IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No: AAU 0046A of 2015
(High Court Case No: HAC 296 of 2014)

BETWEEN	:	**OSEA NAMUA**	***Appellant***
AND	:	**THE STATE**	***Respondent***
Coram	:	**Basnayake JA** **Jayamanne JA** **Perera JA**	
Counsel	:	**Mr. J. Savou for the Appellant** **Ms. P. Madanavosa for the Respondent**	
Date of Hearing	:	**9 February 2016**	
Date of Judgment	:	**26 February 2016**	

JUDGMENT

Basnayake JA

[1] This is a leave application made in pursuance to section 21 (b) of the Court of Appeal Act against the refusal of bail by the learned High Court Judge. The appellant was charged in High Court, on two counts namely, dishonestly receiving stolen property contrary to section 306 (1) of the Crimes Decree No. 44 of 2009 and aggravated robbery contrary to section 311 (1) (a) of the Crimes Decree. The alleged offences were committed on 27 October 2014.

[2] The appellant had applied for bail on 20 November 2014. This application was heard on 18 February 2015 and an order was made refusing bail on 6 March 2015. Reasons for refusal were pronounced on 2 October 2015. The appellant on 13 October 2015 filed this notice (amended notice) seeking leave first and bail. The Court of Appeal may if it gives leave, entertain an appeal from the High Court against the grant or refusal of bail....upon the application ....of the person ....refused bail (Section 21 (3) of the Court of Appeal Act Cap 12).

[3] According to facts as transpired from an affidavit filed by the police on 12 February, 2015, some employees of a commercial establishment called Vinod Patel and Company had carried cash in a sum of $58,507.85 and cheques to the value of $45,382 to be deposited at the ANZ Bank at Centre Point, Suva. On their way, two masked men had grabbed the bag with the money and fled in a vehicle. The driver of the vehicle when traced complained that two men had robbed his mobile phone and the vehicle.

[4] The mobile phone was recovered from one Agnes who stated that it was given by the appellant on 28 October 2014, the day after the commission of this crime. In a cautioned interview the appellant had allegedly admitted to the participation of this crime. However no money was recovered.

Reasons by the learned Judge for the denial of bail

[5] The learned High Court Judge considered that the appellant was 36 years old and married with a son. He was self employed. However the learned Judge found that the charge against the appellant is a serious one carrying a sentence of 20 years imprisonment. Considering the available evidence the learned Judge found that the chances of bail are slim. At the time of delivery of the reasons the appellant had been in remand custody for nearly 11 months. The learned Judge contemplated the trial to be fixed on a date in September 2016. That is 12 months from the date of the order of refusal. Considering the

large amount of money stolen and the manner of committing it and the availability of the evidence, bail was refused.

The Notice filed on 13 October 2015 for the appellant

[6] The appellant had been in remand custody since 10 November 2014. At the time of filing this notice a date had not been fixed for trial. The appellant also complained of the delay in delivery of the reasons for refusal. The appellant has mentioned 3 grounds of appeal namely:

> *'The learned Judge erred in law when he failed to give a fair and balanced consideration under section 19 of the Bail Act 2003 when:*
>
> *i) The learned Judge mentioned in paragraph 5 of the written reasons, "That there doesn't appear to be any need for him to be at liberty for any other lawful purpose" after he had already considered the applicant's family and employment background in paragraph 4;*
>
> *ii) The learned Judge stated that "The accused is likely to be tried between 5 to 9 September 2016.." when no trial date had been set by the Court; and*
>
> *iii) The learned Judge considered irrelevant factors in paragraph 6 under factor 3 regarding the public interest and the protection of the community in his written reasons;"*

[7] The learned counsel for the appellant submitted that the learned Judge erred and failed to give a fair and balanced consideration under Section 19 of the Bail Act. The statement that "there does not appear to be any need for him to be at liberty for any other lawful purposes" is not a fair statement. The learned counsel submitted that the learned Judge was being unfair in not fixing a trial date and predicting that the case would be taken up for trial in about one year's time.

[8] The learned counsel also submitted that the appellant offered to provide 2 suitable sureties, enter into a curfew; surrender travel documents, provide a fixed address and abide by any other bail conditions imposed by court. However the learned Judge failed to consider any of these factors.

[9] The learned counsel for the respondent submitted that a date has already been set for a *voir dire* hearing for 4-6 May 2016. The learned counsel also brought to the notice of court the document marked 'D6' filed along with the affidavit of the investigating officer containing the previous convictions of the appellant. The learned counsel submitted that although the learned Judge did not make reference to document 'D6', this document was part of the court record and hence demands the attention of the Court of Appeal.

[10] The list containing the previous record of the appellant starts from 1995. From the year 2007 to 2013 the list contained the following convictions, namely:

i. *Escaping from lawful custody; 18 months imprisonment-2007*
ii. *Forfeiture of bail bond- $60 fine-2008*
iii. *Forfeiture of bail bond- 18 months imprisonment-2009*
iv. *Escaping from lawful custody- 18 months imprisonment- 2009*
v. *Criminal intimidation- 18 months imprisonment- 2009*
vi. *Possession of illicit drugs- 50 hours community work-2013*

[11] The learned counsel for the appellant made an attempt to stultify the above convictions stating the appellant was not married then and the learned Judge too did not make use of the report marked D6. However the learned counsel did not dispute the said report.

