



**IN THE DISTRICT COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION**

**Criminal Case No. 47 of 2023**

BETWEEN

**MICHAEL RUWOGABWIT  
ALIKLIK**

Applicant

AND

**THE REPUBLIC OF NAURU**

Respondent

BEFORE: **Acting Resident Magistrate  
Vinay Sharma**

DATE OF HEARING: **23 December 2023**

DATE OF EX-TEMPORE  
RULING: **23 December 2023**

DATE OF WRITTEN  
RULING: **27 December 2023**

APPEARANCES:  
Counsel for the Republic: **T Tannang**  
Counsel for the Defendant: **S Shah**

## EX-TEMPORE RULING

[Application for Variation of Bail Conditions]

### INTRODUCTION

1. The application before me for determination is for variation of bail conditions.
2. On 12 December 2023 the applicant was granted bail in the following terms:
  - i. *Is bailed in the sum of \$500 in his own recognizance;*
  - ii. *Must provide a surety in the sum of \$500;*
  - iii. *Must surrender his passport to the court and must not apply for any travel documents without the leave of the court;*
  - iv. *Must stay away from the victim and must not contract him or any potential witnesses in this matter; and*
  - v. *Must appear in court on the 25<sup>th</sup> of January, 2024 at 10.00am in the District Court.*
3. On 21 December 2023 the applicant filed the following documents seeking variation of bail conditions in order to be able to travel to Australia for Christmas:
  - i. Notice of Motion (Bail Variation Application);
  - ii. Affidavit in Support of Michael Ruwogabwit Aliklik;
  - iii. Affidavit in Support of Application for Bail Variation for the Applicant Michael Ruwogabwit Aliklik deposed by Bayonet Aliklik (1<sup>st</sup> Surety)
  - iv. Affidavit in Support of Application for Bail Variation for the Applicant Michael Ruwogabwit Aliklik deposed by June Rose Bill (2<sup>nd</sup> Surety)
4. The applicant is charged as follows:

#### *Count 1*

#### *Statement of Offence*

**INTENTIONALLY CAUSING HARM:** *contrary to section 74(a)(b) and (c) & (i) and section 29(1)(a)(b)(c)(i) or (ii) & (2) of the Crimes Act of 2016.*

#### *Particulars of Offence*

***RUWOGABWIT ALIKLIK and two others on the 6<sup>th</sup> day of December 2023, between 6.30pm and 7.30pm at Buada District in Nauru, did intentionally engage in conduct that caused serious harm to Lambert Dabuae namely, by holding his right hand, applying pressure to right index finger and middle finger, and thereby intending to cause harm to the said Lambert Dabuae.***

Count 2

Statement of Offence

**INTENTIONALLY CAUSING HARM**: contrary to section 74(a)(b) and (c) & (i) and section 29(1)(a)(b)(c)(i) or (ii) & (2) of the Crimes Act of 2016.

Particulars of Offence

***RUWOGABWIT ALIKLIK and two others*** on the 6<sup>th</sup> day of December 2023, between 6.30pm and 7.30pm at Buada District in Nauru, did intentionally engage in conduct that caused serious harm to Lambert Dabuae namely, by grabbing his left fingers, squeezing it tightly and applying pressure resulting in a cut and bleeding of the base of the 4<sup>th</sup> finger, and thereby intending to cause harm to the said Lambert Dabuae.

Count 3

Statement of Offence

**DEPRIVATION OF LIBERTY**: contrary to section 88(1)(a)(b) & (c)(ii) and section 29(1)(a)(b)(c)(i) or (ii) & (2) of the Crimes Act of 2016.

Particulars of Offence

***RUWOGABWIT ALIKLIK and two others*** on the 6<sup>th</sup> day of December 2023, between 6.30pm and 7.30pm at Buada District in Nauru, did intentionally take or detain Lambert Dabuae namely, by taking him in a motor vehicle, with the intention to unlawfully cause the said Lambert Dabuae to be confined and the said Lambert Dabuae is a child.

Count 4

Statement of Offence

**DEPRIVATION OF LIBERTY**: contrary to section 88(1)(a)(b) & (c)(ii) and section 29(1)(a)(b)(c)(i) or (ii) & (2) of the Crimes Act of 2016.

Particulars of Offence

***RUWOGABWIT ALIKLIK and two others*** on the 6<sup>th</sup> day of December 2023, between 6.30pm and 7.30pm at Buada District in Nauru, did intentionally take or detain Loki Tsiode namely, by taking him in a motor vehicle, with the intention to unlawfully cause the said Loki Tsiode to be confined and the said Loki Tsiode is an adult and did not consent to being confined and ***RUWOGABWIT ALIKLIK and two others*** were recklessly indeliberate to the consent of Loki Tsiode.

