

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISC. CASE NO. HAM 230 OF 2019

BETWEEN : **MOSESE CAKAU**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. V. Diroiroi for the Applicant.
: Mr. T. Tuenuku for the Respondent.

Date of Hearing : 04 February, 2020
Date of Ruling : 18 February, 2020

RULING

[Application for bail pending trial]

1. The applicant seeks bail pending trial, in support he has filed the following documents:
 - (a) Affidavit of Mosese Cakau filed on 22nd October, 2019;

- (b) Affidavit of Akisi Tuinuku filed on 15th November, 2019 (proposed surety);
 - (c) Affidavit of Siteri Namere filed on 21st October, 2019 (proposed surety); and
 - (d) Affidavit in response of Mosese Cakau filed on 23rd January, 2020.
2. The application filed by the applicant is opposed by the prosecution. The prosecution in its opposition to bail has filed the affidavit of WDC Meredani on 26th November, 2019.

BACKGROUND INFORMATION

3. The applicant is charged with two counts of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act.
4. The applicant deposes that he has been in remand since 9th September, 2019, he is married with five children and all his children are in primary school. He is the sole bread winner of his family, prior to being remanded he was employed as a Sales Manager.
5. If granted bail the applicant will reside at Sukanaivalu Road, Lautoka. He has previous convictions which are over 10 years. The applicant understands the allegations are serious and he promises to abide by any strict bail conditions. The applicant has provided two proposed sureties who in their affidavits are willing to sign a bond and also have control over the applicant. The proposed sureties understand their role and responsibility if accepted as sureties.

6. The prosecution in its response has filed the affidavit of WDC Meredani who deposed that the prosecution has strong evidence against the applicant particularly his admissions in the caution interview which shows planning by the applicant and others.
7. The deponent also says the circumstance of the alleged offending on both the complainants was traumatic. The mobile phone belonging to one of the complainants was recovered from the applicant. Upon conviction the applicant would face an immediate custodial sentence which is a good incentive for the applicant to abscond bail.
8. The applicant has previous convictions although 10 years ago includes one in respect of forfeiture of bail bond dated 18th January, 2000 and 4 previous convictions of shop breaking, entering and larceny (one count) and three counts of larceny. The last conviction of larceny is dated 19th March, 2004.
9. In his response the applicant deposed that he will be challenging his admissions in the caution interview.
10. The applicant further states that the circumstances of the alleged offending being traumatic to the complainants are a trial issue and not a consideration for bail.
11. Counsel for the applicant stressed that the previous convictions of the applicant were more than 10 years old in particular the previous conviction for forfeiture of bail bond was in the year 2000. Counsel submits that the primary consideration for the grant of bail is the likelihood of the applicant coming to court to face the charges.

12. Counsel also argues that the strength of the prosecution case is overridden by the presumption of innocence and that the prosecution evidence is yet to be tested. Counsel submits that strict bail conditions can be imposed by the court which the applicant will be obliged to follow. Moreover, the applicant has a young family who require the applicant's support and assistance as the sole bread winner.
13. The state counsel argued that the prosecution had a strong case with a likely conviction which will result in an immediate long term imprisonment which will be a good incentive for the applicant to abscond bail.
14. Counsel further states that the applicant will not be prejudiced if he is remanded since he is represented by counsel. Counsel also emphasized that although the applicant's previous convictions were more than 10 years ago it was still a relevant consideration which displaces the presumption that bail be granted to the applicant.
15. Due to the applicant's breach of bail conditions there is a likelihood and a possibility that if granted bail the applicant will not abide by his bail conditions.
16. Finally the state counsel also stated that one of the co-accused have been given immunity to give evidence against the applicant although the law requires that the evidence of the accomplice be corroborated there is a likelihood that the applicant if granted bail would interfere with this witness.

LAW

17. Section 3 of the Bail Act states that 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. There is a presumption in favour of the granting of bail but the person who opposes may seek to rebut this presumption. The presumption in favour of the granting of bail is displaced where:
- a) the person seeking bail has previously breached a bail undertaking or bail condition;
 - b) the person has been convicted and has appealed against the conviction; or
 - c) the person has been charged with a domestic violence offence.
18. Under section 17 of the Bail Act when deciding whether to grant bail to an accused person the court must take into account the time the person may have to spend in custody before trial if bail was not granted. The primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charge laid against him or her.
19. Under section 19 of the Bail Act an accused person must be granted bail unless in the opinion of the court;
- 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 will not be served through the granting of bail;
 - c) granting bail to the accused would endanger the public interest or make the protection of the community more difficult.

20. According to section 3(1) of the Bail Act the presumption in favour of the granting of bail is displaced where the person seeking bail has previously breached a bail undertaking or bail condition.
21. There is no doubt that the applicant has a previous conviction for forfeiture of bail bond in the year 2000. According to the Rehabilitation of Offenders (Irrelevant Convictions) Act 1997 any previous conviction for an adult becomes irrelevant if it is over 10 years.
22. Sections 3 and 4 of the Rehabilitation of Offenders (Irrelevant Convictions) Act 1997 states:

Definition of irrelevant conviction

3. For the purposes of this Act, a conviction is irrelevant:-

(a) where there is no direct relationship between that conviction and the particular matter in respect of which it is sought to take that conviction into account; or

(b) if the rehabilitation period has expired.

