

Crown

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

CR 80 of 2013

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[Signature]
08/08/13

**IN THE MATTER OF SECTION 7(2) OF THE BAIL ACT
1990**

And

IN THE MATTER OF AN APPLICATION

**DE FENG MO (Mg CR 233,228/2013)
CHEN ZHINING (Mg CR 224,229/2013
RUI SHONG MA (Mg CR 222, 227/2013)**

BEFORE THE HON. JUSTICE CATO

The contents of this judgment are suppressed and not to be released for publication until further order of this Court. This judgment is to be made available only to the applicants, the Crown and the Commissioner of Police.

JUDGMENT ON APPLICATION FOR BAIL

rec'd 8/8/13
[Signature]

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Mr Niu for the Applicants

Mr Kefu for the police

[1] The applicants applied for bail after a Magistrate had ordered that they be further remanded in custody until the 2nd September 2013. The applicants were charged with various offenses including abduction and armed robbery arising out of an incident that occurred on the 24th July, 2013. The applicants have been in custody since the 24th July, 2013 after a Magistrate had declined various bail applications made on the 24th and 27th July, 2013, and the 2nd August 2013 when they were remanded for a month in custody.

[2] The Solicitor - General, Mr Kefu strongly opposed this application. He outlined to me the allegations behind the offending which are serious. The complainants were, allegedly, at the home of the applicant, De Feng Mo, when arguments developed over a debt allegedly owed by the complainants to an overseas creditor in association with sea cucumber. This resulted in the complainants being confronted by the applicants and two other Tongans. It would seem that this was planned in advance. They were trussed up with tape

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with large heavy sticks against their backs and threatened that they would be killed if they did not pay up. They were driven around Nuku'alofa for some time and taken to a building on a tax allotment belonging to one of the assailants where further discussions took place. During the period of their alleged abduction knives were presented. There was, however, minimal actual physical violence, aside from them being trussed up. Arrangements were made for a large sum of money to be paid by the complainant from an account in China to the Chinese account of an intermediary X in Tonga for payment to the applicants. I am instructed X has been spoken to by police and inquiries are proceeding.

- [3] In all, by way of cash \$75,000 and cheques amounting to \$325,000, a total of \$400,000 was sought by the applicants as payment. It seems the cheques have been recovered by the police but the cash has not been recovered. Various arrangements had been made for the cheques to be cashed and the proceeds paid out to the applicants and, or associates including the deposit of the proceeds of one of the cheques with an intermediary or go - between whom I shall call Y, who

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has a business in Nuku'alofa. Arrangements relating to one cheque was foiled by police when they apprehended De Feng Mo as the cheque was about to be presented by one of the complainant's to whom it had been made out at the ANZ bank and the proceeds given allegedly to De Feng Mo. This led to the arrest of De Feng Mo and others.

- [4] Charges relating to abduction and armed robbery have been laid, although I am informed that consideration is being given to laying charges of extortion, I understand in lieu of robbery. On any view of the alleged evidence as recounted to me by Mr Kefu, this is very serious and unusual offending for Tonga. Given that the complainants know the offenders and given also the intervention by the police when the proceeds of the negotiated cheque made out the younger complainant were to be handed to the applicant, De Feng Mo, at or in the vicinity of the ANZ bank before his arrest, the Crown case would appear to be strong. As well, I sighted certain physical evidence such as the bindings and wooden stakes used to truss the men up, and photographic evidence of large bundles of money and
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authority to pay over money all of which may well materially support the complaint's testimony.

[5] I understand from Mr Kefu that police inquiries have not yet been completed and are ongoing, with regard to the location of the money and the involvement of X and Y. Of particular concern to me, also, is that a few days after the complaint was made to the police and these applicants were arrested, intermediary X met with the complainants and a person described as "a high ranking person" (whose name I was not given) where it is alleged suggestions were made to the complainants to withdraw their complaints. I understand that police are investigating this complaint which on its face may suggest a conspiracy to pervert the course of justice. Mr Kefu in his submissions opposing bail pointed to this as illustrative of further problems which could be encountered should the applicants be given bail, even on restrictive conditions. Twice daily reporting and a curfew appear to have been accepted by Mr Niu, for example, as appropriate restrictions.

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[6] Mr Niu rightly pointed out that his clients were not physically present and of course they were in custody when this meeting took place. He said that Mr De Feng Mo did not support the action that allegedly took place in relation to the meeting where it was at least suggested that the complaint should be withdrawn. This may be the case, but the allegations are serious particularly in so far as it is suggested efforts were made to undermine the process of justice. I understand X may be talking with the police, and no doubt the investigation whilst in its final stages is at a delicate stage.

[7] The reality is that for some, the acquisition and sale of sea cucumber is a valuable and very lucrative trade the sea cucumber being a delicacy in Asia and highly sought after. The allegations in this case arise out of allegedly large debts owed by the complainants to others overseas in connection with this business. De Feng Mo and Rui Shong Ma have been locally involved in the sea cucumber business here and Ma works for De Feng Mo in the business. The allegations involve efforts to extort money by violence and intimidation which for Tonga I am advised are unusual. It is further very

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disturbing to learn that efforts have been allegedly made by intermediary X and some high ranking person to allegedly attempt to interfere with the course of this prosecution, involving as it does very serious criminal allegations against Mr Niu's clients, and possibly others.

