IN THE COURT OF APPEAL TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 25 of 2021
(CR 153 & 157 of 2021)

BETWEEN:

[1] IAN ROBIN COX

[2] BRENDA COX

Applicants / Appellants

-v-

REX

Respondent

Application for leave to appeal against refusal of bail

RULING

BEFORE:	PRESIDENT WHITTEN QC LCJ
To:	Ms H.C. Stuart of counsel instructed by Ms L. Tonga for the Applicants
	Mr J. Lutui DPP for the Respondent
Date of application:	20 October 2021
Date of final filings:	28 October 2021
Date of ruling:	29 October 2021

CORRIGENDUM

On 23 March 2022, paragraph 22A was inserted to clarify and avoid any uncertainty as to the correct approach to contested bail applications.

Introduction

1. This is an application for leave to appeal, and if leave is granted, an appeal against the decision of Cooper J in the Supreme Court at Vava'u on 8 October

2021 whereby his Honour refused to extend the applicants' bail as earlier granted by the Magistrates Court and remanded them in custody pending their trial, which has been tentatively listed to commence in May 2022.

Background

2. On 2 August 2021, the applicants were charged with, relevantly, possession of a substantial quantity of cocaine.

3. In summary, the Crown alleges that:

   (a) a raft carrying 'bricks' of cocaine washed up on 'Otualea beach in Vava'u;

   (b) in the week of 19 July 2021, the cocaine was found by Nomani Naeata who then distributed the bricks to various individuals including Andrew Motuliki; and

   (c) Motuliki gave some of the cocaine to the applicants.

4. On 19 August 2021, the applicants were committed by the Magistrates Court to stand trial in the Supreme Court. The Prosecution did not oppose bail then being granted. The Magistrate granted the applicants bail on conditions, including a prohibition against leaving Vava'u, reporting, a curfew and provision of sureties.

5. On 28 September 2021, Mr Cox applied for a variation of his bail conditions to permit him to travel to Tongatapu between 25 October and 20 November 2021 in order to carry out work duties as the sole factory-trained Yamaha agent under contract with EM Jones Ltd in Tonga. The Crown consented to the variation.

6. On 4 October 2021, the applicants were arraigned and pleaded not guilty to all counts.

7. The judge adjourned the matter to 8 October 2021 for consideration of bail and to address, among other things, 'the applicants' position regarding the quantity of cocaine allegedly located at their home and in a container in Neiafu during the searches undertaken on 2 and 3 August 2021'.

8. It is not clear whether, on that day, the Crown opposed bail. On this application, the applicants assert that the Crown, at no time, has opposed them being granted bail. In light of its position on this application and appeal (referred to below), it may be inferred that the Crown either did not oppose or did not intend to oppose bail being granted.

9. Notwithstanding, Cooper J refused the applicants bail. In the Records of Mention that day in respect of each applicant, his Honour recorded the following (using the record in respect of Mr Cox which was materially identical to the record in respect of Mrs Cox):

> *"1. The case against Mr. Cox is that he was involved at the third tier. He was given 2 bricks, that is to say 2 kilograms of cocaine.*
>
> *2. The police only recovered 14 kilograms of the 30 kilograms that Mr. Naeta told them was on the raft that brought this cocaine into the Kingdom of Tonga. That leaves 16 kilograms and accounted for.*
>
> *3. This defendant got involved in possessing large quantities of class A [sic] and plainly was going to go on to supply them.*
>
> *4. The defendant concealed some of those drugs at his workplace. There was a further quantity at his home. Some 1,838.75 g at his workplace and a further 87.83 g at his home. All that suggests in the clearest way that he has divided up some of the initial packages he received from which I infer that there is the very real prospect that there is an outstanding amount of cocaine. The Crown's case is he received two bricks and that would equate to 2 kilograms, so over 70 g unaccounted for.*
>
> *5. It is also of significance that those with the drugs apparently went to the Cox, which suggests they have a reputation for being involved in drugs and would know to whom to supply them to.*
>
> *6. With both sources of an account of drugs I believe there is a very real risk that he will be involved with them further. That is to say, he will commit further offences.*
>
> *7. The defendant is therefore reminded in custody…. "*

