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

AC 28 of 2021
[CR 148 of 2021]

BETWEEN:

KAPENI TAMO'UA

Applicant / Appellant

-v-

REX

Respondent

Application for leave to appeal against refusal of bail

RULING

BEFORE:	PRESIDENT WHITTEN QC LCJ
To:	Mr S. Tu'utafaiva and (formerly) Mr S. T. Taufateau for the Applicant Mr J. Lutui DPP and Mr F. Samani for the Respondent Commissioner of Prisons
Date of application:	26 October 2021
Date of ruling:	16 December 2021

CORRIGENDUM

On 23 March 2022, paragraph 16A 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 remanded the applicant in custody pending his trial,

which has been tentatively listed to commence in or about May 2022.

Background

2. On or about 5 August 2021, the applicant was charged with, relevantly, possession of cocaine and remanded in custody.

3. The applicant subsequently pleaded not guilty to counts 31 to 33 of the omnibus indictment against some 15 defendants comprising 47 charges, namely, possession of cocaine, destruction of evidence and failing to disclose a material particular, in contravention of ss 4(1)(a)(iv), 37A(1) and 29(c)(iii) of the *Illicit Drugs Control Act*.

4. When the matter was mentioned before Cooper J on 8 October 2021, his Honour recorded the following, relevantly:

> *"1. The case against Mr Tamo'ua is that he admitted to receiving 3 bricks of cocaine (therefore at least 3 kilograms, none of the bricks recovered being less than 1000g in weight) but told police he had thrown it all away in the sea.*
>
> *2. The police only recovered 14 kilograms of the 30 kilograms that Mr Naeta told police was on the raft that brought this cocaine into the Kingdom of Tonga. That leaves 16 kilograms unaccounted for.*
>
> *3. The defendant got involved in possessing large quantities of class A drugs that one can safely infer he was going to supply others with, so flood Tonga with. He is also connected close to the source of the initial possession and supply and therefore to the person who has not been able to satisfactorily account for the missing 16 kilograms. What ultimately happened to the drugs he received drugs [sic] he has not satisfactorily accounted for, to my mind, and there is a very real chance those are still at large and I therefore conclude there is a substantial risk of further offences."*

5. His Honour then remanded the applicant in custody.

This application

6. On 26 October 2021, Mr Taufateau filed the instant application for leave to appeal against the refusal of bail. The only grounds for the application appear in the supporting affidavit, not of the applicant himself, but of his former counsel, Mr Taufateau, sworn 25 October 2021. At paragraph 3, Mr Taufateau deposed, relevantly and verbatim:

> *"It is the Applicants' contention and my behalf that the Order to remand in custody was that there were no substantial grounds for believing if released on bail he will fail to surrender to custody nor he will commit an offence while on bail or interfere with witnesses or otherwise obstruct the course of justice."*

Directions on 2 November 2021

7. Pursuant to s 17C(5) of the *Court of Appeal Act*, the application was required to

be filed within 10 days of the order refusing bail. As a result, on 2 November 2021, the following directions were made:

> 1. By 5 November 2021, the applicant is to file:
>
> (a) an application pursuant to Order 4 rule 1 of the *Court of Appeal Rules* for an extension of time within which to apply for leave to appeal. That application is to state the grounds for an extension of time and be accompanied by a supporting affidavit; and
>
> (b) submissions on the application for leave to appeal.
>
> 2. If either application is opposed, then:
>
> (a) by 12 November 2021, the Crown is to file a notice of opposition together with any supporting affidavit/s and submissions; and
>
> (b) the applications and, if leave is granted, the appeal, will be heard instanter, on 17 November 2021 at 9 a.m. in court 1; and
>
> (c) any requests to appear remotely by audio visual link are to be communicated to the Registrar no later than 4 p.m. on 15 November 2021.
>
> 3. If the applications are not opposed, they, and if leave is granted, the appeal, will be determined on the papers.

8. The first direction has not been complied with, at all.

9. On 5 November 2021, the applicant filed a notice of change of lawyer naming Mr Tu'utafaiva as his counsel. That notice was filed in Vava'u and was not brought to my attention until recently. In any event, on 11 November 2021, in response to enquiries made by the Court, Mr Taufateau advised that he was ill. A further enquiry of Mr Tu'utafaiva as to when he expected to be able to comply with direction 1 went unanswered. Hence, the determination of this application has been delayed.