[12] There is a presumption in favour of the granting of bail (section 3 (3) of the Bail Act 2002). This presumption could be displaced on proof that the person seeking bail had previously breached bail undertakings (Section 3 (4) (a)). The learned counsel for the appellant found it difficult to circumvent the breaches mentioned. The fact that the appellant was not married was used as a ruse to overcome the difficulty of the learned counsel.

[13] The complaint of the learned counsel that a trial date had not been fixed at the time of the order refusing bail or at the time of delivering the reasons does not hold water now that a date has been fixed for *voir dire* inquiry. The Bail Act provides for the release of a person in custody for over 2 years or more if his trial has not begun (S. 13 (4)). The appellant therefore may not be able to make use of this provision as the appellant is yet to complete 2 years in remand. In terms of the Bail Act (S. 18 (1) (a), (b) & (c)) factors that come into play in the grant or refusal of bail are (a) the likelihood of the accused person surrendering to custody and appearing in court; (b) the interest of the accused person; (c) The public interest and the protection of the community.

[14] In the reasons given the learned High Court Judge has not made any reference to section 18 (1) (a) of the Bail Act. However the document D6 of the affidavit of the investigating officer provides material in support of this limb. On two occasions the appellant had been dealt with for violating bail and the bonds had been forfeited. That was in the years 2007 and 2008. Again in 2007 and 2009 the appellant had been imposed with imprisonments for periods of 18 months and 8 months respectively.

[15] The learned counsel submitted that the breaches were made several years ago. Section 19 (1) further elaborates the limb referred to by section 18 (1) (a). Section 19 (1) states that, "an accused person must be granted bail unless in the opinion of the police officer or the court as the case may be (a) the accused person is unlikely to surrender to custody and

appear in court to answer the charges laid; This is further elaborated under S. 19 (2) (a) (i) to (vi). I find that the learned Judge has in the reasons dealt with (i), (iii), (iv) and (v) of section 19 (2) (a). The learned Judge finds that the offence of aggravated robbery is punishable with a 20 year sentence. The learned Judge had also considered the available evidence. If found guilty, the learned Judge opined that, the appellant would be imprisoned for a period of at least 14 years.

[16] The learned counsel made submissions on the failure of the learned Judge to fix a date for trial. Now that a date has been fixed, I am of the view that that argument has to fail. Under the limb 19 (2) (b) attention of the learned Judge had been drawn to (i), (iii), (iv), (v) and (vi). Limb 19 (2) (b) (ii) relates to the conditions of the custody. As there was no complaint by the appellant about the conditions, a need did not arise for the learned Judge to make reference to it.

The public interest and the protection of the community

[17] This aspect is elaborated under sections 19 (2) (c) (i) to (iii) to wit:-

> *(i) Any previous failure by the accused person to surrender to custody or to observe bail condition;*
> *(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.*

[18] The learned Judge failed to give his mind to the above limbs although there was material before court. The document D6 annexed to the affidavit of the investigating officer contained the previous record of the appellant. One of the witnesses, namely, Agnes Brown from whom the mobile phone was recovered could be a possible witness for the prosecution. There may be a likelihood of interfering with this witness. Considering the

previous record and the gravity of the crime charged the likelihood of the appellant committing another offence is apprehensible.

[19] The learned Judge considered the seriousness of the offence committed and the possible long jail term. The learned Judge also considered the strength of the prosecution case and the period the appellant had been in remand. Further the learned Judge considered as to when the case would be taken up for trial. The learned Judge was conscious of the period the appellant had been in remand. Although a date had not been fixed for trial at the time of delivering the reasons, when this case was taken up for hearing, a date was fixed for *voir dire* inquiry.

[20] "The presence of a combination of factors such as the seriousness of an offence, the strength of the prosecution case and likelihood of a lengthy imprisonment sentence could operate as a strong incentive for an accused person to abscond the jurisdiction of court to avoid trial". This was held in **Bai v State** [2010] FJHC 595; HAM 086.2010 (26 May 2010) and fits in to the case under consideration. Escaping from lawful custody and the forfeiture of bail bonds makes the case worse for the appellant as the presumption in favour of the granting of bail is displaced in terms of section 3 (4) (a) of the Bail Act. Section 3 (4) states that, "***The presumption in favour of the granting of bail is displaced where- (a) the person seeking bail has previously breached a bail undertaking or bail condition***". Therefore I find that this application is without any merit.

[21] On the foregoing reasons I would refuse leave and dismiss the appeal.

Jayamanne JA

[22] I agree with the reasons and conclusions of Basnayake JA.

Perera JA

[23] I too agree with the reasons and conclusions of Basnayake JA.

The Orders of the Court are:

1. *Leave to appeal is refused.*
2. *Appeal is dismissed.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Jayamanne
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL