

IN THE HIGH COURT OF FIJI

AT SUVA

[MISCELLANEOUS JURISDICTION]

MISCELLANEOUS CASE NO: HAM 387 of 2018

TEVITA TUINUKUWAFI

V

STATE

**Counsel** : Ms. Lavinia David for the Applicant  
Ms. Sujatha Lodhia for the Respondent

**Dates of Hearing** : 22 & 29 January 2019

**Ruling** : 31 January 2019

### BAIL RULING

1. This is an application for bail pending trial. The Applicant is the accused in Suva High Court Case No. HAC 235/2018.
2. As per the Information filed by the Director of Public Prosecutions ("DPP") in the substantive matter, the Applicant is charged with one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act No. 44 of 2009 ("Crimes Act").
3. The full details of the Information reads as follows:

#### [COUNT]

#### *Statement of Offence*

**AGGRAVATED ROBBERY:** Contrary to Section 311 (1) (a) of the Crimes Act 2009.

### *Particulars of Offence*

**TEVITA TUINUKUWAFI** and others on the 5<sup>th</sup> day of June 2018, at Suva, in the Central Division, in the company of each other, robbed **ARUN KUMAR NARSEY** of 1 x wallet containing \$500 cash, 1 x Huawei brand mobile phone valued at \$1,000, 1 Samsung brand S7 mobile phone valued at \$1,500, 1 x HTC brand mobile phone valued at \$75, 1 x gold chain valued at \$2,000, 1 x gold chain valued at \$1,000, 1 x gold pendant valued at \$1,000, a pair of gold bangles valued at \$2,000, 1 x mangalsutra valued at \$100, 1 x bracelet valued at \$100, 1 x bottle of Bombay sapphire gin valued at \$175 and 1 x bottle of Raynal liquor bottle valued at \$175, all to the total value of \$9,625.00, the properties of **ARUN KUMAR NARSEY**.

4. When the substantive matter was called before me on 13 July 2018, the State filed the Information and Disclosures relevant to the case.
5. On 10 August 2018, the Applicant was ready to take his plea. Accordingly, he pleaded not guilty to the charge.
6. This is the second application made by the Applicant for bail pending trial. The first application (HAM 202 of 2018) was refused by this Court on 18 September 2018.
7. This application had been originally filed in person by the Applicant (on 14 December 2018). Subsequently, on 7 January 2019, a Supplementary Affidavit was filed on behalf of the Applicant.
8. The Applicant is 22 years of age [His date of birth is 12 April 1996] and he is a first offender with no pending cases against him. He has been in remand custody since 7 June 2018. He submits that prior to his arrest he was employed as a Mechanic at Wing Lee Ltd. If granted bail, his father and mother would stand as his sureties.
9. On 21 January 2019, W/SGT 2618 Melania Saukuru, Police Liaison Officer at the Office of the DPP, has filed an Affidavit in Opposition to this application.

10. The State is strongly objecting to bail. The primary reason for such objection is that this second application made by the Applicant mirrors the grounds stated in the Applicant's previous application for bail.
11. It is stated that the State will be relying on the direct evidence of the two complainants who will describe how the robbery was executed. The State will also be relying on the direct evidence of a Police Officer namely, SC 4306 Romeo Nasila. On 5 June 2018, at around 11.50 p.m. (which was said to be 20 minutes after the alleged robbery), SC Romeo was at the Total Service Station at Flagstaff with three other Police Officers refueling their operations vehicle. At this point in time, SC Romeo had seen three i-Taukei youths walking suspiciously in front of the Sun Insurance Building and getting into a taxi.
12. SC Romeo with the assistance of the other Police Officers immediately stopped the taxi. When SC Romeo had approached the taxi the three youths had got out of the taxi and escaped. Thereafter, the taxi was searched. The Police Officers found the items which were allegedly stolen from the complainant's residence.
13. The said items were shown to the complainants who identified the said items as properties belonging to them.
14. Around 5.45 a.m. on 6 June 2018, upon information received from a source, a raid was conducted at Laqere and the Applicant was arrested. SC Romeo was also part of the arresting team and upon seeing the Applicant he had positively identified him as one of the three i-Taukei youth that he saw boarding the taxi at the Total Service Station in Flagstaff the previous night.
15. The Respondent submits that the taxi that the Applicant was seen boarding and escaping from was the same taxi from which the stolen items were recovered.
16. Thus, the State submits that in addition to the direct evidence in the case, the State will also be relying on strong circumstantial evidence against the Applicant.

