

**ORDER PROHIBITING PUBLICATION OF ANY PART OF THE  
PROCEEDINGS (EXCEPT THE OUTCOME) UNTIL FINAL DISPOSITION  
OF TRIAL.**

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CRI 2008-404-000365**

**YATESH BABULAL**  
Appellant

v

**NEW ZEALAND POLICE**  
Respondent

Hearing: 12 December 2008

Appearances: F C Deliu for the Appellant  
S L McColgan for the Respondent

Judgment: 12 December 2008

---

**JUDGMENT OF ANDREWS J**

---

Solicitors: Equity Law, PO Box 8333, Auckland 1001  
Meredith Connell, PO Box 2213, Auckland 1140

[1] The appellant appeals against the refusal to grant bail in a decision of District Court Judge Bouchier given in the District Court at Auckland on 14 November 2008.

## **Background**

[2] The appellant is charged with two offences under the Immigration Act. It is alleged that he arrived in New Zealand on 26 October 2005 under the identity Hamish Diaz Choudhary, six months after having been removed from New Zealand subject to a Removal Order under his true identity Yatish Suresh Babulal.

[3] It is alleged that he failed to declare that he was known by another name and that he had previously been removed from New Zealand.

[4] It is then alleged that he returned to New Zealand on 1 December 2007 using the identity of Edwin Nilesj Jagessar. Again, it is alleged that he failed to declare that he was known by another name and that he had previously been removed from New Zealand.

[5] Those two charges are laid indictably and on conviction the maximum sentence is imprisonment for seven years.

[6] The appellant is also charged with an offence under the Passport Amendment Act. It is alleged that on 10 August 2007 he was issued with a New Zealand passport in the name of Wiremu Tautuhi Moka. It is alleged that the photographs applied for that passport is the same as used in the application made to Immigration New Zealand in Fiji under the Jagessar identity.

[7] The respondent noted that the appellant is also known by the name Batita Antonio Tusiga.

## **District Court decision**

[8] The appellant has made three applications for bail to the District Court. He was declined bail in judgments delivered by Judge Cunningham, Judge Doogue and Judge Bouchier. This appeal concerns only the judgment of Judge Bouchier.

[9] EM bail was sought in the application heard by Judge Bouchier. The Judge considered with there was just cause for the appellant's continued detention. She referred to factors set out in s 8(1) and (2) of the Bail Act. She noted that the offences with which the appellant is charged are serious and the case against him appears to be reasonably strong. She acknowledged that there were no convictions for offending while on bail and that it would be a considerable period before the charges came to hearing. She also noted the difficulty of preparation for trial when an accused is in custody. She referred to the appellant's family circumstances noting that he has two children (who are barred from entry into Fiji), his partner has a Downs Syndrome child for whom he assists in care, and his partner was at that time pregnant.

[10] The Judge also considered bail judgments referred to her in submissions on behalf of the appellant. The Judge concluded that there is a real and significant risk that the appellant may fail to appear and a real and significant risk that he may continue to offend while on bail – specifically, that he may assume another identity. She was not satisfied that EM bail would alleviate the court's concerns. Accordingly, bail was denied.

## **Appeal**

[11] As set out in the written submissions filed on behalf of the appellant the appeal is on the grounds that:

- The Judge failed to take into account the appellant's family situation, that a flight risk could be managed by EM bail, that the appellant has no relevant criminal history, his voluntary return to New Zealand after an alleged status as a fugitive, and the length of time to trial;

- The Judge took into account irrelevant factors, that the appellant had legally changed his name in Fiji to each of the names under which he entered New Zealand, and the comments made in the earlier bail decisions;
- The Judge was wrong in law in determining that an offer of surety or financial undertaking could not be considered in a decision to grant bail;
- The Judge failed to apply High Court bail decisions, adopted too-rigid a policy, predetermined the appellant's guilt and failed to apply the presumption of innocence;
- There was a breach of natural justice in that the court failed to provide a copy of one of the earlier bail decisions to the appellant.

### **Arguments for the appellant**

[12] On appeal, Mr Deliu summarised the key points of his argument as being that the Judge did not properly balance the risk of failure to appear and offending while on bail, with the humanitarian and family considerations that pointed to a grant of bail, or to balance the likely time to trial against the sentence likely to be imposed if the appellant is convicted.

