

**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

Seen + filed
CR 117 of 2015

14/12/15

BETWEEN: R E X - Prosecution

AND: MANUKAHO FUNAKI - Defendant

BEFORE THE HQN. JUSTICE CATO

**JUDGMENT ON APPLICATION FOR BAIL VARIATION TO TRAVEL
OVERSEAS**

- [1] The Applicant was charged with causing grievous bodily harm contrary to section 106(1) and (2)(c) of the Criminal Offences Act. The allegation set out in the particulars was that he wilfully and without lawful justification caused grievous bodily harm to the complainant when he stabbed his left buttock with a knife. He pleaded not guilty on the 4th October 2015 and elected trial by Judge alone. I granted the applicant bail. However, he now seeks a variation to enable him to travel to Sydney to spend time with his wife and two young children for Christmas.
- [2] The allegations set out in the summary of facts were that the complainant and the applicant were involved in a fight in Neiafu Vava'u. During the fight, the accused stabbed the complainant in the left side of his buttocks and, although continuing to fight, the victim lost consciousness. He was taken to hospital with severe

bleeding from the wound which was very deep. The facts record that, according to the medical evidence, the Complainant almost lost his life but the medical staff were able to resuscitate him in time to save his life. He had a blood transfusion and the wound was repaired later.

[3] The applicant is a first offender. Mr Pifeleti, who appeared for him on this application, although his trial counsel is Mr S Tu'utafaiva, foreshadowed a plea of self-defence. Mrs Langi, who appeared for the Respondent, in opposition to the application indicated that if that were so, the force used was excessive or unreasonable. Plainly, there are triable issues of significance. However, I am informed by Mrs Langi that the accused has admitted involvement and there are eye witnesses. In her assessment, it was a strong Crown case. She also informed me that, although steps in theory could be taken to extradite the applicant should he not return from Australia, this was in practice a difficult task for Tonga to undertake because of the expense involved. The reality, I was informed, when offenders do not return to face trial, there is nothing that can be done about it other than to await their possible return sometime in the future.

[4] The Applicant deposed that he had been living in Vava'u since May of this year to attend to the family's business and construction of a residential house in Vava'u. He stated that he was a permanent resident of Australia and I note his wife, who appears to have Tongan parents, was born in New Zealand. It is unclear whether she has Tongan or Australian citizenship, as well as New Zealand citizenship, derived from her birth in New Zealand, or whether she also is only a permanent resident. At the time of their marriage in 2008, the wife was working as an

administrative officer in Sydney and the applicant resided in Tonga.

[5] The Applicant stated that his family had spent about \$180,000 building a family home In Vava'u which has not been completed. He says also that they had built and operated a business in Neiafu which had stock in excess of \$65,000. He also deposed to have about 10 acres of crops including vanilla, manioke, pineapple, and sandalwood in Vava'u. On this basis, it seems the family have an intention to return to Tonga at some time in the future. However, the wife in her letter accompanying the affidavit, states that she cannot afford to come to Tonga and also asserted that her eldest child was in the first year of school or kindergarten, and the youngest child did not have a passport. It seems that the wife has no present intention of returning to Tonga, rather her husband is tending to their family business here and was intending to return to spend some time with the family in Sydney shortly before this occurred. She said she missed her husband, as did the children, and she would like him home for Christmas before returning for trial, and to assist her with the children. She said she assured his return to tend to the family business and crops.

[6] As I have said, I granted bail to the Applicant but this application is for a variation to enable him to travel overseas to be with his family. The Crown indicated it was at my discretion whether I granted the application, but, if it were to be granted, there would have to be a cash bond. Accordingly, I treat this as an application to which the Crown has not given approval. In relation to cash bonds, I have already made some adverse comment on this practice in relation to overseas bail, in *Shiqing Lin v Police* Am 26/2012 where I reversed a Magistrate's decision

to grant bail to an applicant who was facing serious drug charges to travel back to China. There, the applicant had appealed the amount of a cash bond of \$10,000. A confederate, who had been given bail to travel back to China on similar terms, did not return to face a committal hearing. The applicant, whose bail I had refused and not merely the order for the cash bond deposit of \$10,000, was subsequently convicted and sentenced to a lengthy term of imprisonment. In that case, in reversing the Magistrate's decision to grant a variation for travel purposes with a significant cash bond, I said;

