IN THE COURT OF APPEAL, FIJI ISLANDS

APPELLATE JURISDICTION

CRIMINAL APPEAL No. AAU 0001 of 2009
(High Court Criminal Case 189 of 2008)

IN THE MATTER of a review of the Decision of the High Court in an application for Bail Pending Trial in Suva High Court criminal case number 189 of 2008

BETWEEN:

MERONI ADIKUBE KOROI

(Applicant)

- and -

THE STATE

(Respondent)

RULING ON BAIL PENDING TRIAL

Introduction

1 This is an application to review an order in the High Court by Goundar J refusing Mereoni Adikube Koroi (hereafter the Applicant) bail pending her trial before the High Court on a charge of murder. The application is made pursuant to section 30(4) of the Bail Act 2002.

Grounds for review

2 The case for the Applicant on review is that Goundar J made an error of principle in four ways. These are:

(1) the judge erred in law in applying common law principles in preference to clear and definite statutory provisions for bail pending trial under the Bail Act;

(2) the judge erred in law in using common law criteria in determining the bail of the Applicant by holding that in relation to the crime of murder there must be exceptional circumstances before bail is granted whereas nowhere in the Bail Act is murder treated any differently from any other crime;

(3) the judge erred in law and in fact finding that the prosecution had rebutted the presumption in favour of bail on a balance of probabilities; and

(4) the judge erred in law when giving weight to the untested evidence as contained in the interview attributed to the Applicant.

The ruling of Goundar J

3 On 17 December 2008, Goundar J heard an application by the Applicant in these proceedings for bail pending trial. He provided a considered, written ruling the following day. At paragraph 4 of his ruling, the judge said: "Under section 3 of the Bail Act the accused has a heavy presumption in her favour. The onus is on the prosecution to rebut the presumption on the balance of probability." The learned judge then held that bail must not be refused unless the court is satisfied as to any one or more of the considerations set out in section 19(1) of the Act. The learned judge in his written reasons then set out those provisions.

4 The learned the judge noted that murder is a serious offence because on conviction the sentence is mandatory life imprisonment. He said: "When the alleged offence is serious and the evidence is strong, the likelihood of absconding bail is higher." The learned judge then set out the basis of the prosecution case. He characterised the evidence against the Applicant as strong. One of the components of the evidence against the Applicant was that there were statements under caution attributed to the Applicant which constitute a confession. In this regard, the judge said that the admissibility of the statements under caution was something that the accused is

entitled to challenge trial. He added: "However, a confession well proven is strong evidence."

5 The learned judge then said the following at paragraph 8 of his written ruling:

> Under common law, bail is only granted in exceptional circumstances to an accused charged with murder. The Bail Act has not abolished the common law test. Thus, the court can go beyond the considerations set out in section 19 to consider granting bail when exceptional circumstances are present. What constitutes an exceptional circumstance will depend on the facts of each case.

The judge returned to this concept of exceptional circumstances being required for the grant of bail in the concluding substantive paragraph of his written reasons. The learned judge said at paragraph 10, in part, "I am satisfied there is a real possibility she will not appear for her trial. There are no exceptional circumstances to grant bail. I am satisfied that the prosecution has rebutted the presumption in favour of bail on the balance of probability."

Statutory provisions

6 Under section 30(4) of the Bail Act, the Court of Appeal may review any decision made by the High Court in relation to bail. Section 23(4) of the Court of Appeal Act provides that on an appeal against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, the Court of Appeal may confirm, reverse or vary the decision of the High Court. Section 35(1)(d) of the Court of Appeal Act allows a judge of the Court of Appeal to admit an appellant to bail. There may be a minor technical issue as to whether the section 23(4) of the Court of Appeal Act applies because section 30(4) of the Bail Act speaks of the Court of Appeal being given a power to review as opposed to appeal. However, section 30(9) of the Bail Act provides that on a review the court may confirm, reverse or vary the decision which is the subject of the review. Section 30(10) of the Bail Act provides that the application is by way of re-hearing.

Principles governing bail on review

7 The Supreme Court in ***Jione v State*** [2006] FJSC 9 considered the approach that the Supreme Court should take on a review. The Court held:

> An appellate Court, asked to review a decision made in the exercise of a judicial discretion, does not automatically re-exercise the discretion, but only intervenes if the exercise of the discretion by the primary Judge miscarried. The principles which guide an appellate court in reviewing a discretionary decision are well established, being set out by the High Court of Australia in *House v The King* (1936) 55 CLR 499, 504-5.