[13] Mr Deliu expanded on the grounds of appeal. With respect to the appellant's family circumstances he referred to the appellant's children, his partner and her special needs child, and his mother's mental illness. The latter was not a matter that was before Judge Bouchier and was something that could be taken into account, he submitted, as a change of circumstance. The appellant's mother, who with her step-father cares for the appellant's two children, is suffering from depression which, Mr Deliu submitted, is exacerbated by the appellant's continued incarceration.

[14] In relation to the appellant's family situation Mr Deliu referred me to the United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the New Zealand Care of Children Act each of which,

he submitted, supported giving heavy weight to the interests of the appellant's family in the course of a bail decision. Those Instruments and the Act do not prevail over the Bail Act but they do indicate that considerations as to family situations are relevant to bail decisions. In any they can be considered under the provisions of s 8(1) and (2).

[15] Mr Deliu also referred to the availability of two sureties to a total sum of \$10,000 from the appellant's mother and step-father. This was, he submitted, something that had not been able to be considered by the District Court so was a change of circumstances.

[16] As to the likely time to trial, Mr Deliu submitted that a trial in the District Court is unlikely before 2010 and by that time the appellant would have been in custody for a period that is as long as any term of imprisonment he is likely to receive if convicted. Mr Deliu submitted that the Judge failed to give proper consideration of the presumption of innocence and defences the appellant has available to him on the charges.

[17] Mr Deliu referred to the High Court judgments in *Davenport v Police*<sup>1</sup>, *Police v Thomas*<sup>2</sup> and *Faisandier*<sup>3</sup>. He argued that *Faisandier* is directly analagous to the present case. He also referred to the judgment in *Wong*<sup>4</sup> in which EM bail was granted in circumstances which, he submitted, were analogous to the present.

[18] I have reviewed those decisions. There are differences between them and the present case. As is often said, no two cases are ever exactly the same each must be considered on its own facts and circumstances.

### **Arguments for the Respondent**

[19] On behalf of the respondent Mr McColgan submitted that the appeal should not be allowed. He submitted that there was no error in the Judge's decision on bail

---

<sup>1</sup> *Davenport v Police* HC WN CRI 2008-485-27, 28 17 April 2008, Mallon J

<sup>2</sup> *Police v Thomas* HC WN AP119/89 18 August 1989, Fisher J

<sup>3</sup> *Faisandier v Serious Fraud Office* HC WN M.433-98 2 February 1999, Gallen J

<sup>4</sup> *Wong v R* HC AK CRI 2005-004-015296 22 April 2008, Stevens J

in that all of the matters put before this court had been considered by the Judge in the District Court. He submitted that having considered those matters the Judge properly concluded that the risk of failure to appear and the risk of offending while on bail, could not be alleviated by release on EM bail.

[20] Mr McColgan referred to the appellant's total course of conduct. The essence of the charges against the appellant is his use of false identities, five in all. He submitted that the appellant has demonstrated that he can, and will, change his identity whenever he encounters difficulty with New Zealand law. He submitted that there is a real and significant risk that if he is released the appellant can, and will, create new identities whether or not he leaves New Zealand or simply moves away from his bail address, and whether or not he is with his children.

[21] Mr McColgan accepted that being in custody has an adverse impact on the appellant's family but submitted that that was an inevitable consequence when offences are committed. He submitted that the appellant's case is not significantly different from others to the extent that his should be treated as a special case.

## **Discussion**

[22] A challenge on a appeal to a bail decision is an appeal against the exercise of a discretion. The Court of Appeal in *B v Police*<sup>5</sup> confirmed that an appellant must show that the Judge made an error of principle, failed to take into account all relevant matters, took into account irrelevant matters or was plainly wrong.

[23] The appellant is not bailable as of right. However, under s 7(5) of the Bail Act he must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention. The starting point is s 7(5) of the Act under which there is a presumption that an accused person must be released on reasonable conditions unless there is just cause for continued detention. In any case it is a matter for the discretion of the Judge to assess what is a real or significant risk in the circumstances of the case.

---

<sup>5</sup> *B v Police (No 2)* [2000] 1 NZLR 31

[24] I turn to address the matters set out in s 8(1) of the Bail Act that are relevant in the present case. There is, in my judgment, a real and significant risk of the appellant failing to appear in court. The Judge did not err in reaching this conclusion. Nor, in my judgment, did the Judge err in concluding that there is a real and significant risk of the appellant offending while on bail.

