

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No. HAM 85 of 2021

BETWEEN: **MOHAMMED IFTIKAR**

APPLICANT

AND: **THE STATE**

RESPONDENT

Counsel : Mr. M. N. Sahu Khan for the Applicant.
 : Ms. L. Latu for the Respondent.

Date of Hearing : 18 August, 2021

Date of Ruling : 18 August, 2021

BAIL VARIATION RULING

BACKGROUND INFORMATION

1. The applicant faces two counts of Rape contrary to section 207 (1) (2) (a) of the Crimes Act and one count of Indecent Assault contrary to section 212 (1) of the Crimes Act.

2. On 19th May, 2021 the applicant was granted bail by the Magistrate's Court at Ba, a condition of bail was that the applicant not reside at Varoko, Ba where the complainant lived.
3. Since the offence of Rape is an indictable offence the matter was transferred to the High Court. By Notice of Motion dated 18th June, 2021 the applicant seeks an order that the bail condition that he not live at his residence at Varoko, Ba be varied to enable him to return to his usual residence.
4. The applicant relies on his own affidavit in support sworn on 17th June, 2021 filed herein and also his affidavit in reply sworn on 13th July, 2021 with relevant annexures.

REASONS FOR SEEKING BAIL VARIATION

5. The applicant in his affidavit deposes that he has a sugar cane farm at Varoko, Ba where he has been living and harvesting approximately 176 tons of cane every year.
6. The land is mortgaged to Fiji Development Bank and the debt as at 14th June, 2021 is \$36,679.12. The repayment of the loan is from the cane proceeds.
7. The applicant has also entered into an agreement to purchase a truck registration number AA 050 in the sum of \$15,000.00 which is to be paid in full by 31st December, 2021. Upon full payment the truck will be transferred to the applicant, the applicant has the possession of the truck.

8. Since the crushing season has begun the applicant is required to work in his farm and drive the truck to pay off his debt. The applicant also deposes that if he does not attend to his farm and cartage his cane to the mill in the truck he would lose his farm as well as the truck.
9. Although the applicant's wife is employed earning \$106.00 per week it is not enough to support the family including their three children who are in primary school.
10. According to the applicant, the alleged complainant lives approximately 200 meters away from his house and that he will not walk in front or cross the complainant's house to get to his house.
11. The applicant has also provided the affidavit of Moveen Ali, the Sardar of the harvesting group for the area sworn on 9th July, 2021 as an annexure in his affidavit in reply. Moveen deposes that the applicant and the alleged complainant are not immediate neighbours and in his estimation both lived about 300 meters apart.
12. Moveen also deposed that the applicant's farm is not in between the house of the alleged complainant and that the applicant's farm is about 1 ½ kilometers away. There is another road which the applicant can use to get to his house which is not even close to the complainant's house and by using that road one would get to the applicant's house first before the complainant's house.

RESPONDENT'S SUBMISSION

13. This application is opposed by the State, in response WDC 3961 Meredani Naba has filed her affidavit in opposition sworn on 5th July, 2021 in her capacity as the Investigating Officer.

14. WDC Naba agrees that the applicant has a farm to cultivate at Varoko, Ba, a family to support and debts to pay. However, the Officer deposes that since the alleged complainant and the applicant are immediate neighbours, his return will create fear on the complainant which will create tension and possible interference which might pose a risk to the applicant.
15. The Investigating Officer further deposes that the applicant's house is less than 200 meters away from the complainant's house and visible. Moreover, the main road the applicant has to pass or cross to get to his house is right in front of the complainant's house.
16. State Counsel on the above basis submits that the applicant should not be allowed to reside at his house which will intimidate the complainant and other prosecution witnesses who live in the same area. Counsel further stated that according to the Investigating Officer the wife of the applicant had visited the complainant one day before the applicant was granted bail and asked the complainant to cancel the case and was willing to offer her some money.
17. Finally, counsel submitted that even though there is an alternative route to the applicant's house the state's objection did not change.