Definition of direct relationship

4.-(1) For the purposes of section 3, there is a direct relationship between a conviction and any matter in respect of which it is sought to take that conviction into account if the fact of that conviction means that there is a real likelihood that the person against whom that conviction was entered will, in relation to that matter:-

(a) be unreliable, untrustworthy, or otherwise unsatisfactory; or

(b) commit a further offence.

(2) In determining, whether there is a real likelihood that any of the matters specified in paragraph (a) or paragraph (b) of subsection (1) will occur, the following matters shall be taken into consideration:-

(a) in relation to the offence for which the conviction in issue was entered,-

(i) the type and seriousness of that offence;

(ii) the overall circumstances of that offence; and

(iii) the period that has elapsed since that offence was committed; and

(b) in relation to the person convicted, his or her present personal attitudes and personal circumstances.

23. The issue before the court is whether the applicant will appear before the court if granted bail. The Bail Act is silent whether an irrelevant previous conviction is a consideration when determining bail for a person whose previous convictions are over 10 years old.
24. In regards to the present case the forfeiture of bail was committed in January, 2000 which is about 20 years ago and the last previous conviction of larceny is dated March, 2004 about 16 years ago. The offence of forfeiture of bail with reference to the Bail Act is serious for which the applicant was fined \$20.00 in the year 2000. There is nothing before the court about the circumstances of that offending.
25. For the past 16 years the applicant has not been in conflict with the law. The current allegations against the applicant are yet to be proven beyond reasonable doubt hence the presumption of innocence is very much in favour of the applicant (*see Bechu and Another v R, 8 FLR 240*).
26. The charges against the applicant are serious which carries an immediate custodial sentence if convicted, however, no matter how serious the allegations are, it is not a sufficient ground to refuse bail pending trial (*see Nazeem Sheraz Ali v State, Criminal Misc. Case No. HAM 101 of 2016 (06/07/2016)*).

27. The prosecution relies on direct evidence of the two complainants and the evidence of the accomplice which the state counsel says has the potential of being corroborated. The applicant has the right to test the veracity of the prosecution case during the trial. At this stage there is some evidence against the applicant which suggests that the prosecution has a strong case which is relevant to assess the likelihood of the applicant's appearance in court to answer to the charges.
28. The prosecution has not made any suggestions that the applicant had not co-operated with the police at the time of his arrest or had shown resistance to arrest.

INTEREST OF THE ACCUSED

This is a 2019 matter and the court diary for the year is full hence a trial this year will not be possible even to the extent that it is quite unlikely that this matter may be heard in the year 2021 hence it is not in the interest of the applicant to be kept in custody for an indefinite period.

PUBLIC INTEREST AND THE PROTECTION OF THE COMMUNITY

29. The prosecution contends that the action of the applicant has traumatized both the complainants therefore remanding the applicant will ensure the safety of the complainants.
30. There is no evidence before the court to show whether the trauma of the alleged robbery continues to have an effect on the complainants and if so, to what extent.

31. In my view, the concerns of the prosecution in respect of interference with prosecution witnesses, the public interest and the protection of the community can be taken care of by imposing strict bail conditions.
32. The state counsel in respect of the previous convictions and forfeiture of bail bond relies on the case of *Richard Allen vs. The State, Misc. Case No. HAM 760 of 2018 (16 May, 2018)* at paragraph 6 Goundar J. had observed:

“Apart from pending charges, the accused has an appalling criminal record. He has 17 previous convictions since 2004 for serious offences such as robbery with violence and burglary. In 2007, he was convicted of forfeiture of bail bond and in 2009 for breaching a bail condition. He was also convicted of giving false information to a police officer in 2009....”

33. The current case is distinguished from the above case authority, here the applicant’s previous conviction dates to some 16 years ago for the offence of larceny and for forfeiture of bail bond some 20 years ago. All this while, the applicant has lived a crime free and stable life with his family. In *Allen’s* case (supra) the most recent breach of a bail condition was in 2009 which is an active previous conviction.

CONCLUSION

34. For the above reasons, this court is satisfied that the applicant be granted bail pending trial under strict conditions which also binds the two sureties who are proper persons to act as sureties for the applicant.

ORDERS

- a) The applicant is bailed in the sum of \$1,000.00 with the two sureties bonded in the like sum;
- b) The applicant is to deposit the sum of \$1,500.00 being cash bond prior to release from remand. This cash bond is to be returned to the applicant upon the determination of the substantive matter. The applicant will forfeit the sum of \$1,500.00 if there is any breach of the bail conditions.
- c) The applicant is to stay at Sukanaivalu Road, Lautoka with one of the surety's namely Siteri Namere and is not to change his address without the approval of this court.
- d) The applicant is not to interfere with the prosecution witnesses either directly or indirectly or harass them in anyway whatsoever.
- e) The applicant is not to enter Waiwai, Ba and is also to keep away from the two complainants and the prosecution witness Mr. Togalesi Matarara.
- f) The applicant is to be of good behaviour and is not to commit any offence whilst on bail.
- g) A stop departure order is to issue against the applicant immediately.

- h) A curfew is imposed on the applicant from 9 pm to 6 am daily. The applicant is to report to the Lautoka Police Station every Saturday's between 6am and 6pm.
- i) For administrative purposes the applicant is to provide a photo identification which will be photocopied and kept in court file for future reference.
- j) The applicant and the sureties are to sign the usual terms and conditions of bail as additional conditions.




Sunil Sharma
Judge

At Lautoka

18th February, 2020

Solicitors

Office of the Legal Aid Commission for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.