

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

MISCELLANEOUS CASE NO: HAM 152 of 2023

MUNESH GOUNDAR

V

STATE

Counsel : Mr. Wasu Pillay for the Applicant
Ms. Sheenal Swastika for the Respondent

Date of Hearing : 7 September 2023

Ruling : 27 September 2023

BAIL RULING

Introduction

1. This is an application for bail pending trial. The Applicant is the accused in High Court Lautoka Criminal Case No. HAC 82 of 2023.
2. On 3 July 2023, the Director of Public Prosecutions (“DPP”) filed Information against the Applicant in the substantive matter. The relevant Disclosures were filed in Court on 19 June 2023 and Additional Disclosures filed on 5 July 2023 and 1 August 2023.
3. As per the Information filed by the DPP in the substantive matter, the Applicant is charged with one count of Attempted Murder, contrary to Section 44(1) and Section 237 of the Crimes Act No. 44 of 2009 (Crimes Act); one count of Arson, contrary to Section 362 (a) of the Crimes Act; and one count of Damaging Property, contrary to Section 369 of the Crimes Act.
4. The full details of the Information is as follows:

COUNT ONE

Statement of Offence

ATTEMPTED MURDER: Contrary to Section 44 (1) and Section 237 of the Crimes Act 2009.

Particulars of Offence

MUNESH GOUNDAR, on the 21st day of May 2023, at Dreketi Feeder Road, Lautoka, in the Western Division, attempted to murder **BIU TUWAI**.

COUNT TWO

Statement of Offence

ARSON: Contrary to Section 362 (a) of the Crimes Act 2009.

Particulars of Offence

MUNESH GOUNDAR, on the 21st day of May 2023, at Dreketi Feeder Road, Lautoka, in the Western Division, wilfully and unlawfully set fire to the dwelling house of **PETER O'BRIEN**.

COUNT THREE

Statement of Offence

DAMAGING PROPERTY: Contrary to Section 369 of the Crimes Act 2009.

Particulars of Offence

MUNESH GOUNDAR, on the 21st day of May 2023, at Dreketi Feeder Road, Lautoka, in the Western Division, wilfully and unlawfully destroyed vehicle registration FG 395 belonging to **PETER O'BRIEN**.

5. On 2 August 2023, the Applicant was ready to take his plea. Accordingly, he pleaded not guilty to the three charges against him in the Information.
6. The complainant in count one is the Applicant's de-facto wife.

The Notice of Motion for Bail and Affidavit in Support of Bail

7. This application for bail was filed by way of a Notice of Motion for Bail, which was supported by an Affidavit in Support deposed to by the Applicant, and filed in Court on 29 June 2023.

8. Therein the Applicant *inter-alia* states that he is a Fiji citizen, 42 years of age, and residing at his family home Field 4, Lovu, Naikabula, Lautoka. He is an Electrician by occupation. He is in a de-facto marriage with Biu Tuwai and has two children – Jacob Goundar, who is 4 years old and Justin Goundar, who is 2 years old.
9. The Applicant states that prior to being remanded into custody for this case he was self-employed doing odd jobs and earning approximately \$150.00 per week.
10. The Applicant deposes that he has not in the past and prior to the charges filed against him in this case, been charged or convicted with any criminal offence.
11. He further deposes that he has never been convicted of any criminal offence in Fiji and that he has been a law abiding citizen for 36 years of his life.
12. He states that the current charges against him arise from events which took place on 21 May 2023. He is said to have voluntarily surrendered himself into the custody of the Police when this matter was being investigated. He was formally charged on 23 May 2023, and produced in Court the following day. He has been in remand custody since that day.
13. The Applicant has proposed the names of two sureties. The first surety proposed is Vishwa Nadan Goundar, Businessman, residing at Korovuto, Nadi. He is said to be a cousin brother of the Applicant from his paternal side. The second surety proposed is Prakash Chand, self-employed, residing at Korovuto, Nadi. He is said to be a friend of the Applicant. Both sureties have filed Surety Affidavits in Support of Bail for the Applicant.
14. In the event of being granted bail, the Applicant undertakes to reside in Korovuto, Nadi, with his first proposed surety Vishwa Nadan Goundar.
15. The Applicant further deposes that he is willing to comply with any bail conditions that this Court may impose on him in the event of bail being granted to him. He is willing to surrender his passport to the custody of Court and is willing to surrender to any or all orders that prohibit him from applying for and/or getting a new passport.

The Affidavit in Opposition filed by Sergeant 2118 Satendra Kumar

16. On 24 July 2023, an Affidavit was filed by Sergeant 2118 Satendra Kumar, Police Officer, based at the Lautoka Police Station, in opposition to this application for bail. SGT Kumar, who is the Investigating Officer in respect of the case and who has served in the Fiji

Police Force for 15 years, strongly objects to the application for bail made by the Applicant.