DETERMINATION

18. There is no doubt that the applicant is presumed to be innocent until proven guilty of the offences he is charged with. The application for bail variation has been prompted due to the fact that any continued restriction on his usual place of residence will have dire financial consequences in that he will not be able to pay his debts which will result in him losing all his properties.

19. The State does not deny this aspect, however, the Investigating Officer in her affidavit for whatever reason goes further to say the following at paragraph 11 of her affidavit:

“...Given the difficulty that the complainant had in trying to disclose this allegation to her family, the Applicant’s return will create more fear on PW1 to prepare for trial. So, if he returns to his house in Varoko, Ba, this will create a lot of tension and possible interference...”

20. The above assertion by the Investigating Officer is a mere speculation in the absence of any affidavit given by the alleged complainant who would have been better placed to depose how the return of the applicant to his house would affect her.
21. This court is unable to give any weight to this assertion by the Investigating Officer. Furthermore, the State has not disputed the facts mentioned in the affidavit of Moveen Ali, the Sardar of the harvesting group.
22. The Sardar has given a clear picture about the distances between the complainant and the applicant’s house including the applicant’s farm which I accept. More importantly, I also give weight to the fact that there is another road which the applicant can use to get to his house which will not take him close to the house of the complainant.
23. It is difficult to accept the fact that the applicant’s wife had approached the complainant to withdraw the complaint and in return will be given some money. The police statement annexed to the affidavit of WDC Naba does suggest a complaint being lodged but there is nothing before this court as to what happened to the complaint and how the applicant is connected to this allegation.

24. It is also concerning to note that nowhere in her affidavit the Investigating Officer had mentioned anything about an alternative road the applicant can use. At paragraph 12 WDC Naba deposed that she had personally visited the roads at Varoko and the main road which the applicant has to pass to get to his house is right in front of the complainant's house yet the State Counsel in her submission stated that there is an alternative route to the applicant's house which the applicant can use to work in his farm and then leave to reside at Tauvegavega, Ba (the new address).
25. This failure by WDC Naba to state in her affidavit that there was an alternative road which the applicant can use gives credence to what the applicant and Moveen Ali have stated in their affidavits that there is indeed an alternative road which the applicant can use and which is not close or near the complainant's house. I regard this omission by WDC Naba in her affidavit in regards to the alternative road available as a material non-disclosure.
26. This court is satisfied that the reasons given by the applicant for a bail condition variation is acceptable hence this application is allowed.
27. By allowing the variation the applicant will be able to get back to a normal life with his wife and three children and be on a financial footing to earn an income from his farm and truck to pay his debts and also support his family.
28. Moreover, the applicant has to understand that any breach of the bail conditions will be to his disadvantage and detriment considering the fact that there are prosecution witnesses living in the same area. The State Counsel in this regard is directed to inform the Investigating Officer that the prosecution witnesses are not to take any undue advantage of the

applicant's presence in Varoko. Any enmity between the parties must be held back allowing the due process of law to take its course.

ORDERS

- (a) The application for variation of bail condition in respect of the applicant's place of residence is granted as follows:
- (i) The applicant is to reside at his residence situated at Varoko, Ba and is to cultivate his farm by using the alternative road which does not go near or close to the house of the alleged complainant;
 - (ii) The applicant is to keep away from the complainant by at least 100 meters and is to use the alternative road at all times.
- (b) All the other terms and conditions of bail imposed by the Magistrate's Court at Ba continue in existence.
- (c) The applicant and the surety are to sign a fresh bond as an acceptance that they are aware of all the terms and conditions of bail (including the above variation).



Sunil Sharma
Sunil Sharma
Judge

At Lautoka

18 August, 2021

Solicitors

Messrs. Nazeem Lawyers, Ba for the Applicant.

Office of the Director of Public Prosecution for the Respondent.