

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAM NO. 155 OF 2015

BETWEEN : JOSEPH NAYEF ABOURIZK

Applicant

AND : STATE

Respondent

Counsel : Mr. Iqbal Khan for Applicant

Ms. Kiran for Respondent

Date of Hearing : 18th of September 2015

Date of Ruling : 1st of October, 2015

BAIL RULING

1. The Applicant files this Notice of Motion seeking an order that the Applicant be released on bail. The Notice of Motion is being supported by an affidavit of the Atunaisa Lewenioila, the legal clerk of Messrs Kevueli Tunidau Lawyers, stating the grounds for this application. Before, I move onto the main issue of bail, I now direct my attention to the admissibility of the affidavit of Atunaisa Lewenioila in evidence.
2. Justice Sapuwida in Naidu v Singh [2015] FJHC 333; Civil Appeal 04.2015 (5 May 2015) has discussed the admissibility of an affidavit of the legal clerk of the lawyer, where his lordship held that;

"In Repeni Sulimuana Momoivalu v Telecom (2006)(Unrep) Suva High Court Civil Action No: 527/1997s where His Lordship, Mr. Justice Winter, in respect of affidavits deposed by the lawyers' clerks had this to say at page 3 & 4 of the Judgment:-

"The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

"It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents were not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr Joji Boseiwaqa who appeared on instruction from the plaintiff as the relevant time. The court respectfully endorses the general thrust of dicta by Lyones J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No, HBC 323 of 1977 about the propriety of law clerks dispensing affidavits".

The affidavit barely engages the applicant defendant in many meaningful ways is in any event quite illegitimate. Although the Defendant has in part responded to his document by the law clerk I intend to give it absolutely no weight whatsoever."

3. The affidavit in support filed by Atunaisa Lewenioila, the legal clerk of the Applicant's solicitor, obviously contains with contentious issues in this application. There is no explanation for filing such an affidavit, instead of the Applicant or his wife. Hence, it is my opinion the affidavit of Atunaisa Lewenioila should not be given any weight in evidence.
4. The Respondent filed an affidavit of Detective Inspector Tuitai in opposition of this application, stating their objection for granting the bail. I.P. Tuitai stated in his affidavit that the prosecution has a strong case against the Applicant and if he found guilty the Applicant could be sentenced for a long

period of imprisonment as the charge against him is very serious. I.P. Tutitai further deposed that the Applicant has no fixed address in Fiji, wherefore there is a high likelihood of the Applicant absconding prosecution.

5. The Applicant filed an affidavit in response to the affidavit of IP Tuitai, where he only denied the averments in the affidavit of IP Tuitai. He tendered photocopies of some of his personal details. He sought bail on strict conditions to remove any suspicion of absconding if court has any.
6. Subsequent to the filing of respective affidavits, the application was set down for hearing on 18th of September 2015, where the learned counsel for the Applicant tendered a written submission and did not make any oral submissions. The learned counsel for the Respondent informed the court that he relies on the affidavit of IP Tuitai. Having considered the respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.
7. In pursuant of Section 13 of the Constitution and the Section 3 (1) of the Bail Act, every person has a right to be released on bail unless it is not in the interest of justice.
8. The primary consideration in granting bail is the likelihood of the accused person appearing in court. Section 19 (2) (a) stipulates some of the circumstances that the court must have to consider in order to determine the issue of likelihood of surrender to custody, where it states, That;
 - i. The accused person's background and community ties,
 - ii. Any previous failure by the person to surrender to custody or to observe bail conditions,
 - iii. The circumstances, nature and seriousness of the offence,

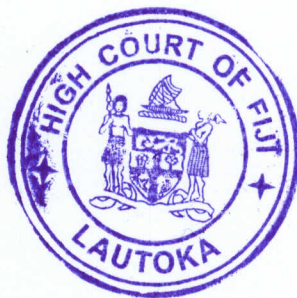
- iv. The strength of the prosecution case,
 - v. The severity of the likely penalty if the person is found guilty,
 - vi. Any specific indication,
9. The Applicant is an Australian Citizen and has no community tie in Fiji. He has not property or family interests in Fiji. Though he stated an address in Lautoka which he proposed to stay, he has failed to specify the nature and on which terms he resides in that proposed residence. Moreover, there is no evidence as to how will he finance to reside in such a place as he has no business or financial interest in Fiji.
10. The offence that the Applicant is being charged is a very serious offence. It involves with sophisticated maneuver and planning. Justice Madigan in Xhemali v State (2011) FJHC 148; CRC 050.2011 (8 March 2011) has outlined the serious nature of the offences under the Illicit Drugs Control Act, and its adverse impact on public interest, where his lordship found that;
- “the potential charge will be very serious. Never before in Fiji have dangerous and addictive drugs in such quantity been imported by such sinister means. The method displays obvious sophisticated planning and the latent risk to the vulnerable and uninformed consumers in our society is alarming. It is definitely in the public interest that the perpetrators of this consignment be brought to justices as soon as possible, and to this end it would perilous to admit this applicant to bail”.*
11. Having considered the observations of Justice Madigan in Xhemali (supra), Justice Nawana in Kreimanis v State (2012) FJHC 1316; HAM86.2012 (6 September 2012) found that;
- “Recently, in Xhemali v State [2011] FJHC 148, Madigan J., dealing with an identical case of a foreigner suspected of having been in possession of a large quantity*

of an addictive drug, held that it was definitely in the public interest that the perpetrators in possession of such a large consignments of illicit drug be brought to justice as soon as possible; and, to that end it would be perilous to admit such suspect-applicants to bail.

Accordingly, I conclude that the grant of bail to the applicant in this case is certainly not in public interest, which attracts paramount consideration in granting bail under the Bail Act of Fiji. In the result, bail is refused. Refusal of bail, even after ten-month long detention on remand, is within the statutory framework of the Bail Act - especially under Section 13 (4) of the Act - which empowers court to detain an accused on remand for a maximum period of two years before the trial in appropriate circumstances."

12. In view of the observations made in those two judicial precedents, it appears that the judicial approach in granting of bail for the offences of this nature is heavily depended on the issue of public interest and the nature and seriousness of the offence.
13. The Respondent stated that this offence involves with large amount of illicit drugs, worth of millions of dollars. This reflects the serious nature of this offence and it obviously attracts a heavy penalty if the Applicant is found guilty.
14. Having considered the background and community ties of the Applicant, the nature and seriousness of the offence, the strength of the prosecution case and the severity of the likely penalty for this offence, I am satisfied that the Appellant is unlikely to surrender to custody and appear in court to answer the charge if he is granted bail.

15. Having considered the reasons and the judicial precedents discussed above, I refuse and dismiss this application for bail of the Applicant on the grounds of unlikelihood to surrender to custody if granted bail and on interest of justice.
16. The applicant may invoke the jurisdiction of the Fiji Court of Appeal to review this ruling pursuant to section 30 (4) of the Bail Act.



R. D. R. Thushara Rajasinghe
Judge

At Lautoka
1st of October 2015

Solicitors : Messrs Iqbal Khan & Associate for the Applicant
Office of the Director of Public Prosecutions