

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 108 OF 2016

BETWEEN : **NARAIN SAMMY NAIDU**
Applicant

AND : **STATE**
Respondent

Counsel : **Mr I.Khan for Applicant**
Mr A. Singh for Respondent

Date of Hearing : **4th July, 2016**

Date of Ruling : **11th July, 2016**

BAIL RULING

Background

1. This is an application for bail pending trial.
2. The Applicant is charged with Rape contrary to Section 207 (1) (2) (a) of the Crimes Decree 44 of 2009. The charge was filed on 1st June, 2016 before the Magistrates Court at Nadi. The learned Magistrate, having refused the bail application made orally by the Counsel for Applicant, sent the record to this Court.
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. Medical condition 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 Ravinesh Prasad, 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. Flight risk

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)];

10. The principles governing bail applications have developed around the fundamental question of whether the accused will appear in court.

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."

11. In *Tak Sang Hao v The State* [2001] FJHC 15; HAM0003d.2001s (26 April 2001) Madam Shameem J observed:

In England bail is governed by the 1976 Bail Act, which provides that bail may be refused where there are substantial grounds for believing that the defendant if released on bail, would fail to surrender to custody, commit an offence while on bail, interfere with witnesses, and where the court is satisfied that the defendant should be kept in custody for his own protection and welfare (schedule 1 Part 1(2)). However, case law on the interpretation of the Human Rights Act 1998, and the European Convention on Human Rights shows a shift towards a more narrow approach to the refusal of bail. Article 5(3) of the Convention states that a person charged with an offence must be released pending trial unless the state can show that there are relevant and sufficient reasons to justify his continued detention. Further, bail may be refused for only four reasons".

Analysis

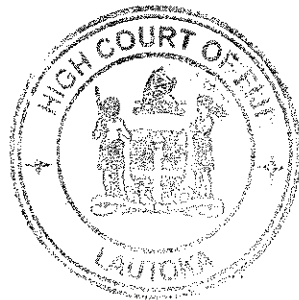
12. Without doubt, the charge against the accused is serious and entails a severe punishment if found guilty. However, seriousness of the charge alone is not a sufficient ground to refuse bail pending trial. *Tak Sang Hao* (*supra*)
13. Respondent is relying on the statement of the complainant to police when it says that there is a strong case against the Applicant. Applicant denies the allegation and alleges of conspiracy on the part of the victim and his previous employees. Existence


of some evidence against the applicant is relevant at this stage to assess the likelihood of him appearing in court to answer the charge.

14. Respondent concedes that there are no previous bail violations or previous convictions recorded against the Applicant. Main concern of the State is that he is a flight risk in the sense that he has a permanent residency in Australia. Applicant has not denied that his family is residing in Australia as permanent residents. However he denies that he is an Australian citizen or Australian passport holder.
15. Respondent concedes that Applicant is a Fiji passport holder and he had used the Fijian Passport all the time to travel to Fiji. Respondent also concedes that Applicant is having substantial property and business interests in Fiji.
16. Applicant had been caution interviewed for this offence in September 2015 and was released without a charge being laid. The record of his travel history filed by the Respondent shows that, after the caution interview, he has travelled to Australia and returned to Fiji on several occasions despite the allegation against him. When the Applicant was informed, he surrendered to police on his own free will and cooperated with police.
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 hand over his passport and furnish sureties acceptable to Court to ensure his appearance in court.
18. Applicant is 56 years old. He has tendered a medical report to prove that he is undergoing treatment for asthma. He is on medication for his shortness of breath. He has substantial business interests in Fiji and properties as is confirmed by the Respondent. He is in a business of buying vegetables from local farmers and exporting them to Australia.
19. 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].

20. Information is yet to 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.
21. The proposed purpose to be achieved by restricting Applicant's liberty is to ensure his appearance in Court to face his trial. Flight risk can be avoided by imposing stringent bail conditions. Having considered the above mentioned factors, I am of the view that imposition of strict bail conditions is sufficient to ensure his presence in Court.
22. For the reasons given in this Ruling, application for bail pending trial is allowed. Applicant is granted bail on following bail conditions.
- a. Personal bail bond for \$ 10,000. (non- cash)
 - b. Surety bail bond for \$10,000 with two sureties acceptable to court.
 - c. Not to interfere with State witnesses.
 - d. Applicant must reside in Vuniyasi, Nadi address until conclusion of this case.
 - e. Reporting to Nadi Police Station on every last Saturday of the month between 8 am. and 4 p.m.
 - f. Travel ban imposed restricting his movements out of *Viti levu*. Applicant's Passport to be surrendered to Court.

Deputy Registrar is directed to inform of the travel ban to the Fiji Immigration Department and Australian High Commission in Fiji.




Aruna Aluthge
Judge

At Lautoka
11th July, 2016

Solicitors: Iqbal Khan & Associates for the Applicant
Office of the Director of Public Prosecution for the Respondent