

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: HAM 101 OF 2016

BETWEEN : **NAZEEM SHERAZ ALI**
Applicant

AND : **STATE**
Respondent

Counsel : **Mr J. Singh for Applicant**
Mr A. Singh for Respondent

Date of Hearing : **23rd June, 2016**

Date of Ruling : **06th July, 2016**

BAIL RULING

Background

1. This is an application for bail pending trial.
2. The Applicant is charged with Murder contrary to Section 237 (a) (b) (c) of the Crimes Decree 44 of 2009. The charge was filed on 13th May, 2016 before the Magistrates Court at Ba. The learned Magistrate has informed the Applicant to make the bail application in this Court when he made an oral bail application.
3. Information is yet to be filed by the Director of Public Prosecution and no trial date is fixed.
4. The grounds for the bail application are set out in the affidavit of the Applicant. Application is based on the following grounds:

- a. Presumption of innocence
 - b. Denial of allegation
 - c. Personal circumstances of the Applicant and need to prepare for his defence
 - d. Strong likelihood to abide by bail conditions
 - e. Projected length of delay to start the trial
5. The State is objecting to bail. DC Kamal Goundar, the Investigating Officer of Applicant's substantive case, has filed an affidavit stating the grounds of objection.
6. Opposition to bail is based on the following grounds:
- a. Charge against the Applicant is serious and entails severe punishment, if found guilty.
 - b. Case against the Applicant is strong and therefore likelihood of not appearing in Court to face trial is high.
 - c. Strong likelihood of interference with State witnesses.
 - d. Safety of the Applicant.

Law

7. There is a presumption in favour of the Applicant's innocence until the charge is proved. There is also a presumption in the Bail Act in favour of granting of bail. That presumption is rebutted when there are valid grounds for detention.
8. Section 3(1) of the Bail Act provides :
"Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted".
9. The Constitution of the republic of Fiji provides:
"Every person who is arrested or detained has the right—(h) to be released on reasonable terms and conditions, pending a charge or trial, unless the interests of justice otherwise require; [Section 13 (1)]; to have the trial begin and conclude

without unreasonable delay [14 (2) (g)]; Every person charged with an offence has the right—(a) to be presumed innocent until proven guilty according to law [14(1)];

Analysis

10. Without doubt, the charge against the accused is serious and entails a severe punishment if found guilty. However, seriousness of the charge alone is not a sufficient ground to refuse bail pending trial.
11. Prosecution relies mainly on the caution interview to prove the charge against Applicant. Applicant is alleged to have confessed to the murder when he was interviewed by police. Applicant says that he was unfairly treated in police custody and that he intends to challenge the voluntariness of the confession in Court. Respondent has denied the allegation of unfair treatment. However, admissibility and truthfulness of confessions made to police are issues to be decided by Court in due course on an evidentiary basis.
12. Apart from the caution interview, Prosecution also intends to prove admissions made to two of his friends soon after the incident. Statements to police are out of court statements and credibility and truthfulness of them can only be ascertained at the trial stage. Therefore, it is only suffice to say at this stage that there is some evidence against the Applicant. Existence of some evidence against the accused is only relevant to assess the likelihood of him appearing in court to answer the charge.
13. Respondent concedes that there are no previous bail violations or previous convictions recorded against the Applicant. He is a first offender. Main concern of the State is the propensity of the Applicant to interfere with the State witnesses, specially the friends to whom the Applicant had allegedly made admissions after the incident.
14. Before coming to a decision to deprive personal liberty, interests of public and concerns for public protection must be rightly balanced with the interests of the Accused. The Courts in Fiji have described on numerous occasions interests which the constitutional rights were designed to protect as comprising both individual and

societal rights. The former were the presumption of innocence, right to security of the person, the right to liberty, and the right to a fair trial. As to the latter, there is a societal interest in bringing to trial those accused of offending against the law. Furthermore, undue interference with witnesses and the administration of justice process, offend the public interests. Here there is a tension between the accused's interests and those of the community. In balancing those competing interests, courts must also be mindful of the primary consideration in determining bail; that is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.