10. On 20 October 2021, the applicants filed an application (dated 18 October 2021) in this Court, as required by s 17C(1)(b) of the *Court of Appeal Act*, for leave to appeal against the interlocutory order refusing bail. The grounds of the application (and appeal if leave is granted) are that the learned judge erred by:

    (a) placing excessive weight on:

        (i) the assumption that the applicants were or are in possession of an outstanding quantity of cocaine that was not seized by the Police;

        (ii) the risk that the applicants would offend on bail;

        (iii) the assumption that the applicants have a reputation in the community for being involved in drugs with knowledge of people to whom they could supply drugs; and

    (b) failing to properly take into account:

        (i) the presumption of innocence;

        (ii) the lack of any evidence that the applicants had ever supplied or had any intention to supply cocaine to others;

        (iii) the risk that others who were allegedly in possession of the packages of cocaine prior to the applicants coming into possession of the packages could have tampered with or removed cocaine from those

packages;

(iv) Mr Cox's co-operation with the Police in locating packages alleged to contain cocaine;

(v) that neither applicant has any prior convictions or history of offending on bail; and

(vi) Mr Cox's advanced age and medical conditions which render his custodial remand unduly harsh.

11. The application is supported by affidavits from each of the applicants, sworn 15 October 2021, in which, relevantly, they confirmed:

(a) the above background;

(b) that they have complied with all conditions of their bail granted by the Magistrates Court;

(c) their denial of the charges and the judge's remarks about their reputation; and

(d) that they have no previous convictions.

12. On 22 October 2021, I issued directions including for the Respondent to indicate by a specified date whether it opposed the application for leave or, if leave is granted, the appeal. If it did not, then the application and appeal would be dealt with on the papers.[1]

13. On 27 October 2021, the Respondent filed a notice of no opposition to the appeal. In that notice, the Respondent went further and effectively supported the appeal on the stated grounds that:

(a) Cooper J's assumption that the applicants were in possession of an outstanding amount of cocaine was unsubstantiated;

(b) based on the evidence, the Police have seized all cocaine that was (allegedly) possessed by the applicants and there is no outstanding cocaine in relation to the applicants;

(c) the evidence and circumstances of the case do not support Cooper J's assumption that there was a real risk that the applicants would offend if bail was granted; and

(d) the judge did not 'seriously consider' the mandatory considerations of ss 4(1) and (2) of the *Bail Act*.

14. On 28 October 2021, the applicants filed an application to adduce additional

[1] In accordance with s 24(1)(a) of the Court of Appeal Act and Order 8, rule 2(4) of the Court of Appeal Rules.

evidence in the form of an affidavit sworn by Calvin Manceau on even date. Mr Manceau is Mrs Cox's son. Section 17C(2) of the *Court of Appeal Act* provides that:[2]

> An appeal under this section shall, unless the Court of Appeal gives leave to adduce fresh, additional or substituted evidence, be determined on the evidence (if any) given in the proceeding to which the appeal relates.

15. In circumstances where the Crown had not indicated any opposition to bail being granted and it appears that there was no actual evidence before the judge on the application for bail, I doubt that an application for leave to adduce additional evidence on this application is required. However, if it is, and given the Respondent's position, I am satisfied there are special grounds in the overall interests of justice to admit it: *Kaufusi v Tukui'aulahi (No. 2)* [2021] TOCA 7.

16. Mr Manceau deposed of his concerns for the wellbeing of the applicants while in custody. In particular, he averred that:

    (a) the applicants are of good character and highly regarded in Vava'u, as evidenced by seven character references exhibited to his affidavit;

    (b) to the best of his knowledge, the applicants have never been involved with drugs, nor do they have a reputation for involvement with drugs;

    (c) his mother suffers from a major depressive disorder with anxiety attacks, for which she is prescribed antidepressants to manage her mental health, as confirmed by an exhibited letter from her general practitioner;

    (d) Mr Cox is 71 years of age and suffers from lumbar spine stenosis, asthma and gastroesophageal reflux disease, for which he requires medication, as confirmed by an exhibited letter from a Dr Toumoua; and

    (e) remaining in custody is impeding the applicants' ability to communicate with their lead lawyer, who is based overseas, thereby risking their right to a fair trial.

