the arrest of the defendant, the said child was left in the care of the Connect staff. Inspector Dowedia gave evidence that the child is living with another family at Nibok and that she believes Child protection is looking after defendant's daughter. On the other hand the defendant gave evidence that since his arrest and detention his daughter has been cared for by his friends.

34. I find that the prosecution has not discharged the onus to satisfy me that bail should be refused. The defendant is released on bail subject to the following conditions;

1. To reside at the quarters allocated to him by Connect at Anuijo Camp, RPC 3, or any other accommodation allocated to him by Connect.
2. To keep the peace and be off good behaviour
3. To enter into his own recognisance in the sum of PB\$200.00
4. To appear in court as and whenever required by the court to do so.

Dated this 9 February 2016


Emma Garo
Resident Magistrate

