

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

Criminal Misc. No. HAM 241 of 2018

BETWEEN : **ISIKELI BAINITABUA**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Applicant in person.
: Ms. L. Latu for the Respondent.

Date of Hearing : 22 February, 2019

Date of Ruling : 26 February, 2019

RULING

[Application for bail pending trial due to change of circumstances]

1. The applicant seeks fresh bail pending trial after his bail was revoked by this court on 7th June, 2018. The applicant filed his application dated 27th November, 2018 via a letter captioned “fresh application for bail under new circumstances”.

2. The application is opposed, prosecution filed the affidavit of W/Cpl 3692 Asenaca Taufu sworn on 7th January, 2019. The applicant filed his affidavit in reply sworn on 12th February, 2019 incorrectly mentioned as 2018.

BACKGROUND INFORMATION

3. The applicant is charged with two counts of indecent assault, two counts of sexual assault and two counts of rape under the Crimes Act. The substantive matter is pending in this court under Criminal Action No. HAC 19 of 2016.
4. The applicant was given conditional bail by this court according to information in court file the applicant had four bench warrants issued against him, however, on three occasions this court exercised its discretion in favour of the applicant by accepting his reasons for failing to come to court in cancelling his bench warrants.
6. The bench warrant issued on 10th May, 2018 was pending for about a month until the applicant was arrested and produced in court on 7th June, 2018.
7. On 7th June, 2018 the applicant's bail was revoked by this court. The applicant has been in custody for about 8 months now. At the time of the hearing the applicant advanced a new ground in support of his bail application submitting that his family is affected by his remand. His wife is employed therefore a baby sitter has been hired to look after their 4 year old son. This is putting additional financial burden on his wife to meet the needs of the family. The applicant if granted bail will be able to also support his 18 year old son who is attending school. According to the applicant his family needs him to support them financially.

CHANGE OF CIRCUMSTANCES

8. Furthermore, the applicant also submits that there has been a change in circumstances since his bail was refused. He states that whilst in remand he does not have the means of communication to engage a private counsel since the Remand Center does not provide any such assistance. Furthermore, he adds that the Remand Center does not allow access to law materials or a library or tables or chairs to aid in the preparation of his defence.
9. The above according to the applicant is a breach of his Constitutional Right to fair trial. The applicant therefore seeks bail so that he can engage a counsel and adequately prepare for his defence.
10. The State Counsel submits that this is the applicant's third (3rd) bail application. The applicant's first bail application was granted, the second was refused after he breached his bail and this is the third one for consideration. On 13 November, 2018 this court had refused the applicant's application for reinstatement of bail pending trial.
11. Counsel further submits that the Corrections Center has facilities to assist the applicant upon request the applicant has been assisted by the Corrections Officers in the past resulting in him communicating with a lawyer of his choice. The applicant has brought this situation by delaying the substantive matter. Firstly he terminated the services of the Legal Aid Commission on 24th September, 2018 at the pre-trial conference stage. Secondly the applicant sought numerous adjournments to engage private counsel which did not eventuate.

LAW

12. Section 3 of the Bail Act states that every person has a right to be released on bail unless it is not in the interest of justice that bail should be granted. The prosecution must rebut this presumption when bail is objected to. The presumption in favour of the granting of bail *inter alia* gets displaced where the person seeking bail has previously breached a bail undertaking or bail condition.

13. The relevant considerations which the court must take into account when determining whether bail is to be granted or not is mentioned in section 19 of the Bail Act. The three broad categories are:
 - a). the likelihood of surrender to custody and appearing in court;
 - b). the interest of the accused person,
 - c). the public interest and protection of the community

14. Section 19 (2) of the Bail Act states a police officer or court must have regard to all the relevant circumstances and in particular-
 - (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 beat 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.*

15. Section 30 (7) of the Bail Act gives the court powers to consider bail if there are material change in circumstances after bail had been refused on a previous occasion:

(7) A court which has power to review a bail determination, or to hear a fresh application under section 14(l), may, if not satisfied that there are special facts or circumstances that justify a review, or the making of a fresh application, refuse to hear the review or application.