The essence of those principles is that the exercise of a discretion will be reviewed on appeal, if the judge acts on a wrong principle, if he mistakes the facts, if he is influenced by extraneous considerations or fails to take account of relevant considerations. And if it should appear that on the facts the order made is unreasonable or plainly unjust, even if the nature of the error is not discoverable, the order made will be reviewed.

8 Two points should be made about the decision of the Supreme Court in *Jione v State*. First, the court was dealing with an application for bail pending appeal. Different principles apply to the application of bail pending appeal. Second, the jurisdiction of the Supreme Court is narrowed by section 7(2) of the Supreme Court Act. Nevertheless, the general approach propounded by the Supreme Court is apposite in respect of an application for review of bail pending trial by the Court of Appeal making full allowance for the fact that the principles in relation to bail pending trial are fundamentally different.

Submissions on review

9 The Applicant contends that the learned judge made an error of principle when he imported what he characterised as a common law principle that when an accused is charged with murder, bail is only granted if there are exceptional circumstances and, by implication, absent such exceptional circumstances the prosecution have discharged the burden imposed upon them if there are no exceptional circumstances.

10 There is no doubt that the concept of no bail being granted unless there are exceptional circumstances applies in relation to bail pending appeal. Plainly that is not what Goundar J had in mind. At common law, as a matter practice bail was usually not granted in murder cases. See, in this regard, Archbold: *Criminal Pleading Evidence & Practice*, 36th edition, for 1966, paragraph 203. The grant of bail pending trial in England has been subject to statute (the Bail Act 1976) for some time. Under that Act, subject to a minor exception, murder is not treated any differently to any other offence which is punishable by imprisonment. The exception is not presently relevant. Even prior to the Bail Act 1976 there were a variety of statutory provisions such as the Magistrates Courts Act 1952 which governed bail by justices. Under that provision, justices were entitled to grant bail in all cases but treason.

11 There are a series of decisions of the High Court which predate the advent of the Bail Act 2002 in which it is clear, albeit variously expressed, that in murder cases bail was only granted in exceptional circumstances. Perhaps the clearest example of this line of authority is a decision of Pain J in ***State v Kaylesh Chandra*** [1994] FJHC 68. Pain J used the language of Archbold (above). Pain J noted two decisions of Fatiaki J (as he then was) which used the language of exceptional circumstances.

12 So far as the applicability of common law principles in relation to bail under the Bail Act 2002, in ***State v Shankar & Narayan*** [2003] FJHC 50, Gates J (as he then was) considered the operation of the Act which, at the time of his examination of it, was still relatively new. It is not irrelevant to note that the accused in that case were charged with murder. Gates J observed:

> [9] The Bail Act 2002 has encapsulated long standing principles of the Common Law and provides guidance to persons charged with the duty of deciding bail, and on the priority of competing considerations. First, the Act makes clear that there is for every accused person an entitlement to bail [Section 3(1)]. This does no more than reflect the principle of the presumption of innocence, which is also stated by the Constitution [Section 28(1)(a)]. Section 3(6) however also states that that entitlement will fail if it is not in the interests of justice that bail should be granted.

> [10] The second presumption is stated to be that in favour of the granting of bail. The presumption is rebuttable [Section 3(3)], if it can be shown that the accused has previously breached a bail undertaking or bail condition, or has been convicted and has appealed against the conviction [Section 3 (4)].

Gates J pointed out, citing section 17(2) of the Act that the primary consideration in this decision making process is the likelihood of the Accused person appearing in court to answer the charge. The learned judge then set out the three relevant criteria in the Act.

13 Later in his judgment, when he was considering the merits of the application Gates J observed:

> [23] The allegation is a very serious one. It is that both Accused entered the flat of the female victim at night when she was asleep. Both of them then raped her twice. They had bound and tied her legs and wrapped masking tape over her face, almost completely covering it. They strangled her with a rope until she expired. They left the flat taking with them some of the deceased's personal property, a radio, camera, bags, a fan etc. Bail is only granted in murder cases in exceptional circumstances. These are not present here: ***Kaylesh Chandra v The State*** (unreported) Suva High Court Misc. Applic. No. 5.94, 24 June 1994; ***The State v Felix Keith Vusonitokalau*** (unreported) Suva High Court Cr. Case No. HAC0005.96S; 2 September 1996. [emphasis added]