17. SGT Kumar deposes that the Applicant is charged with two serious indictable offences of Attempted Murder and Arson. The State has a strong case against the Applicant. The State will be relying on the direct evidence of the complainant Biu Tuwai. The Applicant and the complainant were said to be in a de-facto relationship at the time of the alleged incident. They have 2 children namely Jacob Goundar and Justin Goundar. The Applicant's older child Jacob Goundar is also said to be direct witness to the alleged incidents.
18. SGT Kumar further deposes that considering the domestic relationship between the Applicant and the complainant the presumption in favour of bail has been displaced in this case.
19. Currently the complainant is said to be residing in Suva with her 2 children. However, there is still a high possibility of interference with the State witnesses in the event the Applicant is granted bail.

The Supplementary Affidavit in Opposition filed by DC 5356 Tevita Rika

20. Subsequent to this matter been fixed for Hearing, the Learned State Counsel sought Leave of Court to file a Supplementary Affidavit in Opposition to Bail. Court permitted the application by the State. Accordingly, on 21 August 2023, a Supplementary Affidavit was filed by DC 5356 Tevita Rika, Police Officer, based at the Lautoka Police Station, in opposition to this application for bail. DC Rika, is also an Investigating Officer in this case.
21. DC Rika states that the Applicant was charged for Murder (of one Rajnesh Singh) in the Supreme Court of New South Wales, Australia, in the year 2007. The jury had found the Applicant not guilty of Murder, but guilty for the lesser charge of Manslaughter. On 5 November 2010, he was sentenced to 10 years and 8 months imprisonment, to date from 8 March 2007; with a non-parole period of 8 years, to date from 8 March 2007. A copy of the Judgment on Sentence, dated 5 November 2010, has been annexed to the Supplementary Affidavit and tendered as Annexure "A".
22. DC Rika deposes that the Applicant has misled Court in paragraph 4(e) of his Affidavit in Support by not acknowledging that he had been previously charged and convicted for an offence in New South Wales, Australia.

23. As per the Applicant's travel history he is said to have left Fiji on 23 August 2003, on Fijian Passport No. 513705 to Sydney, Australia. The Applicant had returned to Fiji from Sydney on 28 April 2017, on a temporary travel document number CI22380. The said temporary travel document was issued to the Applicant to facilitate one way travel back to Fiji.
24. The Applicant has spent approximately 14 years in Australia as per his travel history. A copy of the Department of Immigration, Border Control, Arrival Card and Fijian Immigration Travel History has been annexed to the Supplementary Affidavit and tendered as Annexure "B".
25. According to the Regional Border Training Officer (RBTO) Pacific, Australian Border Police, after serving his sentence the Applicant was removed from Australia as his visa was cancelled due to his criminal history and he was accordingly deported to Fiji on 28 April 2017. A copy of the email confirmation from the Regional Border Training Officer (RBTO) Pacific, Australian Border Police, has been annexed to the Supplementary Affidavit and tendered as Annexure "C".
26. DC Rika further deposes that the Applicant currently does not have any travel document nor has he applied for any new travel document to date. A copy of the letter from the Fiji Immigration Department has been annexed to the Supplementary Affidavit and tendered as Annexure "D".
27. DC Rika submits that since the Applicant has failed to disclose his previous criminal history the undertakings provided by him in his Affidavit in Support cannot be relied upon.

The Affidavit in Reply filed by the Applicant

28. On 4 September 2023, the Applicant filed an Affidavit in Reply to the Affidavits in Opposition filed by the State.
29. Therein, the Applicant tenders unreserved apology to this Court for not disclosing his previous conviction in Australia. He states that he did not intend to mislead this Court and that he truly believed that his conviction was not relevant to his application for bail before this Court.
30. The Applicant deposes that in Australia and now in Fiji he had been at the wrong place at the wrong time.

The Bail Hearing

31. This matter was taken up for hearing before me on 7 September 2023. During the hearing both Counsel for the Applicant and the Respondent were heard.

The Law

32. 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.”*
33. 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.”*
34. 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.*
35. Since there is a domestic relationship between the Applicant and the complainant in Count 1 of the Information, who is his de-facto wife, the presumption in favour of granting of bail is displaced in this case.
36. 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. Section 17 (1) of the Bail Act states, that 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 is not granted.
37. Section 19(1) of the Bail Act (as amended by the Domestic Violence Act), 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."*

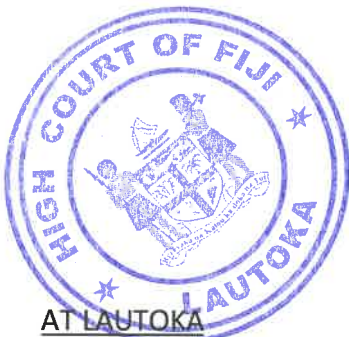
38. In forming the opinion required by subsection (1), Section 19(2) of the Bail Act stipulates that Court must have regard to all the relevant circumstances, and in particular to the circumstances enumerated in the said sub section.