5. On 23 December 2023 I heard the application for variation of bail conditions. Thereafter, I delivered an Ex-Tempore ruling allowing the application. I informed the parties that I would provide my written reasons at a later date.
6. I now provide my written reasons.

#### **APPLICANT'S REASONS FOR BAIL VARIATION**

7. The applicant's counsel submits that his client's sister lives in Australia and that they have not met for a very long time.
8. He further states that arrangements for his client's family to travel to Australia for the Christmas break had been made prior to the date when the alleged offences took place.
9. The Affidavit in Support of Michael Ruwogabwit Aliklik deposed the following pertinent facts:
  - i. The applicant is employed by Nauru Airlines as a luggage/baggage handler;
  - ii. That the applicant's wife, their two children and the applicant are booked to fly out of Nauru to Australia for a family Christmas holiday following an invitation by family members in Australia;
  - iii. Their proposed date of travel is from 24 December 2023 to 4 January 2024 (travel itinerary was annexed to the affidavit);
  - iv. The applicant understands his obligations to attend his court dates;
  - v. In compliance with the bail conditions, the applicant is seeking to vary bail conditions so he can travel to Australia on the proposed dates of travel;
  - vi. The applicant is granted a Visitors Visa Class 600 and is allowed to remain in Australia for a maximum of 3 months on each arrival (a copy of the visa was annexed to the affidavit);
  - vii. The applicant is seeking bail in the sum of \$1500 in his own recognizance;
  - viii. The applicant is providing two sureties, namely, Bayonet Aliklik of Anetan District and June Rose Bill of Nibok District to be bonded in the sum of \$1500.
  - ix. The applicant is providing an undertaking to the effect that he consents to having the trial continue without his "*presence if in any event that this unlikely scenario would happen*".

#### **RESPONDENT'S POSITION WITH REGARD TO THE VARIATION APPLICATION**

10. The Republic has no objections to the granting of the application.

## CONSIDERATIONS

### *Applicable Laws*

11. Section 31 of the ***Bail Act 2018*** (“the Act”) provides the following in relation to the power to review a bail application:

#### ***31 Power of review***

*(1) A Resident Magistrate may review any decision made by a police officer in relation to bail.*

***(2) A Resident Magistrate may review a decision made by another Resident Magistrate, including a reviewing Resident Magistrate, in relation to bail.***

*(3) The Supreme Court may review any decision made by it, by a Resident Magistrate or by a police officer in relation to bail.*

*(4) The Nauru Court of Appeal may review any decision made by it in relation to bail.*

***(5) A court which has power to review a bail determination, or to hear a fresh application under Section 15(1), may, if not satisfied that there are special facts or circumstances that justify a review, or the making of a fresh application, refuse to hear the review or application.***

*(6) The power to review a decision under this Part in relation to an accused person may be exercised only at the request of the:*

*(a) accused person;*

*(b) police officer who instituted the proceedings for the offence of which the person is accused;*

*(c) Secretary for Justice;*

*(d) Director of Public Prosecutions; or*

*(e) victim of the offence.*

***(7) The power to review a decision under this Part includes the power to confirm, reverse or vary the decision.***

*(8) The review shall be by way of a rehearing, and evidence or information given or obtained on the making of the decision may be given or obtained on review. (emphasis added)*

12. The Honorable Acting Chief Justice Khan in ***Denuga v Republic***<sup>1</sup> made the following observations at [11] of his honor’s judgment with regard to a court’s power to review a bail determination under Section 31 of the Act:

*[11] The Bail Act 2018 allows an accused person to make any number of*

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<sup>1</sup> [2023] NRSC 12; Criminal Appeal 5 of 2021 (18 May 2023), at [11]

*fresh applications if there is change in circumstances, and the effect of the 2 subsections is that it allows the court to review bail conditions if: “there are special facts and circumstances (s.31(5)) and “to vary the bail conditions” (s.31(7)), if the court deems it appropriate.*

13. The High Court of Fiji in *Ho v State*<sup>2</sup> made the following observations at [6], [7] and [8] of its ruling with regard to an identical provision in Fiji’s Bail Act on the power of the court to review a bail determination:

[6] *The statutory test for a renewed application for bail is whether there are special facts or circumstances to consider releasing the Accused on bail. This is the test provided by section 30 (7) of the Act. That section states:*

*A court which has power to review a bail determination, or hear a fresh application under section 14(1), may, if not satisfied that there are special facts or circumstances, that justify a review, or the making of a fresh application, refuse to hear review or application.*