"In every case, great care should be taken to ensure that flight risk factors are absent before bail is varied to allow an alleged offender to travel overseas for whatever purpose when a criminal prosecution is still pending. If there is any possibility that a defendant will not return to Tonga either because he has no ties here or his ties are much stronger elsewhere than in Tonga, permission should not be granted. Paramount is the orderly enforcement of Tongan penal laws; ... "

[7] I turn to section 4 of the Bail Act and address the following relevant issues namely whether there are substantial grounds for believing that, if released on bail, the applicant will fail to surrender to custody. In considering this matter, I am required by section 4 (2) to consider all the relevant circumstances and in particular here; the nature or seriousness of the offence and the probable method of dealing with the defendant for it; the character, antecedents, associations and community ties of the defendant; his record in relation to fulfilment of obligations under previous grants of bail, and the strength of the evidence of his having committed the offence.

[8] This is a serious case. Causing grievous bodily harm carries a maximum sentence of 10 years imprisonment. The circumstances here were serious also and involved the use of a knife. Conviction will likely involve a term of imprisonment. I am informed that the appellant has made some admissions and that it is a strong case. It may be that trial will establish that there exists mitigating or exculpatory material that alters what is a prima facie view of the case. Even if self-defence is raised proportionality, however, is likely to be an issue where a knife is introduced into a fight and as here, used.

[9] There is no suggestion the applicant has not met his bail conditions but this is his first application to travel overseas. I take into account that, on his word largely, he has assets here in Tonga and has been working to build up those assets in Tonga. Both he and his wife state that it is his intention and indeed their need for him to return to Tonga to carry on with his work.

[10] However, I consider that the family does not yet have a residential base in this country if ever that will arise. His wife and children reside in Australia and it seems have no present intention of leaving. I consider the base of his family life is in Australia where he has permanent residence and had lived for five years and where his wife and children reside.

[11] Where there is application for bail variation to travel outside of Tonga, the Court must weigh up against the private need or desires of the Applicant and his family, the seriousness of the crime and consequences of conviction and the public interest in bringing to justice a person who has allegedly committed a crime in Tonga. The more serious the crime and the greater the

consequences of conviction, the greater is the public interest in requiring offenders to remain in Tonga pending the outcome of their case, and the more critically should applications for overseas bail be scrutinised. Inevitably, there is a risk associated with allowing alleged offenders to leave Tonga, where the crime is serious and imprisonment on conviction a likely consequence, that they will not return. Whilst offenders may manifest a genuine intention to return to Tonga, at the time of their application, they may well have a change of heart when the need to return comes about as family and other factors come into play. In my view, a cash bond, even a significant one, does little to alter this situation where the crime is serious and the consequence of conviction is a likely term of imprisonment.

[12] In my view, there is a risk based on substantial grounds that the Applicant may choose not to return to Tonga. His family and children reside in Sydney, notwithstanding his assertions that he has property and business interests here which require his being here. The crime for which he is charged and the circumstances alleged are serious and I am told it is a strong case. The consequences, if he is convicted, suggest a term of imprisonment is probable. There would be little that Tonga could practically do, bearing in mind the time and cost of extradition, should he decide not to return. In these circumstances, it is my view, that he should not have the variation sought. Rather, his wife and or children should travel to Tonga to be with him at some point before his trial if they so choose, his trial likely to be in the next sitting of the Supreme Court in Vava'u in April or May, 2016. Given the family has the assets he speaks of in his affidavit; there should be no difficulty in his making available funds for his wife and family to travel here before his trial. I add that even if

that were to prove not to be the case, I would not have granted the variation, in this case.

[13] I also add that, in future applications based on assets being present in Tonga, I would expect to see annexed in affidavit form evidence supporting their existence and not just the bare assertion by an applicant that he has those assets. These are extremely serious applications and as this application illustrates, they will be closely examined.

[14] The Application is declined.

DATED: 3 DECEMBER 2015