10. The Respondent has not filed any notice of opposition. In light of the applicant's failure to comply with direction number 1, that perhaps is understandable. However, on 15 December 2021, Mr Lutui, the Director of Public Prosecutions, advised the Court by email that the Respondent did not oppose bail being granted below and does not oppose the present application and appeal. Further, as the Respondent has not identified any prejudice by reason of the application being out of time, and in the interests of justice, I will proceed to consider the substantive issue.

Consideration

11. 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.

12. 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.

13. 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).

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

15. The discretion conferred by s 4, like any other statutory curial discretion, must be exercised judicially and in accordance with legal principles, dictated by reason and justice. The discretion must not be exercised arbitrarily or capriciously or to work oppression or abuse, or by reference to irrelevant or extraneous considerations: *Tupa v R* [2021] TOCA 8 at [14][1]; *Secretary of Fisheries v Lanivia* [1999] TOCA 17; *R v Tonga* [2021] TOSC 163; *Latu v Magistrates Court of Tonga*

[1] Citing *Ottway v Jones* (1955) 2 All ER 585 at 591.

[2020] TOSC 81 at [97].[2]

16. A judicial exercise of discretion must be based on some admissible evidence. 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 evidence and/or admission by the accused in court. The provision does not call for the bail judge to be satisfied to any legal standard of the disqualifying factor under consideration. Rather, the court is to determine whether it is satisfied there are substantial grounds for believing that, as here, the applicant for bail would commit an offence while on bail if granted. Such grounds, if they exist, must be identifiable from evidence before the court or as a matter of record, such as a guilty plea or previous criminal history. Where the Prosecution intends to oppose bail, it should adduce either affidavit or oral evidence in support of one or more of the grounds specified in s 4. For example, if it intends to rely on a confession given during interview, it will be a simple matter for the Prosecution to rely upon an affidavit by one of the interviewing officers, exhibiting the record of interview and averring to the accuracy of the record and that the accused voluntarily gave the confession recorded and, where it is affixed, that the accused signed the record of interview. In other cases, an officer may aver, for example, to an accused being arrested while in possession of illicit drugs at a time when he/she was on bail for similar offences. Similarly, any assessment of the strength of the evidence that the accused committed the offence alleged, as prescribed in ss 4(2)(d), can only be undertaken by some consideration of that evidence.

16A. 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

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[2] Citing *Oshlack v Richmond River Council* (1998) 193 CLR 83 at [65]. See also *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 557; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 and *In re Elgindata Ltd (No 2)* [1993] 1 All ER 232.
[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.

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 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]

17. It is not clear from the very limited information before this Court whether, and if so what, information the bail judge had before him on 8 October 2021. There is also no evidence as to what occurred below save for the Respondent's recent advice that the Prosecutor at the time did not oppose bail.

18. From the record of mention issued by the learned judge, it appears likely that, when considering the issue of bail, his Honour acted solely on the basis of the summary of facts.

19. The relevant parts of the summary provide as follows:

> *"(86) After receiving the admission from Nomani that he had given 3 bricks of cocaine to Leonati Motuliki on 1 August 2021, Police then recorded a statement from Kapeni Tamo'ua, whose residence Leonati was residing. "Leonati" is the de-facto partner of Lapeni's daughter. However, by this date Leonati had already travelled to Tongatapu.*
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> *(87) According to the statement Kapeni stated that about 3 weeks prior, Leonati asked to go with him in a vehicle that he was using to Ha'alaufuli.*
>
> *(88) Kapeni stated that as they reached the cemeteries at Ha'alaufuli near the LDS church, Leonati got off and walked to a house. After a short while, Leonati came back and told him to go to a beach.*
>
> *(89) A male person came and Leonati got off and talked to him, whilst Kapeni stayed inside the car. He looked up and noticed the male person coming from the sea and continued talking with Leonati. After a while, Leaonati came back together with the person and got into the vehicle. They dropped off the person at the edge of the village and they drove back to 'Utungake.*