DETERMINATION

16. There is no doubt that the applicant was granted conditional bail which he breached by not appearing in court as required. The applicant was arrested and produced in court for the breach of his bail conditions.
17. At the hearing the applicant advanced a new ground in support of his bail application since the applicant was unrepresented this court allowed the applicant to proceed. Although the applicant placed a lot of emphasis on his family obligations stating that his family was affected by his absence, there is no doubt in cases such as this a family will most inevitably be affected. Whilst the court is sympathetic to such a situation, the applicant must realise that it was his conduct which has led to this situation.
18. In my view there are options available which can be explored by families in such a situation. Family support agencies may be very willing to assist the applicant's family should such a request be made by the members of the family.
19. Furthermore I note from the letter of Fiji Corrections Service dated 27 December, 2018 written by the Chief Corrections Officer, A. Tavo annexed to the affidavit of W/Cpl 3692 Asenaca Taufu mentions that the applicant had made a request to the Officer in Charge of the Remand Centre on 15 November, 2018 to contact Mr. Aman Datt a lawyer. A call was made and the response from Mr. Datt was that he will not be

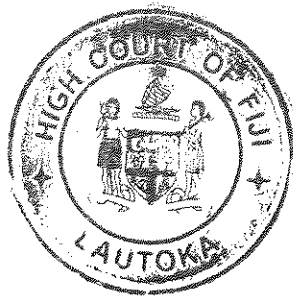
representing the applicant. Furthermore the writer also states that on 15 November, 2018 the applicant had made a request to the Officer in Charge of the Remand Center for a copy of the Criminal Procedure Act which was approved and provided.

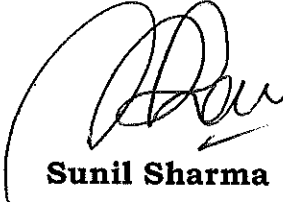
20. A perusal of the letter written by the Fiji Corrections Service does indicate to me that efforts are made by the Remand Center to attend to the requests of remandees and assistance are provided accordingly. The letter also mentions that the applicant has been assisted upon request by him.
21. This court is satisfied that the reasons given by the applicant are not material change of circumstances for the grant of fresh bail in my view the applicant does not require bail to attend to the above. The applicant was granted bail and he has clearly misused that opportunity.
22. This court is also mindful of the Constitutional Right of the applicant that the presumption of innocence is in his favour, however, the applicant has brought this situation upon himself. By his conduct the applicant has indicated to this court that he is a flight risk and is unlikely to appear in court as required. This proposition is further strengthened by the fact that a conviction in the substantive matter means he will spend a long term imprisonment.
23. According to information in court file the applicant was approved Legal Aid assistance for the substantive matter, however, the applicant terminated their services on 8 October, 2018 thereafter the applicant sought 9 adjournments on the pretext of engaging private counsel but he did not engage one thereby delaying the substantive matter.

24. This court is not satisfied that there are special facts or circumstances that justify the grant of a fresh bail. In the substantive matter the applicant filed his Voir Dire grounds only on 18 December, 2018. On 18 February, 2019 the applicant asked for additional Voir Dire disclosures. The substantive matter is coming up for mention on 4 March, 2019 for the prosecution to provide additional disclosures.
25. It is not in the interest of justice that the applicant be granted bail. The application for fresh bail is refused as frivolous. The applicant is no doubt aware that he can re-engage the services of the Legal Aid Commission to represent him in the substantive matter. It is in the interest of the applicant to do so if he wishes.

ORDERS

1. The application for fresh bail is refused as frivolous.
2. A trial date is to be assigned as soon as practicable.
3. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

26 February, 2019

Solicitors

Applicant in person.

Office of the Director of Public Prosecutions for the Respondent.