[8] It is plain to me that whilst the applicants have been arrested for their alleged roles involving serious intimidation as stand-over men, they may well be players in a larger enterprise. In these circumstances, I well can understand that police inquiries have not been completed, and the concern is, if released, there may well be an attempt by the applicants to interfere, undermine or otherwise obstruct the course of justice. I am particularly minded that the police have not completed inquiries into the intermediaries, X and Y and possibly the high ranking person.

[9] Mr Niu advised me that his clients are all first offenders, and all have families and ties here in Tonga. De Feng Mo has lived for over five years in Tonga and has a child with his partner. He is aged 43 and has two children, aged 4 and one. He became a naturalized Tongan in 1998. He has interests in the fisheries

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business namely in seacumber, and travels between China and Tonga in connection with this. Rui Shong Ma is aged 41. He is married and has a child. He lives with his wife and Tongan extended family and maintains the family. He works for De Feng Mo in the cucumber business. Chen Zhining is married with three children. He owns his own home and he has a retail business in Tonga. He became a naturalized Tonga in 2000.

[10] I accept that all have ties and relationships in the country. None apparently have convictions. I was informed by Mr Niu that none of them have passports other than those which he tendered to the court yesterday, after I had asked him to make inquiries. Mr Kefu says inquiries are being carried out with Chinese authorities to ascertain whether any have Chinese passports, as well as Tongan passports.

[11] I have to consider the following matters in granting or refusing bail, there being a presumption under section 4 in favour of bail unless the Court is satisfied that there are substantial grounds for believing that, if released on bail, (whether or not subject to conditions) he will –

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- a. Fail to surrender to custody;
- b. Commit an offence while on bail;
- c. Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

[12] When considering these matters, the Court is to take into account all the relevant circumstances and in particular;

- d. The nature or seriousness of the offence and the probable method of dealing with it;
 - e. The character, antecedents, associations, and community ties of the defendant;
 - f. The defendant's record in respect of the fulfilment of obligations under previous grants of bail;
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g. The strength of the evidence of his having committed the offence.

[13] I consider the offences very serious and it seems to me on what I have heard about the case, for reasons I have given, this would appear to be a strong prosecution case but it depends on the reliability of the complainants' evidence and their continued willingness to give evidence. Inevitably, periods of imprisonment are likely to be imposed on conviction. I accept that all the applicants have strong Tongan connections and community ties. None have previous convictions. I do not consider either with the surrender of existing passports already in the possession of the Court, an airport watch in place, and daily reporting terms which was suggested by Mr Niu there is substantial reason here to believe they will be a flight risk should bail be given, at least for them not to travel beyond Tongatapu.

[14] However, I am concerned from the nature of the allegations in this case already which involved a high level of group intimidation, the fact that it appears the area of influence may extend beyond these applicants

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and the fact that already there appears an allegation by the complainants that a serious attempt has been made to interfere with the course of justice already, that there are substantial grounds to believe they may make attempts, if released, to interfere with complainants, or compromise their evidence, and possibly compromise also other persons such as intermediaries X and Y in whom the police have an obvious interest. I understand dialogue is taking place between the police and at least one of these men. My principal concern and, it is a very substantial concern, is that police inquiries may be obstructed and the course of justice undermined if the accused are released, at this stage of the inquiry. For these reasons, I decline bail and in effect in doing that I am upholding the approach the Magistrate took. The present remand in custody as imposed by the Magistrate will remain in place.

[15] However, I am conscious that this case could take a long time to be finalized with trial not likely to be before the latter part of next year. I grant leave to the applicants to bring this matter back before me and the police also in any event before the present custodial remand fixed by the Magistrate expires later this

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month, when I would expect the prosecution to have settled the charges, and the police resolved their position in relation to the intermediaries X and Y and possibly the high ranking person. The prosecution may also be in possession then of information relating to whether any other passports are held that could affect the issue of flight risk, and be able to substantiate the information provided to me that the passports the applicants hold are the only ones they have. I will then reconsider the position of bail when, hopefully, matters will have become clearer, than they are now and the dust settled.

[16] In any event, I would want to hear concrete proposals from Mr Niu and Mr Kefu that will ensure the security of the complainants and further ensure that no pressure of any kind is brought to bear on prosecution witnesses before I would grant bail. The applicants should be advised clearly by Mr Niu that if bail is granted, that it will be forfeit on application by the Crown should there be any approaches made directly or indirectly by them to exert pressurise on the complainants or do anything that would affect their security, the security of prosecution witnesses or in any way undermine the

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prosecution itself. That includes any attempt at association with the complainants. I am very concerned in this case and I believe I have substantial reason to hold this belief on the information I have received, that there is a real risk of this prosecution being undermined should the applicants be released, at this stage of the inquiry.

DATED: 8 AUGUST 2013