[25] As to whether there is any other matter that would make it unjust to detain the appellant, that leads to consideration of the appellant's family situation and that is a matter to be balanced against other factors.

[26] Turning to the s 8(2) factors the Judge considered the nature and seriousness of the offence and the strength of the evidence. Clearly if the appellant is convicted he faces a term of imprisonment. It may be as short as Mr Deliu suggested, but that is not a matter I can predict.

[27] The Judge also considered the appellant's history noting that he has no previous criminal convictions.

[28] The Judge considered the likely length of time to trial and the possibility of prejudice in preparing his defence.

[29] The Judge also noted the appellant's family situation as a relevant factor under s 8(2).

[30] The only matters either not before or not considered by Judge Bouchier were the offer of a surety and the information as to the appellant's mother's illness. I note that the surety issue was noted in the judgment of Judge Doogue who observed that she did not consider it would, of itself, be sufficient to alleviate the risk of failure to appear.

[31] Ultimately the decision as to bail comes down to whether what the court accepts is a real and significant risk of failure to appear and of offending while on bail, can be alleviated by appropriate conditions of bail. In this case it is suggested that electronic monitoring will alleviate that risk. The question is whether this court

can be satisfied that if he is released on such conditions the risk that the appellant will fail to appear in court and will offend while on bail, can be alleviated to the extent that there is no longer just cause for him to be detained in custody.

[32] On the basis of the availability of EM bail, the appellant's home address having been assessed as suitable for EM bail, and the availability of sureties, this court has concluded that bail should be allowed but it will be on strict conditions so that the appellant can be closely monitored.

### **Result**

[33] The appeal is accordingly allowed.

[34] EM Bail is granted on the following terms and conditions:

- a) Upon release, the appellant is to travel directly to the approved EM bail address and await the arrival of the Probation Officer.
- b) The appellant is to live and remain continuously at 3 Roby Street, Te Atatu, Waitakere on a 24-hour curfew for the duration of the EM bail.
- c) The appellant is not to consume alcohol or non-prescribed drugs for the duration of EM bail.
- d) The appellant is to surrender any passports held by him and not to apply for any passport, or other travel document.
- e) The appellant's mother and step-father are each to provide surety such that a total surety of \$10,000 is provided.

[35] Further conditions of EM bail are to apply, they are:

- Electronic monitoring of curfew applies.

- To travel directly, without stopping, to 3 Roby Street, Te Atatu Peninsula, Waitakere upon release from custody.
- To be absent from the address on each and every Court appearance date, solely for the purpose of attending Court. To remain at the Court until the conclusion of the hearing, whereupon, to return directly to the EM Bail address.
- To attend pre-approved (by the EM Bail Assessor) scheduled legal, medical or dental appointments. Confirmation of the appointment is to be provided to the EM Bail Assessor, 48 hours in advance. Travel to be direct between the EM Bail address and that of the appointment.
- The appellant must give a security guard from the monitoring company (on provision of appropriate identification) access to the house on request to check and maintain the electronic monitoring equipment, respond to alarm alerts, and to remove the equipment.
- The appellant must not tamper with or damage any electronic monitoring equipment.
- The appellant must present himself at the door if called upon by a member or employee of New Zealand Police on provision of Police identification.
- The appellant must not refuse a Police EM bail assessor (on provision of Police identification) access to the house to speak to an occupant where an occupant (being a person who has consented to the appellant residing at the address) has requested to speak with an EM bail assessor.
- The appellant must surrender himself to Police custody if, for any reason, he is unable to remain at the address listed in the bail bond.

- The appellant must co-operate with the security guard in fitting the electronic bracelet to his body.
- If the appellant is unavoidably delayed while travelling from court to the residence he must inform the EM bail assessor immediately on 0274-900105.
- If a variation to the appellant's bail conditions is sought, he must make his application in writing to the court for a variation at least 3 working days prior to any proposed variation in bail conditions.
- The appellant must advise the Police EM bail assessor if he is required to attend court prior to the date listed in the Notice of Bail. The assessor will require evidence that the appellant is required to attend Court.

---

Andrews J