

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

CRIMINAL MISC. CASE NO: HAM 050 OF 2009

BETWEEN:

FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)

Applicant

AND:

JOSATEKI TOGA

Respondent

Date of Hearing: Saturday 25th July 2009

Date of Ruling: Tuesday 28th July 2009

Counsel: Mr. A. Rayawa for FICAC
Mr. R. Chaudhary for Respondent

RULING

[1] This is an application by the FICAC for a review of the decision of the Nadi Magistrates' Court to grant bail to the respondent, Josateki Toga, on 24 July

2009. Due to the urgency of the matter, the application was heard in a special court sitting on 25 July 2009.

- [2] The respondent was arrested on 23 July 2009 at around 11am by the FICAC's officers at Nadi McDonald and taken to the FICAC's Lautoka Office for a caution interview. The interview concluded on 24 July 2009. After the conclusion of the interview, the respondent was charged with one count of bribery. He appeared in the Magistrates' Court and was granted bail over strong objections from the prosecution.
- [3] The prosecution seeks review of that decision. The grounds for review are that the prosecution was denied to present evidence of the strength of its case and that fresh evidence was discovered on the evening of 23 July 2009 when the FICAC investigators conducted a search of the respondent's house, which could lead to new charges against the respondent.
- [4] In support of its application, the FICAC led evidence of two officers.
- [5] Evidence was led that the respondent was under the FICAC's surveillance. On 23 July 2009, the respondent met a businessman, Stephen Mallerich, at Nadi MacDonald. Unknown to the respondent, the FICAC officers were present at the MacDonald premises. The meeting and the conversation between the respondent and Stephen Mallerich were digitally recorded without the knowledge of the respondent.

- [6] Evidence was led that the respondent solicited \$500 cash and a mobile phone in exchange for information about travel history of another person. The respondent was wearing his immigration uniform. The businessman handed a red paper bag to the respondent and walked away. The FICAC officers approached the respondent and arrested him. \$500 cash and a new mobile phone were seized from the respondent. The respondent was interviewed under caution. In his interview, he made incriminating statements.
- [7] On the evening of 23 July 2009, the FICAC officers conducted a search at the respondent's house. They found documents belonging to the Immigration Department. A former and a current immigration officer have given statements that the documents belong to the Immigration Department and should not have been removed from the Department's premises. Further investigations are being conducted regarding the documents.
- [8] The respondent gave evidence. He said he was not advised by the FICAC's officers that he was under arrest. He admitted being at the MaDonald. The Court warned the respondent of his privilege against self incrimination and that he should not make any statement that may incriminate him.
- [9] Bail hearings are not trials. The rules regarding admissibility of evidence are relaxed in bail hearings. Bail hearings are conducted not to determine guilt or innocence but to consider the legal justification to grant or refuse bail to an accused.

- [10] Under section 30 and subsections (3) and (10) of the Bail Act, the High Court has power to review any decision made by a Magistrate in relation to bail and the review must be a way of rehearing. In other words, a review is a *de novo* hearing.
- [11] Section 17(2) states that the primary consideration is the likelihood of the accused appearing in court for trial. Bail must be granted unless the court is satisfied of any one of the following under s. 19(1):
- (a) the accused person is unlikely to surrender to custody and appear in court to answer the charges laid;
 - (b) the interests of the accused person will not be served through the granting of bail; or
 - (c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult.
- [12] In forming the opinion, the court must have regard to factors such as the accused's background, employment, previous criminal history, previous failure to surrender to custody, the circumstances and nature of the offence, the strength of the prosecution case, the length of time the person is likely to have to remain in custody, the likelihood of the accused interfering with witnesses and the likelihood of the accused committing an arrestable offence while on bail (s.19(2)).
- [13] Without the Magistrates' Court file, this Court cannot say whether these factors were considered before bail was granted to the respondent. However, the FICAC's contention is that the prosecution was denied an opportunity to present evidence on the strength of its case.