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

> *(90) Kapeni said that he did not know what Leonati did. He also stated that Leonati came in the 'Otuanga'ofa with his partner and children to Tongatapu and are staying at Nukunuku.*
>
> *(91) On or about 5 August 2021 at about 12:45pm, the Police received information that 3 bricks of cocaine was given to Kapeni by Leonati to bury at a tax allotment.*
>
> *(92) The Police acted on this information and proceeded to the Accused's residence but he was not there. They found him at a tax allotment.*
>
> *(93) The Police informed Kapeni that they were Police officers and they will conduct a search without a warrant for illicit drugs, pursuant to section 24 of the Illicit Drugs Control Act.*
>
> *(94) Whilst the search was being conducted, Kapeni was talking with a senior police officer. Kapeni during the conversation voluntarily admitted to the senior police officer that he had destroyed the 3 bricks of cocaine. He stated that on the day before Leonati travelled to Tongatapu, Leonati told him about the three bricks of cocaine, which was left with him. Subsequently he felt uncomfortable so he took the bricks of cocaine to the sea beside the bridge at 'Utungake and disposed of it.*
>
> *(95) The Accused was subsequently arrested by the Police and remanded into custody.*
>
> *(96) On 16 August 2021, the Police conducted an interview with Kapeni and he cooperated with the Police by admitting that he received 3 bricks of cocaine and admitted that destroyed those drugs.*
>
> *(97) Kapeni does not have any previous convictions.*

20. Having regard to the reasons expressed in the record of mention and the above excerpts from the summary of facts, I consider, with respect, that the judge erred in his approach and reasoning in the following respects.

21. Firstly, there was no evidence before the court of any substantial grounds for believing the applicant would offend while on bail. Further, that the Prosecution did not oppose bail should have been interpreted by the judge as an assessment by the Prosecution that there was no evidence of any substantial grounds to engage section 4.

22. Secondly, in what appears to have been a purported assessment of the strength of the evidence that the applicant committed the offences with which he is charged, the judge appears to have treated the allegations in the summary of facts as proven. As observed recently in *Cox v R* [2021] TOCA 23,[9] another of the Vava'u cocaine cases:

> *"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*

[9] AC 25 of 2021 (29 October 2021).

> *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 its 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."*

23. On that basis, the judge's exercise of discretion was based on extraneous considerations.

24. Thirdly, by his plea of not guilty, the applicant put in issue all the allegations against him. They include not only whether he made the admissions alleged but also the truth of the content of any statements he made to police, such as his alleged disposal of the cocaine. As such, there was no basis, in principle, for assessing the likelihood of the applicant committing any offence while on bail by reference to the alleged admissions.

25. Fourthly, the judge was selective in his acceptance of the truth of the content of the alleged admissions. On the one hand, he clearly proceeded on the basis that the applicant's alleged admission to police that he came into possession of the cocaine was true, but appears inferentially, on the other, to have rejected that part of the alleged admission by which the applicant is said to have disposed of the cocaine. By that reasoning, the judge concluded that the cocaine was still at large and therefore, if granted bail, the applicant might go on to further deal with it. Further, by referring to the applicant not having satisfactorily explained the whereabouts of the cocaine, the judge indirectly reversed the onus of proof.

26. Fifthly, the judge's inference that the applicant intended to supply the cocaine to others and his Honour's reference to there being a 'very real chance' that the three bricks of cocaine were 'still at large' were not matters alleged by the Prosecution in the summary of facts. He was not charged with supply (even though the quantity alleged is deemed to be supply[10]). Further, by charging the applicant with destruction of evidence, it is implicit that the police and Prosecution have accepted that the applicant did, in fact, dispose of the drugs.

27. Sixthly, it is not apparent that the judge considered any of the other factors specified in ss 4(2) or that he asked for any evidence or submissions in relation to them. While the nature of the offences charged are clearly serious, the fact that the applicant has no previous convictions (as stated by Prosecution in the summary of facts which must be accepted as a matter of record) was a significant factor in favour of bail.

Result

28. Leave to appeal is granted.

29. The appeal is allowed.

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[10] Section 4(2)(b) of the Illicit Drugs Control Act.

30. The decision of the Supreme Court in proceeding CR 148 of 2021, on 8 October 2021, to remand the appellant in custody pending his trial, is quashed.

31. The appellant is granted bail to appear before the Supreme Court in the said proceeding, as and when required, on the following conditions, namely, that:

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

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

    (c) he is to surrender his passport, if any, to the Court registry in Vava'u forthwith;

    (d) his name is to be added to the no-fly list;

    (e) he is to report to the Neiafu Police Station once a week; and

    (f) he is not to contact any Crown witness in his case.

NUKU'ALOFA
16 December 2021

M. H. Whitten QC LCJ
PRESIDENT