17. On 28 October 2021, counsel for the applicants filed submissions in which they recited the above background, grounds for the application and concerns as expressed by Mr Manceau. Further, it was submitted that:

    (a) the Crown (did not and) is not alleging that either of the applicants remain in possession of cocaine which has not been seized, nor is there any evidence to that effect;

    (b) the suggestion, therefore, that there might be additional cocaine in their possession was speculative;

    (c) the inference drawn by the judge that the applicants had a reputation for

[2] See also Order 8, rule 1(3) of the Court of Appeal Rules.

being involved in drugs and would know to whom to supply them was:

(i) unsupported by any evidence;

(ii) inconsistent with the applicants' lack of any previous convictions (to which the judge did not refer);

(iii) contrary to the evidence now produced through Mr Manceau's affidavit that the applicants are reputable businesspeople in the community; and

(iv) speculative and unreasonable.

(d) the applicants were not given an opportunity to address the judge's presumption about their reputation;

(e) the judge's decision that the applicants presented a risk of offending while on bail:

(i) was based on unsubstantiated allegations that went beyond the Crown's case;

(ii) failed to take into account that the applicants:

A have no previous convictions; and

B had been on bail for two months without demonstrating any behaviour that would suggest they were at risk of offending; and

(iii) was therefore unreasonable and unduly harsh.

Consideration

18. Section 3 of the *Bail Act* provides that, subject to the provisions of the Act, every person who is charged with a criminal offence *shall* be released on bail until the date when he/she is next due to surrender to custody.

19. Section 4 provides, relevantly:

> **4 Bail may not be granted**
>
> (1) A person who is arrested or charged with an offence punishable with imprisonment shall be granted bail unless the Court, or a police officer (in the case of a person arrested) is satisfied that —
>
> (i) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will —
>
> (a) fail to surrender to custody;
>
> (b) commit an offence while on bail; or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
>
> (ii) he should be kept in custody for his own protection or welfare;
>
> (iii) the case has been adjourned for inquiries which it would be impracticable to make unless the defendant is kept in custody;

> (iv) he is already in custody pursuant to a sentence of a Court; or
>
> (v) he has already been released on bail in connection with the present proceedings and has been arrested pursuant to section 9 of this Act.
>
> (2) In taking the decisions required by subsection (1), the Court or police officer shall have regard to all the relevant circumstances and in particular —
>
> (a) the nature or seriousness of the offence (and the probable method of dealing with the defendant for it);
>
> (b) the character, antecedents, associations and community ties of the defendant;
>
> (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail;
>
> (d) the strength of the evidence of his having committed the offence.
>
> …

20. Those provisions make plain that, in Tonga, prima facie bail is as of right and may only be refused in the circumstances provided for in ss 4(1) having regard to the non-exhaustive considerations in ss (2).

21. The judge's reasons did not refer to the Act or any specific provision of it. However, it is reasonably clear that his refusal of bail was purportedly based on ss 4(1)(i)(b), that is, that there were substantial grounds for believing that if released on bail, the applicants would commit an offence.

22A. That is not to say that the requisite substantial grounds can only be established by formal evidence or that every opposition to bail *must* be supported by sworn evidence. To the extent that it ought be applied in the relevant circumstances in Tonga,[3] including the overarching presumption in favour of bail and the physical conditions to be endured by those who are refused bail, the English common law approach to bail applications is that by their very nature, they will ordinarily involve, and in most cases, will only permit, an 'informal enquiry'[4] in which the strict rules of evidence have been held to be 'inherently inappropriate'.[5] Nonetheless, evidence *may* be adduced to provide substantial grounds for the belief that a defendant will (not might), if released on bail, commit any of the acts or omissions specified in s 4(1)(i)(a), (b) or (c). In some cases, the Court should consider whether fairness *requires* the calling of evidence on oath for the determination of the application. The procedural task of the Court is to ensure that the defendant has a full and fair opportunity to comment on, and answer, any evidence or other information presented against him/her.[6] If evidence is adduced by the Prosecution in relation to any of the exceptions in ss 4(1) and/or any of the considerations prescribed by ss 4(2), the defendant must be given an opportunity