14 I respectfully agree with Gates J when he observed that the Bail Act 2002 encapsulated long standing principles of the Common Law and provides guidance to persons and courts charged with the duty of deciding whether or not to grant bail. The principles which inform the decision as to whether or not to grant bail under the Bail Act 2002 are the same for all offences and is there is no special rule of law governing the decision in respect of the crime of murder. However, as the situation was in respect of bail in murder cases at common law, as a matter of simple common sense it is easy to understand why a practice developed in which it was relatively unusual to grant bail for murder cases. In years past, a person convicted of murder faced the death penalty. In the more enlightened times in which we live, we no longer have the death penalty. Nevertheless murder is one of the most serious offences in the law. This is reflected in the penalty: life imprisonment. Accordingly, long experience would normally suggest that an accused faced with a charge of

murder would, in many circumstances, be a real bail risk in the sense of possibly not turning up court; possibly suborning witnesses; possibly being a danger to himself or herself. There are many other conceivable concerns which a court might have in this regard. I have only listed a few of them. For the avoidance of doubt, I am far from saying that in any individual case that all would be present and that, of course, includes the present case.

15 If the phrase "exceptional circumstances" was meant to convey that in law or fixed practice that the burden of persuasion is somehow reversed in murder cases and that this is somehow superimposed upon the Bail Act 2002 then I respectfully suggest that this is inconsistent with the Act. It would also be wrong in law to suggest that such a principle as a matter of law or practice rebuts the presumption of bail. I interpret the approach evinced in the decision of Gates & Goundar JJ as merely a reflection of a common sense mode of analysis reflecting the accumulated wisdom and experience of common law judges all over the world. That wisdom and experience was not excluded by the Bail Act 2002. Neither analysis of either Goundar J or Gates J would make a great deal of sense if they were meaning to convey that in law or in practice the burden of persuasion is reversed notwithstanding the clear words of the statute. That is especially so since both of them expressed with absolute clarity the principles enunciated in the Bail Act 2002. In my judgment, while it is possibly unfortunate usage to speak of bail in murder cases only been granted in exceptional cases, properly understood this often reflects the practical application of the act. As counsel for the Applicant noted there are numerous cases where a bail in murder cases has been granted. That demonstrates exactly the point that I seek to make: there will obviously be cases where a bail is appropriate in cases where the accused is charged with murder.

16 The other main point of principle of which the Applicant complained is that Goundar J was wrong when he gave weight to the untested admission attributed to the Applicant in a statement under caution. A relevant factor for a judge to take into account in determining whether or not a person is likely to answer to bail is to look at

is the strength of the evidence that might be levelled against that person. At common law, by obvious implication of section 17(2) and section 18(1)(a) of the Act and explicitly by section 19(2)(a)(iv), such an issue is a relevant consideration. It is not suggested that it was inappropriate to take into account that, apparently, witnesses saw the Applicant stab the deceased. In my judgment, it is generally appropriate for a court to take into account that an accused made admissions to be police under caution. Certainly there have been cases where admissions under caution have been challenged as to the admissibility and, in the result, have been held to be inadmissible. It may be that eyewitness evidence turns out to be valueless. It may be in other cases other forms of evidence such as visual identification evidence is either of little or no weight because of the circumstances in which the visual identification was. Experience demonstrates that evidence sometimes turns out to be far different when it is presented in open court compared to such evidence as it was recorded in witness statements - no matter how carefully and meticulously the statement was taken. In my judgment, Goundar J was perfectly entitled to take into account the admissions made under caution by the Applicant.

17 Section 30(10) of the Act mandates that this is a rehearing. In other words, section 3(1) requires me to approach this matter upon the basis that an accused has the right to be released on bail unless it is not in the interests of justice that bail should be granted. Consistent with this principle, section 3(3) of the Act declares that there is a presumption in favour of the granting of bail to a person, but a person who opposes the granting of bail may seek to rebut the presumption. In determining whether a presumption is rebutted, the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charges laid against him or her: section 17(2). Where bail is opposed, section 18(1) requires that the party opposing bail address the following considerations:

(a) the likelihood of the accused person surrendering to custody and appearing in court;

(b) the interests of the accused person;

(c) the public interest and the protection of the community.

18 Section 19(1) of the Bail Act provides that an accused person must be granted bail by a court unless:

(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.

19 Section 19 (2) of the Act sets out a series of considerations that the court must take into account in determining whether or not any of the three matters mentioned in section 19(1) established. Those matters are:

(a) as regards the likelihood of surrender to custody-

(i) the accused person's background and community ties (including residence, employment, family situation, previous criminal history);

(ii) any previous failure by the person to surrender to custody or to observe bail conditions;

(iii) the circumstances, nature and seriousness of the offence;

(iv) the strength of the prosecution case;

(v) the severity of the likely penalty if the person is found guilty;

(vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);

(b) as regards the interests of the accused person-

(i) the length of time the person is likely to have to remain in custody before the case is heard;

(ii) the conditions of that custody;

(iii) the need for the person to obtain legal advice and to prepare a defence;

(iv) the need for the person to be at liberty for other lawful purposes (such as employment, education, care of dependants);

(v) whether the person is under the age of 18 years (in which case section 3(5) applies);

(vi) whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;

(c) as regards the public interest and the protection of the community-

(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;

(ii) the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person:

(iii) the likelihood of the accused person committing an arrestable offence while on bail.