[14] In ***State v Tanidrala & Ors.*** HAM042 of 2005S (HAA096 of 2005), Shameem J said:

“State counsel referred in particular, to the decisions of the High Court of Australia in ***Kioa and Others v. Minister for Immigration and Ethnic Affairs and Another*** 62 ALR 321 and ***Annetts and Another v. McCann and Others*** 97 ALR 177, to submit that where there was the denial of natural justice to a litigant, the resulting decision was a nullity. In ***Michael Anthony Lewis*** (1988) 34 A Crim.R.212, the High Court considered the decision of the Court of Criminal Appeal (Northern Territories) to grant leave to appeal and allow an appeal against conviction without giving the Crown an opportunity to be heard. Although the Court refused special leave, it did hold that the Crown had been denied natural justice. Judgment however was not set aside because the setting aside of an acquittal was an exceptional proceeding. The Court said at page 216 that:

“Once it be conceded, as in our view it must be, that the Crown counsel was denied an opportunity to make a general summation of the evidence with a view to demonstrating that notwithstanding the submissions advanced for the respondent the verdict was neither safe nor satisfactory, then it must follow that the proceedings were marked by a serious irregularity in procedure whereby the Crown was denied natural justice. The Crown is as much entitled to natural justice as any other litigant.”

If these principles are valid in all criminal proceedings, they must be of even greater importance under the Bail Act. So specific are the relevant considerations for the grant or refusal of bail under the Act, that the deciding court must, perforce, hear submissions from both prosecution and defence.”

[15] If the FICAC was indeed denied an opportunity to be heard, then the proceedings in the Magistrates’ Court were marked by a serious irregularity in the procedure

where the prosecution was denied natural justice, justifying a review of the decision to grant bail.

- [16] The FICAC's objection to bail is after they found new evidence of Immigration Department's official documents at the respondent's house; a separate investigation was launched independent of the bribery case. Mr. Rayawa submits that if the respondent is released, he is likely to use his position and power to interfere with the investigation and destroy evidence.
- [17] Mr. Chaudhary for the respondent submits that there is not justification to detain the respondent and that the FICAC is in a fishing expedition to look for evidence against the respondent. Mr. Chaudhary says the respondent is presumed innocent and his liberty should not be unnecessarily restricted.
- [18] As regards the bribery charge, the respondent is facing strong evidence. The alleged offence was committed in the plain view of the FICAC officers. Arising from this investigation, immigration documents were retrieved from the respondent's home, which according to officials from the Immigration Department should not have been removed from the Office.
- [19] The FICAC has launched further investigation in relation to the official documents found in the respondent's possession. The respondent is a senior immigration official. He must bear some influence and command over other immigration officers in his department. He has not been suspended or terminated from his post as an immigration officer. These circumstances lead me to conclude that the respondent is likely to interfere with evidence and that it is not in the public

interest to release him pending the completion of investigation into the circumstances the official documents were found in the respondent's home.

- [20] If the Magistrate would have properly directed his mind to these matters, he would have reached the conclusion that this Court has reached, that it is not in the public interest to grant bail to an accused who is facing a strong prosecution case and investigations are continuing in relation to further allegations.
- [21] For these reasons, I refuse bail. However, the respondent may renew his application for bail within 14 days.
- [22] There is a further issue. Mr. Rayawa advises the Court that when he made an application to have the case transferred to the High Court for trial, the learned Magistrate called for submissions and listed his application for hearing.
- [23] The governing principle when an application is made by the prosecution to elect High Court trial pursuant to s. 220 of the Criminal Procedure Code is settled. When prosecution elects to try the case in the High Court before calling any evidence, the Magistrate has no discretion but to transfer the case to the High Court (**Vijay Kumaran v. State** [2006] AAU0070/07, **Abhay Kumar Singh v. State** Cr. App. No. AAU009 of 2004S, **Makario Anisimai v. State** Cr. App. No. CAV006 of 2008S).
- [24] I do not think that the Magistrate should unnecessarily delay the transfer by inviting submissions on a settled law. The case should be transferred to the High

Court promptly when the prosecution elects the case to be tried in the High Court.

SO ORDERED.

Daniel Goundar
JUDGE

At Suva
28th July 2009

Solicitors:

Office of the Commissioner for FICAC for the Applicant
Messrs. Gordon & Chaudhary Lawyers for Respondent