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[3] Civil Law Act, ss 4(b).
[4] *R v Liverpool City Magistrates' Court, ex parte Director of Public Prosecutions* [1992] 3 All ER 249
[5] *Re Moles* [1981] Crim. L.R. 170; *R v Mansfield Justices, ex parte Sharkey and other applications* [1985] 1 All ER 193.
[6] *R (on the application of the Director of Public Prosecutions) v Havering Magistrates' Court; R (on the application of McKeown) v Wirral Borough Magistrates' Court* [2001] 3 All ER 997.

to cross examine the relevant witness/es. The defendant must also be permitted to give or call evidence or produce other information in relation to the matters prescribed by s 4. Any disputes on the facts in relation to those matters are to be determined on the balance of probabilities.[7] However, in determining whether it is satisfied that substantial grounds have been established, the Court should take into account the quality of the material before it, whether by way of sworn evidence, documentary proof, matters of record, hearsay, assertion or submission, and attach such weight to each piece of information as it considers appropriate. The ultimate obligation of the Court is to evaluate the information in the light of the serious potential consequences to the defendant and to weigh up all the relevant circumstances of the case.[8]

22. The existence of substantial grounds for the purpose of s 4(1)(i) requires more than mere suspicion or supposition and will ordinarily be established only by compelling and admissible evidence and/or an admission. The learned judge had neither before him.

23. The bases for the judge's decision appear to have been, firstly, an acceptance, as matters of fact, of the Crown's allegations against the applicants; and secondly, a deduction based on an assumption as to the weights of the cocaine allegedly involved, that not only had the applicants been in possession of it, but that they had removed and retained some of it from that recovered by the police. There was no evidence before the Court (nor, in the usual course, would there be at such an early stage of criminal proceedings as the arraignment) to support either basis.

24. Ordinarily, the only information available to a Supreme Court judge upon an arraignment will be the indictment and a summary of facts. The contents of those documents are not evidence. Here, the applicants pleaded not guilty to the charges, by which they denied the allegations against them. Absent a reliable confession or guilty plea, unless and until the Crown proves it case at trial, where evidence is adduced and tested, the allegations against the applicants remain just that. The judge's reasoning ignored that. It also failed to give effect to the presumption of innocence enshrined in clauses 10 and 14 of the Constitution.

25. The judge also failed to take into account relevant considerations in determining whether there were substantial grounds for believing the applicants might offend if granted bail. Subsections 4(2)(b) and (c) direct attention to, among other things, the applicants' antecedents and bail history. That they had no previous convictions (particularly given Mr Cox's age) and had complied with their bail conditions from the Magistrates Court, ought to have been powerful factors in favour of extending their bail.

26. The judge's assessment of the applicants' character (as one of the considerations prescribed in ss 4(2)(b)) was also infected by the defective premise referred to in

[7] *R v Governor of Canterbury Prison ex parte Craig* [1991] 2 QB 195.
[8] *Manu v Police* [2002] TOSC 16.

paragraph 23 above. He also failed to take into account their medical conditions.

27. Finally, there was no evidence by which the judge could have formed any view as to the strength of the Crown's case (as provided for by ss 4(2)(d)), let alone the presumptive conclusions he did reach.

28. For those reasons, the judge misapprehended the requirements of s 4 of the *Bail Act* and erred in his application of the relevant provisions of the Act. As a result, the judge's residual discretion miscarried.

Result

29. Leave to appeal is granted and the appeal is allowed.

30. The decision of the Supreme Court in proceedings CR 153 and 157 of 2021, on 8 October 2021, to remand the appellants in custody pending their trial, is quashed.

31. The appellants are granted bail to appear before the Supreme Court in the said proceedings, as and when required, on the following conditions, namely:

    (a) they must not commit any offence punishable by imprisonment;

    (b) they must not leave Vava'u without a court order;

    (c) if they have not already done so, they are to surrender their passports to the Court registry in Vava'u forthwith;

    (d) their names are to be added to the no-fly list;

    (e) they are to report to the Neiafu Police Station once a week; and

    (f) Mr Cox is granted permission to travel to Tongatapu for work purposes, during which, he is to report to the Central Police Station in Nuku'alofa once each week.

32. I do not consider it necessary to include any curfew condition or require sureties.

NUKU'ALOFA
29 October 2021

M. H. Whitten QC LCJ
PRESIDENT