20 It seems to me that account should also be taken of the presumption of innocence. As has been rightly pointed out on behalf of the Applicant in the course of submissions, there is a clear connection between the presumption of innocence and the presumption of the right to bail.

21 How, given the facts, of this case should those principles operate? The charge is murder. On conviction the Applicant faces a life in prison. Apparently the victim of the alleged murder was a male person who is described as the partner of the Applicant. It is said that alcohol was involved. It is also said, and I take it into account, that the evidence will be that some time shortly after the killing the Applicant made admissions to the police. It is said that those submissions were under caution. All things considered, on the material for me it seems undeniable that the State as a strong potential case against the Applicant. I have no doubt that she must realise this and one cannot ignore at least the possibility that faced with a serious charge with very serious consequences on conviction and strong evidence in support of that charge that the temptation not to answer her bail at trial would be nothing short of overwhelming. Although the Applicant promises otherwise in her affidavit, given what appear to be the domestic circumstances in which these events took place there is a real risk that the Applicant is allowed on bail might interfere with her witnesses. Plainly, that would not be in the interests of justice. That falls within the concerns outlined in section 19(2)(c).

22 The Applicant is a single and is aged 33. She does not have any children. She has three previous convictions. Each of them is a minor conviction and none of them are suggestive of violence. While the three convictions might be said not to permit the Applicant to say she is a person of previous good character, of themselves, the previous convictions are of little assistance in determining this matter. The Applicant says that she has no adverse history in respect of breaching bail conditions.

23 In the affidavit in support of her application, the Applicant sets out in paragraphs 5 and 6 of the affidavit her personal circumstances. In paragraph 6 she asserts that she lives with her parents in a settlement near Suva. The Applicant says that she intends to stay at home with her family. There is no indication in her affidavit what her employment history is or what her employment prospects are in the event that she was to be released on bail. I was given to understand during the course of submissions that she was formerly working on a part-time basis. The affidavit of the Applicant's mother supports this. There was some suggestion by counsel for the State that the Applicant was, contrary to her assertion in paragraph 6 of her Affidavit, residing in Nadi. It was objected by counsel for the Applicant that this was not supported by an affidavit. I should indicate that it is not the absence of an affidavit from the prosecution that causes me not to take this matter into account. It is simply that it was all a little bit vague.

24 The Applicant in her affidavit promises the court to be of good behaviour. She is prepared to report to a police station if granted bail. Her mother in an affidavit sworn on 12 December 2008 indicates that she is prepared to be the surety for her daughter. The Applicant's mother proposes that she lives with her husband who is unemployed. He also says in her affidavit that their son aged 26 (who is the brother of the Applicant) also resides with them.

25 Although it does not appear in either of the affidavits tendered in support of the application for bail, I was told, and I accept, that the Applicant does not presently hold a passport.

26 The obligations of a surety include not only the obligation to ensure that the bailed person attends for her trial but also that the bailed person observes the terms and conditions of bail which might be imposed. Obvious possibilities in this regard would include an order that without the permission of the court the bailed person had no contact whatever with any of the witnesses other than, possibly, for the purposes of her lawyers interviewing them in connection with the preparation of her defence to the charge of murder. Other obvious possibilities include orders to reside at certain places; report to a police station; not to leave the country and so on. Given the age and circumstances of the proposed surety I do not think that the Applicant mother is really capable of acting as surety.

27 In my judgment for the reasons set out in this judgment, there is a real likelihood that the Applicant will not answer her bail when called upon to do so. I also think that there is real risk that she will unlawfully interfere with the potential witnesses. I also do not think that even if I was minded otherwise to grant her bail to the surety would, in the circumstances, be an adequate one.

28 Bail is refused.

29 The Applicant is informed that she has a right of review before the Supreme Court of Fiji.

30 I understand that the Applicant is scheduled to appear before the High Court on 27 March 2009 for mention. I remand the Applicant in custody and be brought up before the High Court at 9-30 am on 27 March 2009.

DATED the 18th day of March 2009.

(Andrew Bruce)
Justice of Appeal