15. Having given due consideration to the above, Courts in determining bail must be satisfied that the deprivation of personal liberty is the only option available and resorting to that option is not disproportionate to the objective that is to be achieved thereby. If the concerns of public interests and protection of the community can be addressed by imposing stringent bail conditions, Courts must not resort to curtail personal liberty, since the primary consideration in determining bail is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.
16. In *Bechu and Another v. R.* 8 FLR 240 MacDuff C.J. correctly espoused the 'primary test' in the exercise of the court's discretion to grant or refuse bail when he said at p.241:

"..... the discretion must be exercised judicially in the light of the paramount principle that an accused person is presumed innocent until he has been found guilty. For that reason he should not be deprived of his liberty merely because he is accused of a crime if he can satisfy the test that in all the circumstances he will appear to stand his trial on that accusation."
17. Applicant is willing to give a strong undertaking to abide by any bail condition to be imposed by this Court. He is willing to relocate himself either in Ba or Lautoka in the event his application being successful to ensure that no interference with witnesses takes place.

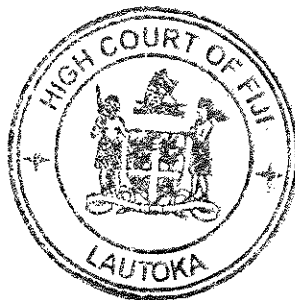
18. The other ground in opposition to bail is the concern of the State that personal safety of the Applicant is at stake if bail is granted. The safety and physical protection of the Applicant can be considered under Section 19 (2) (b) VI of the Bail Act in forming an opinion as regards the interests of the accused.
19. The affidavit filed by the Respondent states that the safety of the Applicant is paramount, since this is a fresh murder case; the deceased family are still mourning the passing away of the deceased.
20. I concede that the particular circumstances of the offence contain serious allegations against the Applicant which are likely to provoke strong feelings on the part of the deceased's family against him. But the Applicant has expressed his willingness to relocate himself at a place far removed from where the incident took place. A considerable time has also elapsed since the incident.
21. In Vuli v The State [1990] FJHC 49; HAM 0008d.90s (21 June 1990) Fatiaki J (as he then was) observed:


"As for the "safety" of the applicant himself, it is the court's view that this alone is an insufficient ground for depriving a person of his liberty.

It I might say so the protection, safety and security of persons in this country rest primarily with the police and not with prison warders. Furthermore it is not suggested that the police would not be able to carry out its normal responsibilities in regard to the applicant or that he has received serious life-endangering threats".

22. Applicant is 30 years old and looks after his family, and resides with his wife, grandmother, grandfather, brother, father and his 5 year old son. He was employed as a Maintenance Planner in a private Company earning \$ 300 per week. He needs to be on bail not only to work but also to ably prepare for his defence and adequately instruct his Counsel.

23. When deciding whether to grant bail to an accused person, Courts must take into account the time the accused may have to spend in custody before trial if bail is not granted [Section 17.-(1) of the Bail Act].
24. Information is yet be filed by the State. Trial diary of this Court is full until April 2017. It will take considerable time to dispose of the trial of the Applicant. Prolonged pre-trial detention without trial will violate the Applicant's constitutional rights.
25. The proposed purpose to be achieved by restricting Applicant's liberty is avoidance of undue interference with administration of justice process. Risk of interference (with witnesses) can be avoided by imposing stringent bail conditions. Applicant has already indicated to Court that he will keep away from the witnesses and the family of the deceased until the trial is over. Having considered the above mentioned factors, I am of the view that imposition of strict bail conditions is sufficient to prevent undue interference with witnesses.
26. For the reasons given in this Ruling, application for bail pending trial is allowed. Applicant is granted bail on following bail conditions.
- a. Cash bail of \$ 1000.
 - b. Personal bail bond for \$ 1500.
 - c. Surety bail bond for \$1000 with two sureties.
 - d. Not to interfere with State witnesses.
 - d. Applicant must reside in Lautoka address until conclusion of this case.
 - e. Reporting to Lautoka Police Station on every last Saturday of the month between 8 am. and 4 p.m.




Aruna Aluthige
Judge

At Lautoka
6th July, 2016

**Solicitors: Samusamuvodre Sharma Law for the Applicant
Office of the Director of Public Prosecution for the Respondent**