17. In terms of section 3(1) of the Bail Act No. 26 of 2002 ("Bail Act"), *"Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted."*
18. Section 3(3) of the Bail Act provides that: *"There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption."*
19. In terms of Section 3(4) of the Bail Act, as amended by the Domestic Violence Act No 33 of 2009 ("Domestic Violence Act"), the presumption in favour of granting of bail is displaced in the following circumstances:
- (a) the person seeking bail has previously breached a bail undertaking or bail condition; or*
  - (b) the person has been convicted and has appealed against the conviction; or*
  - (c) the person has been charged with a domestic violence offence.*
20. In terms of Section 17(2) of the Bail Act the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in Court to answer the charges laid against him or her.
21. Section 18 (1) of the Bail Act stipulates that a person making submissions to a court against the presumption in favour of bail must deal with-
- (a) the likelihood of the accused person surrendering to custody and appearing in court;*
  - (b) the interests of the accused person;*
  - (c) the public interest and the protection of the community.*
22. Section 19(1) of the Bail Act (as amended by the Domestic Violence Act No 33 of 2009), provides for grounds for the Court to refuse to grant bail. The sub section is reproduced below:

*"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;*
- (b) the interests of the accused person will not be served through the granting of bail;*
- (c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult; or*
- (d) the accused person is charged with a domestic violence offence and the safety of a specially affected person is likely to be put at risk if bail is granted taking into account the conditions that could be applied if bail were granted."*

23. In forming the opinion required by subsection (1), section 19(2) of the Bail Act stipulates that Court must have regard to all the relevant circumstances, and in particular to the circumstances enumerated in the said sub section.
24. It must be stated that provisions of Section 19 (1) (d) are not relevant or applicable in the instant case. What is relevant and applicable in relation to the instant case are the provisions of Section 19 (1) (a), (b) and (c).
25. The Respondent is relying on the provisions of Section 18(1) to object to bail.
26. However, Section 30 (7) of the Bail Act provides that:

*"A Court which has power to review a bail determination, or to hear a fresh application under Section 14 (1), may, if not satisfied that there are special facts or circumstances that justify a review, or the making of fresh application, refuse to hear the review or application."*

27. In the case of **Regina v Nottingham Justices, ex parte Davis**: QBD 1980; [1980] 71 Crim. App.R.178; [1981] 1 QB 38.

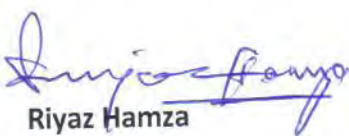
The Lord Justice Donaldson stated thus;

*"...The Court considering a fresh the question of bail is both entitled and bound to take account not only of the change in circumstances which has occurred since the last occasion but also all circumstances which, although then existed, were not brought to the attention of the Court. To do so is not to impugn the previous decision of the Court and is necessary in justice to the accused. The question is a little wider than 'Has there been a change? it is Are there new considerations which were not before the Court when the accused was last remanded in custody?..."*

28. During the hearing of this application, the learned counsel for the Applicant submitted the following factors as special facts or circumstances that justify a review of this matter.
- (1) The Applicant has now been in remand custody for over 7 months.
  - (2) The substantive matter has been fixed for trial from 24 June 2019 to 28 June 2019. Therefore, at the time the substantive matter is taken up for trial the Applicant would have been in custody for more than one year.
  - (3) The State has submitted to Court that they are no longer relying on the caution interview statement made by the Applicant.
  - (4) Notice of Alibi has been filed in the substantive matter, wherein three alibis have been named by the Applicant (his aunt and two cousins). The State has already provided the alibi statements of two of the alibi witnesses. The said statements confirms that the Applicant was at the residence of the two alibis at the time of the alleged incident.
29. Considering all the facts and circumstances of this case, I am satisfied that the Applicant has established "changed circumstances" which entitles him to be released on bail.
30. Accordingly, this Court orders that the Applicant be enlarged on bail on the following conditions:

1. *The Applicant must enter into a bail bond of \$1000 at the Registry of this Court.*
2. *The Applicant to produce two Sureties who should enter into a surety bond of \$1000.00 each. The sureties shall be his father, Mr. Tomasi Delaibau, who resides at Navuso Village, Nausori, and, his mother, Ms. Vilisi Baravi, who resides at the same address.*
3. *The Applicant shall reside with the said sureties at their residence at Navuso Village, Nausori, until the final determination of this case.*
4. *The Applicant shall not change his place of residence without prior approval of this Court.*
5. *The Applicant shall not in any manner interfere with the witnesses for the prosecution and must not have any form of contact or communication with them.*
6. *The Applicant should report to the Nausori Police Station on every Saturday of the month, between 8.00 a.m and 6.00 p.m., commencing on Saturday the 2 February 2019.*
7. *The Applicant to surrender his travel documents, if any, to the Registry of this Court.*
8. *The Applicant shall not apply for any new travel documents.*
9. *The Applicant is to appear before this Court on all mention and trial dates.*



  
**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 31<sup>st</sup> Day of January 2019

**Solicitors for the Applicant** : **Office of the Legal Aid Commission, Suva.**  
**Solicitors for the Respondent** : **Office of the Director of Public Prosecutions, Suva.**