

IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAM NO. 184 OF 2016

BETWEEN : MOHAMEMD RAFIQ

Applicant

AND : STATE

Respondent

Counsel : Ms U. Baleilevuka for Applicant
Mr. J. Niudamu for Respondent

Date of Ruling : 21st of November, 2016

Ruling on Bail Variation

1. This Notice of Motion is filed by the Applicant seeking following orders inter alia;
 - i) *The Applicant be allowed to report once a month at Sabeto Police Station between 6 a.m. to 6 p.m.,*
 - ii) *That the Applicant be allowed to reside at his residential home at Rarawai, Ba, from Monday to Thursday only,*
2. The Notice of Motion is being supported by an affidavit of the Applicant, stating the grounds for this application for variation of bail conditions. The Applicant

stated that he is the owner and the proprietor of a Construction company "Express Painters". He deposed that his company has construction jobs around Viti Levu, therefore he needs to travel to Ba, Tavua, Nadi, Rakiraki and Lautoka frequently. He stated that he had those construction jobs prior to this alleged incident took place.

3. The Applicant has further deposed that his wife lives at his residential home in Ba and she is suffering hardship and no one to assist her at his residential home. He said that his residential house is about 400 meters away from the victim's house.
4. Having stated above grounds, the Applicant seeks an order to vary bail conditions imposed on him by the court on the 26th of July 2016 and allows him to reside at his residential home at Rarawai, Ba from Monday to Thursday and to report at Sabeto Police Station once a month.
5. The learned counsel for the Respondent initially informed the court that the State does not object for this application of variation. However, the court inquired from the Applicant about the changes of his personal and family details and invited the Applicant to file a supplementary affidavit, which the Applicant filed as per the invitation.
6. The Applicant is being charged with one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree. It was agreed by the prosecution and the accused during the Pre Trial Conference, that the accused is the brother of the victim's grandfather. Hence, this offence falls within the meaning of Section 3 (1) and (2) of the Domestic Violence Decree.

7. The Applicant first made a bail application on the 26th of July 2016. The State did not object for the bail if the Applicant could relocate his residence until the disposal of the substantive matter. The Applicant consented to relocate and resides with his son Mr. Shofeed Ali at Sabeto, Nadi until the final disposal of the substantive matter. Accordingly the court granted him bail on the following conditions;

i) \$ 1000 bail bond with two suitable sureties,

ii) Not to reoffend,

iii) Not to interfere with the prosecution witnesses,

iv) To reside with his son Mr. Shofeed Ali at Sabeto, Nadi until the disposal of the main matter,

v) To report Sabeto Police Station on every Saturdays between 6 a.m. to 6 p.m.

8. The Applicant in this application seeks an order to vary the above conditions.

9. Section 3 (4) (c) of the Bail Act as amended by the Part 2 of the Schedule to the Domestic Violence Decree states that;

The presumption in favour of the granting of bail is displaced where;

c) the person has been charged with a domestic violence offence'

10. Accordingly, the Applicant could not rely on the presumption in favour of the granting of bail as stipulated under Section 3 (3) of the Bail Act.

11. Section 16 (1) of the Bail Act has required the person who is granted bail to provide the detail of his residential address at the time of the granting of bail. Section 16 (3) of the Bail Act as amended by the Part 2 of the Schedule to the Domestic Violence Decree states that;

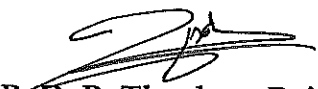
“Subject to subsections (5) and (6), where a person who is charged with a domestic violence offence is granted bail the person must reside at the residential address stipulated in the bail conditions until the hearing of the case”

12. Accordingly, the place of the resident is an integral factor to be considered in determination of bail for an offender who is charged with an offence that falls under the definition of domestic violence. The court has to consider the information provided by the Applicant in determining the place of resident under Section 16 (3) of the Bail Act.
13. In this instant case, the Applicant in his bail application deposed that he is self-employed as a carpenter. (paragraph 4 of the Affidavit in Support). He did not provide any more detail of the nature of his employment and his resident. At the hearing, he willingly consented that he will resident at his son’s place at Sabeto. Accordingly, the court granted the Applicant bail on the 26th of July 2016.
14. However, the Applicant in this application of variation of bail claims that he is an owner and the proprietor of a construction company “Express Painters” and have construction jobs around Viti Levu. He further deposed that he has been doing these construction jobs in Ba, Tavua, Lautoka, Rakiraki even before this alleged incident took place.

15. Accordingly, I find that the Applicant in his bail application has deliberately surpassed the information about his construction company and the constructions jobs that he had been doing. He has deposed in the affidavit in support filed in the bail application that he is a self-employed as a carpenter, surprising the fact that he owns a construction company. He has intentionally and purposely lied about his profession. Moreover, the Applicant in his bail application has intentionally surpassed about his movements and business involvements around the area where the victim resides.
16. A person providing false information and surpassing material details to the court in order to obtain bail for an action involves with domestic violence, and subsequently coming to the same court to change the bail conditions that was imposed on the false information provided by him, undoubtedly defeats the purpose of Bail Act and the protective regime established for the victims under the Domestic Violence Decree. Such an act unquestionably falls within the definition of "abuse of the process of the court". The court and the officers of the court must protect the process of the court from such activities as it undermines the integrity and the competence of the rule of law.
17. With hesitancies and regret, I express my concern about the conduct of the counsel in this matter. It is my view that a lawyer is not someone's hired gun. I do not wish to make any further comment, but quote the remarks made by Justice Clement F Haynsworth Jr, in his speech made at the Law Centre of the University of South Carolina on the 24th of May 1975, where Justice Haynsworth said that;

"The lawyer serves his client without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right, and as a professional, he cannot give in to a client's attempt to persuade him to take some other stand"

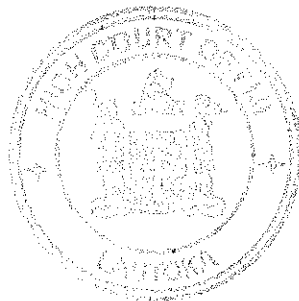
18. Having considered above discussed reasons, I refuse and dismiss this application for variation of bail.
19. I further imposed following additional bail condition to the existing conditions of the bail, that;
- i) To surrender all of his travel documents to the Registry of the High Court before being released,
 - ii) Restrict the movements of the Applicant within the range of five kilometres of the residence of the victim,


R. D. R. Thushara Rajasinghe

Judge

At Lautoka

21st of November, 2016



Solicitors : Office of the Director of Public Prosecutions
Messrs Iqbal Khan & Associates