[7] *The statutory test appears to be more stringent than the common law test of material change in circumstances applied by this Court in the earlier cases of renewed applications for bail (see, Nagata v State – Bail Ruling [2015] FJHC 644; HAM152.2015 (31 August 2015), State v Dhamendra [2016] FJHC 386; HAM58.2016 (10 May 2016)).*

[8] *The Bail Act has not defined the phrase ‘special facts or circumstances’ but has left it to the courts to decide on case by case basis. **The word ‘special’ has been given the meaning exceptional or unusual in a number of cases. For the facts to be special they must be “peculiar to the particular case which set it apart from other cases”** (Lyon v Wilcox [1994] 3 NZLR 422, 431 (CA), following the Full Court in Re M [1993] NZFLR 74). **For circumstances to be special they must be exceptional, abnormal or unusual** (Crabtree v Hinchliffe (Inspector of Taxes) [1971] 3 All ER 967,976 (Lord Reid), 983 (Viscount Dilhorne)). (emphasis added)*

14. Section 31(2) of the Act grants a Resident Magistrate the power to review a decision made by another Resident Magistrate in relation to a bail determination. Further, Section 31(5) of the Act provides that where a court has a power to review a bail determination it **may** refuse to hear the application for review “*if it is not satisfied that there are special facts or circumstances that justify a review, or the making of a fresh application*”.

15. In light of the above, a review of a bail determination may not be heard if the court is not satisfied that there exists special facts or circumstances that justify a review of the bail determination. Once the court is satisfied that special facts or circumstances

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<sup>2</sup> [2019] FJHC 820; HAM146.2019 (23 August 2019), at [6],[7] and[8]

exists that justify a review, then the court may confirm, reverse or vary the bail determination. However, it must be noted that the use of the word ‘**may**’ indicates that there remains a discretion in the court to hear the application for review despite there being no special facts or circumstances that justify a review.

16. There may arise situations in which the circumstances or facts of a particular case do not satisfy the requisite threshold of being “*special*”, however, the nature of the facts or circumstances in that case nonetheless may justify a review. Therefore, it is clear that Section 31(5) of the Act vests a discretion in the court to hear applications for the review of a bail determination, which is to be dealt with on a case by case basis.
17. In *Re Zhang*<sup>3</sup> the Supreme Court of Victoria made the following observations at [17] of its judgment with regard to the effect of a successful bail variation application:

*...A successful application to vary bail conditions results in the court — in granting the application to vary — making a fresh grant of bail with new conditions.*

18. Where an application for variation of bail conditions is allowed by a court, a fresh grant of bail with new conditions is entered into.
19. When considering the fresh grant of bail with new conditions the court needs to reconsider whether the interest of justice requires that bail should not be granted (Section 4(3) of the Act). Further, the factors under Section 17, 18 and 19 of the Act may also need to be reconsidered.

#### *Standard of proof and application of rules of evidence in a bail hearing*

20. Before I consider the facts and circumstances in this matter, I refer to [8] and [9] of the ruling of the High Court of Fiji in *Kumar v State*<sup>4</sup> with regard to the applicable standard of proof and the application of the rules of evidence in a bail hearing:

8. *The State submits that there is a strong case against the Applicant. Generally, the strength of the prosecution case for the purpose of bail are assessed on a balance of probabilities on the basis of the facts disclosed by the State. In Seru v State 2015] FICA 30; AAU 152.2014, the Court of Appeal stated the following regarding evidentiary rules when it comes to considering bail:*

*[12] When considering an issue relating to bail, there is no requirement for formal evidence to be given. It is well established that the bail jurisdiction was not equivalent to a criminal charge, the rules of evidence need not apply, and a court may rely on written hearsay evidence provided it was*

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<sup>3</sup> [2023] VSC 8, at [17]

<sup>4</sup> [2023] FJHC 629; HAM170.2023 (31 August 2023)

*properly evaluated. In In re Moles 1981/ Crim L 170 the Divisional Court stated that strict rules of evidence were inherently inappropriate when deciding a bail issue. In R V Mansfield Justices, Ex p Sharkey [1985] QB 613 , 626, Lord Lane CJ stated that in a bail hearing the relevant material can be presented by a police officer. Also, under the Bail Act 2002 Forms have been prescribed to provide the relevant information to the courts from the Bar table.*

9. *In State v Tuimouta [2008] FJHC 177; HAC 078.2008 Goundar J observed:*

*[18] A bail hearing is not a trial. In a trial the prosecution carries the burden of proof to satisfy the guilt of an accused beyond a reasonable doubt. In a bail hearing the prosecution carries the burden of proof on balance of probability that the accused should not be granted bail.*

21. As provided in [20] of this ruling, strict rules of evidence do not apply in a bail hearing and the standard of proof is on a balance of probabilities. The hearing on the application for the variation of bail conditions was conducted accordingly.

*Whether there are any special facts and/or circumstances that justify a review of the bail determination made on 12 December 2023?*

22. The circumstances of the applicant must be considered in light of Nauruan context.
23. Nauru is a Christian state and is a small island nation. Many of its citizens live abroad. It is during special events such as Christmas that family members, both from abroad and in Nauru, gather together and share the special event as a family.
24. The applicant's sister lives in Australia and the applicant has not seen his sister for a long time.
25. The applicant wishes to re-unit with his sister and spend Christmas with her and other family members in Australia.
26. The Republic does not object to the granting of the application.
27. Maintaining of family relationship and having meaningful bonding time with them is a very important aspect of every individual's life. The need of the applicant to spend Christmas with his sister and other family members is important and is special in the circumstances.
28. Alternatively, even if the circumstances or the facts do not satisfy the requisite threshold of being special, the circumstances of this case nevertheless justify the



review of the bail determination and I am exercising my discretion to do so.

*Whether fresh grant of bail should be refused in the interests of justice?*

29. Since the Republic is not objecting to the fresh grant of bail with new conditions, I will only take a cursory look at whether the interests of justice require that bail should be refused.
30. The applicant has not breached his bail conditions and has been appearing in court for his case.
31. There is no material before the court that would suggest that the applicant will not attend court to answer the charges laid against him.
32. The applicant is only granted a visitor's visa to Australia. Further, he has no ties to Australia apart from his sister and/or other family members who live there. On the other hand, the applicant grew up in Nauru, continues to live in Nauru, and is employed by Nauru Airlines. In this regard, I find that he has strong ties to Nauru. It is unlikely that he would not return to Nauru after he celebrates Christmas in Australia.
33. The applicant has also given an undertaking in his affidavit in support that in the unlikely event if he does not return to Nauru, he consents to the trial of the charges being conducted in his absence. This is a standard undertaking that has been given in a few Supreme Court criminal cases.
34. The applicant is also providing two sureties, namely, Bayonet Aliklik of Anetan District and June Rose Bill of Nibok District to be bonded in the sum of \$1500 each.
35. In light of the above, the court is satisfied that there are no reasons to refuse bail in the interest of justice.

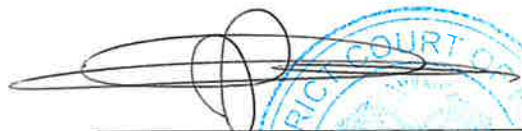
### ***CONCLUSION***

36. In conclusion, I am satisfied and the court finds that the circumstances and/or facts in this matter justify:
  - i. a review of the bail determination made on 12 December 2023;
  - ii. a variation of the bail conditions of the bail granted on 12 December 2023;
  - iii. setting aside of the bail granted on 12 December 2023; and
  - iv. granting of fresh bail with new conditions.
37. Therefore, I allow the variation application made via Notice of Motion filed on 21 December 2023 accordingly and make necessary orders below.

### ***ORDERS***

38. The orders of this court are as follows:
- i. That the bail granted on the 12<sup>th</sup> day of December 2023 is set aside and fresh bail is granted in the sum of \$1500 in the applicant's own recognizance.
  - ii. That the applicant is to provide two sureties, namely, Bayonet Aliklik of Anetan District and June Rose Bill of Nibok District who shall be bonded in the sum of \$1500 each.
  - iii. That the conditions of the fresh bail are:
    - a. That the applicant is permitted to travel out of the country on the 24<sup>th</sup> day of December 2023 or any other suitable date and shall return to the Republic of Nauru on the 5<sup>th</sup> day of January 2024, and he is permitted to uplift his travel documents from the registry for this purpose;
    - b. Upon the applicant's return on the 5<sup>th</sup> day of January 2024 he is to surrender his travel documents to the Registrar of Courts forthwith;
    - c. That the applicant must stay away from the victim and must not contact him or any other potential witnesses of this case; and
    - d. The applicant shall personally attend at the Court House, District Court on the 25<sup>th</sup> day of January 2024.
  - iv. The matter is adjourned to the 25<sup>th</sup> day of January 2024 at 10am.

Dated this 27<sup>th</sup> day of December 2023.

  
Acting Resident Magistrate  
Vinay Sharma