Analysis

39. The primary objection taken up by the State in this case is that the Applicant is charged with a domestic violence offence and the safety of the specially affected person, in this instance the complainant in Count 1 of the Information, who is the de-facto wife of the Applicant, is likely to be put at risk if bail is granted to him. Furthermore, a crucial witness for the prosecution is the applicant's 4 year old son, Jacob Goundar.
40. This Court agrees with the contention of the State. Court is conscious of the fact that the complainant, Biu Tuwai, and her 4 year old son are crucial witnesses for the prosecution.
41. However, these concerns could have been mitigated by imposing strict bail conditions on the Applicant prohibiting him from having any form of contact or communication with the State witnesses. This is more so due to the fact that, as is now confirmed by the State, the complainant and her children are now residing in Suva and, in the event of being granted bail, the Applicant proposes to reside with his first surety in Nadi.
42. However, what concerns this Court more is the fact that the Applicant has clearly attempted to mislead this Court by not disclosing material facts that were well within his knowledge. A consideration of such facts are necessarily relevant in an application for bail.

43. In his original Affidavit the Applicant has deposed that he has not in the past and prior to the charges filed against him in this case, been charged or convicted with any criminal offence. This is undoubtedly a false statement. It is manifest that the Applicant has been found guilty for the offence of Manslaughter, convicted and sentenced by the Supreme Court of New South Wales, Australia, on 5 November 2010. This fact should have been divulged to Court.
44. This matter only came to light upon the State filing a Supplementary Affidavit in Court. Even when the Learned State Counsel had indicated that she may have material to this effect and put the Applicant on notice, prior to the filing of the Supplementary Affidavit, the Applicant did not attempt to come clean and disclose this information to Court on his own.
45. Filing an Affidavit in Reply and belatedly tendering an unreserved apology does not cure the initial non-disclosure by the Applicant of material facts and the fact that he attempted to mislead this Court.
46. It is also pertinent to note that after committing the offence for which he was later found guilty and convicted in New South Wales, Australia, it is recorded that the Applicant had left to New Zealand. He had been arrested in New Zealand and extradited to New South Wales, Australia, to face the charge against him. Thus he had not been granted bail during the pendency of his trial.
47. The Learned Counsel for the Applicant endeavoured to argue that the conviction and sentence against the Applicant in another jurisdiction (a foreign jurisdiction) is not entirely relevant for this Court in making its determination on bail. This Court cannot agree with this contention, especially when the conviction and sentence relate to an offence of a similar nature.
48. In any event, for the Applicant to depose in his original Affidavit that he has not in the past and prior to the charges filed against him in this case, been charged or convicted with any criminal offence, is inexcusable, as it is a patently false statement of fact.
49. During the course of the Hearing, the Learned Counsel for the Applicant made detailed reference to the Supreme Court decision of **(Abhinesh) Kumar v The State** [2021] FJSC 1; CAV 20 of 2020 (5 February 2021). He made particular reference to paragraphs 4.32 to 4.40 of the judgment, where the Supreme Court has discussed several cases where bail had been granted by Court where the facts and circumstances may have been similar.

50. However, the facts and circumstances of this case can be clearly distinguished from ***Kumar v The State (Supra)***, particularly in light of the material non-disclosure of relevant material to this Court.
51. 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. As per Section 19(1) of the Bail Act Court can refuse bail where the accused person is unlikely to surrender to custody and appear in Court to answer the charges laid against him.
52. In forming the opinion required under Section 19 (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. This *inter-alia* includes the circumstances, nature and seriousness of the offence; the strength of the prosecution case and the severity of the likely penalty if the person is found guilty.
53. As stated earlier, the Applicant is charged with the serious offence of Attempted Murder, and if found guilty, the Applicant is likely to be imposed a mandatory sentence of imprisonment for life, with a judicial discretion to impose a minimum term to be served before a pardon maybe considered. In addition, he is also charged with the offences of Arson and Damaging Property. Therefore, this Court is of the opinion that there is a high likelihood that he would fail to appear in Court to answer the charges against him in the event of being granted bail.
54. Therefore, taking into consideration all the above factors, I am of the opinion that it is not in the interests of justice that bail should be granted to the Applicant.
55. Accordingly, the application for bail pending trial is dismissed.



AT LAUTOKA

Dated this 27th Day of September 2023


Riyaz Hamza

JUDGE
HIGH COURT OF FIJI

Solicitors for the Applicant : Messrs Gordon & Co., Barristers & Solicitors, Lautoka.
Solicitors for the Respondent : Office of the Director of Public Prosecutions, Lautoka.