IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2009-404-000356

SIONE FONOKALAFI
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 6 November 2009

Appearances: D Rawlings for Appellant
S McColgan for Crown

Judgment: 6 November 2009

Reasons: 11 November 2009

JUDGMENT OF WHITE J

This judgment was delivered by me on 11 November 2009 at 10:00 am pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Solicitors/Counsel:
Crown Solicitor, PO Box 2213, Auckland 1140

D Rawlings, Public Defence Service, PO Box 90243, Victoria Street West, Auckland 1142

[1] These are the reasons for the judgment given on Friday, 6 November 2009.

[2] This is an appeal against the decision of District Court Judge Cunningham dated 7 October 2009 declining Mr Fonokalafi's application for bail. Previous applications for bail in the District Court have been declined by District Court Judge Mathers on 10 March 2009 and District Court Judge Sinclair on 26 June 2009. The three judgments contain the background to the charges which Mr Fonokalafi faces and the reasons why bail was declined.

[3] This appeal, however, relates only to the judgment of District Court Judge Cunningham. As an appeal from the District Court it is to be "by way of rehearing" and subject to certain procedural provisions from the Summary Proceedings Act 1957: ss 41(6) and 42 of the Bail Act 2000.

[4] It was submitted for the Crown, on the authority of the judgment of the Court of Appeal in *R v Winn* CA 294/06 27 September 2006, that because the decision of the District Court Judge was the exercise of a discretion, the appellant would need to show that the District Court Judge acted on a wrong principle, took account of irrelevant factors, omitted to consider relevant factors, or was plainly wrong in her decision. The judgment of the Court of Appeal in *R v Winn* concerned an appeal against a bail decision of the High Court, to which the provisions of ss 66 and 67 of the Bail Act 2000 would have applied.

[5] There is other authority to support the Crown submission that appeals from the exercise of a discretion are governed by the principles in *May v May* [1982] 1 NZFLR 165 (CA), which were applied in *R v Winn*, and that the decision of the Supreme Court in *Austin, Nicholls & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 has not altered the position: *Blackstone v Blackstone* [2002] NZCA 312 at [8] and *Mortimer v New Zealand Police* HC NEL CRI-2009-442-000016 5 August 2009 at [2]. I also note that there are judgments of this Court which have suggested that in light of the decision in *Austin, Nicholls* the Court must apply its own judgment and cannot abdicate responsibility for making its own assessment of the merits of the application: *Webster v New Zealand Police* HC AK CRI-2008-0053 18 April 2008 at [13] *Burchell v New Zealand Police* HC AK CRI-2009-404-000030 17 February

2009 at [12] and *Black v New Zealand Police* HC AK CRI-2009-404-000021 20 February 2009 at [8].

[6] In the present case I was satisfied that bail should be declined and the appeal dismissed because there was no relevant error in the exercise of the discretion by the District Court Judge and, in any event, there was no merit in the appeal.

[7] As far as the District Court Judge's exercise of discretion was concerned, it is clear from her decision that bail was refused because:

- Mr Fonokalafi had previously offended while on bail on 18 occasions;
- He had not been accepted for Odyssey House;
- There were no letters from Epsom Lodge, the Salvation Army Bridge Programme or Odyssey House.

[8] The District Court Judge concluded in her decision:

> [14] To summarise, the prospect of Mr Fonokalafi being at Epsom Lodge for up to two and a half months before a bed becomes available, is just not enough in terms of a change in circumstances. I imagine that this letter I have from Odyssey House was probably before Judge Sinclair on 26 June, and so there is nothing confirmed or in writing, that really advances the position from there.
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> [15] If Mr Rawlings is able to obtain a letter from Odyssey House saying when they could take him and that there was an earlier time than 23 December this year, then I would certainly be prepared to look at the matter afresh. At this stage, the concerns that the previous Judges had about offending on bail and in front of them, also charges where Mr Fonokalafi has breached his obligation to attend Court, those concerns still remain while he remains untreated.
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> [16] If Mr Fonokalafi is able to get written confirmation, that he is able to enter one of these programmes soon, then the application can be brought back before me, or some other Judge, and I would certainly be happy to look at it again, but at the moment, bail is declined.
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> [17] Mr Fonokalafi, you are remanded in custody. Mr Rawlings, I direct that a copy of that is to be given to you as soon as possible. I am quite happy for you to show that to either Odyssey House or Salvation Army Bridge programme for the purposes of trying to assist Mr Fonokalafi to get into one of those programmes.

> [18] You can certainly get in touch with the registry and say that I am happy to have it put back in front of me.

[9] Mr Fonokalafi's counsel was unable to point to any relevant error in the exercise of the discretion by the District Court Judge. Her decision disclosed no error of principle, consideration of irrelevant factors, omission of relevant factors, and was not plainly wrong. On the contrary, the District Court Judge left open to Mr Fonokalafi the possibility of a further application for bail.

[10] As far as the merits of the appeal were concerned, Mr Fonokalafi faced two significant difficulties. First, while there were letters from the Salvation Army Bridge Programme and Epsom Lodge, there was still no place available for him in Odyssey House. He was on a waiting list for some weeks. Secondly, as Mr Fonokalafi's counsel acknowledged, the provisions of s 12 of the Bail Act applied in his case.

[11] As a result of the application of s 12, Mr Fonokalafi's application for bail needed to be considered in the context of the following subsections:

> (4) No defendant to whom this section applies may be granted bail or allowed to go at large unless the defendant satisfies the Judge that bail or remand at large should be granted.
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> (5) In particular (but without limiting any other matters in respect of which the defendant must satisfy the Judge under subsection (4)), the defendant must satisfy the Judge on the balance of probabilities that the defendant will not, while on bail or at large, commit –
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> (a) any offence involving violence against, or danger to the safety of, any other person; or
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> (b) burglary or any other serious property offence.
>
> (7) In deciding whether or not to grant bail to a defendant to whom this section applies or allow the defendant to go at large, the need to protect the safety of the public and, where appropriate, the need to protect the safety of the victim or victims of the alleged offending, are primary considerations.

[12] The difficulty for Mr Fonokalafi was that the current serious charges included charges of possession of a loaded pistol and live ammunition. When those charges were considered with the serious drug charges and his previous offending while on bail, he was unable to satisfy me on the balance of probabilities that while on bail he

would not commit any offence involving violence against, or danger to the safety of, any other person. No evidence was adduced for Mr Fonokalafi to discharge the onus of proof on him in this respect.

[13] I did not overlook the fact that Mr Fonokalafi had been in custody for eight months already and that he was likely to remain in prison for 16 months before he was sentenced on these charges. But the provisions of s 12 needed to be applied in his case.

[14] Bail was declined and the appeal was dismissed.

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D J White J