

HIGH COURT

ADESH SINGH  
UMA SHANDAR  
RATTAN SINGH

A

v.

THE STATE

B

[HIGH COURT—Fatiaki, J.—14 July 1988]

C

Criminal Jurisdiction

*Criminal Law—Application for bail—factors which will guide judicial officers dealing therewith in the exercise of their discretion.*

I. Khan for the first and 2nd Applicants  
V. Parmanandam and H. Nagin for the 3rd Applicant  
B. S. Singh for the Respondent

D

Adesh Singh, Uma Shankar and Rattan Singh applicants were charged jointly in separate counts for Receiving Stolen Property contrary to section 313 of the Penal Code, Cap. 17.

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The applicants first appeared on the charges before the Suva Magistrate's Court on 4 July 1988, pleaded not guilty, were denied bail and remanded in custody.

The learned Magistrate gave short reasons in refusing the appellant's application for bail. The present proceeding was a fresh application—not an appeal.

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This report is concerned only to note the comprehensive list of matters to which a judicial officer might have to address himself to enable him to exercise his discretion in granting or refusing bail—

- (1) that an accused is presumed innocent until proven guilty;
- (2) that the primary test entitling an accused to bail is whether or not it is probable that he will appear to stand trial on the charges laid against him;
- (3) the existence of any earlier refusal of an application for bail;
- (4) the seriousness of the accusations and charges and the nature of the prosecutions evidence in support of those charges;
- (5) the likelihood of the offence being repeated before trial and whether or not the safety of the accused would be imperiled by his release on bail;
- (6) any likelihood of the accused interfering with prosecution witnesses;
- (7) the nature of the accused's character and antecedents;

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- (8) the fact that the accused might be seriously prejudiced in the preparation of his defence;
  - (9) the likelihood of further charges being laid against the accused: and
  - (10) whether or not the application for bail is opposed.

**B** The Court noted that although the accused were charged jointly, the case of each accused was (correctly) dealt with separately.

*Held:* Applying these principles, for reasons given in respect of each accused, the first applicant was refused and the second and third granted bail subject to conditions.

**C**

FATIAKI, J.:

#### Decision

**D**

The applications for bail in this instance although instituted by separate motions and affidavits may be conveniently dealt with in a single decision.

The applicants are charged jointly on separate counts with the offence of Receiving Stolen Property: Contrary to Section 313(1)(a) of the Penal Code Cap. 17. The particulars in each count alleges that:

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"on days unknown between the 1st day of December, 1987 and 3rd day of July, 1988 at Suva in the Central Division, received 111 roofing iron valued at \$1,110.00, knowing the same to have been stolen."

It is to be noted that the ownership of the roofing irons is not averred in the charges although the precedent Form provided in the schedule to the Criminal Procedure Code does include the same.

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Further at the date of hearing these applications two persons who appeared with the applicants in the Magistrate's Court were convicted of stealing the 333 roofing irons, the subject matter of the Receiving Counts.

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The applicants first appeared on the charges before the Suva Magistrate's Court on Monday the 4th July, 1988 (incorrectly deposed by the 1st and 2nd-named applicants as Tuesday the 5th July, 1988). They all pleaded not guilty to the charges but were unsuccessful in their applications for bail and were remanded in custody by the learned Magistrate until Friday the 15th of July, 1988.

In opposing bail in the Magistrate's Court the police prosecutor relied on the following grounds: (so far as can be deciphered from the original handwritten record of the Magistrate's Court).

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- (a) a lot of roofing was still missing;
- (b) fears that the applicants would interfere with the investigations;
- (c) fears that the applicants would abscond;
- (d) investigations were incomplete; and
- (e) possibility of further charges being laid.

I can only suppose that (b) and (d) refer to some wider investigation evidentially unrelated to the present charges. A

The learned trial Magistrate's short ruling refusing bail is in the following terms:

"I have carefully considered the points raised in support of bail application by Mr Khan and Mr Nagin on behalf of their clients Accuseds 3, 4 and 5. B

The prosecution through the Divisional Prosecuting Officer Mr Singh has raised serious objections. They fear the accused may interfere with witnesses as the investigation is still in progress, which forms part of a large investigation. C

He fears interference of witnesses most of whom are related to the 3 accused. The 4th accused has a New Zealand visa. D

This court has to consider all these matters in . . . particularly the probability of the accuseds absconding and interfering with the next stage of police investigations. E

This court cannot lightly thrust aside the State's objection if it feels that the interest of justice which is wound up with the public interest as well requires that bail be refused. F

I am of the view that the prosecution's fears are well founded and I accordingly refuse bail. After all this is the accuseds first appearance in court, and a short remand does not mean the end of the world for them if circumstances do require that they be remanded. I accordingly remand accuseds 3, 4 and 5 in custody till 15/7/88 for mention. G

With respect to the learned Magistrate his reference to a short remand not being the end of the world is inappropriate and unfortunate and would have been better omitted. H

I accept that a Magistrate has a discretion under Section 108(1) of the Criminal Procedure Code to admit any accused person to bail with or without sureties and subject to such conditions and limitations he may think fit to impose. Subject only to the amount fixed for bail not being excessive. F

Nevertheless, as was stated by MacDuff, C.J. in *Bechu and Another v. R.* 8 F.L.R. 240 at 241:

". . . the discretion must be exercised judicially in the light of the paramount principle that an accused person is presumed innocent until he has been found guilty. For that reason he should not be deprived of his liberty merely because he is accused of a crime if he can satisfy the test that in all the circumstances he will appear to stand his trial on that accusation. G

In that case the learned Chief Justice specifically accepted that (in Fiji) a court in considering whether to grant or refuse bail may take into consideration any likelihood that the defendant may interfere with prosecution witnesses and in this regard the court is entitled to decide what weight (if any) is to be attached to such evidence produced or assertion made by the prosecution. H

In this case the assertion was made by the divisional Prosecuting Officer, Superintendent C.B. Singh and the learned Magistrate gave it such weight as he considered appropriate in exercising his discretion to refuse bail.

**A** I am of course mindful that this is a fresh application for bail and as such is not to be treated as if it were an appeal against the Magistrate's refusal to grant bail, but nevertheless in my view an earlier refusal of bail by a Magistrate's Court and the reasons for such refusal are appropriate factors to be taken into account by this court in considering anew the exercise of its discretion pursuant to Section 108(3) of the Criminal Procedure Code Cap. 21 on an application for bail pending trial.

**B** The respondent was represented at the hearing by Mr B. Singh a State Counsel from the office of the Director of Public Prosecutions who, in opposing this present application, submitted similar grounds to that advanced before the Magistrate's Court. These were:

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- (a) the likelihood of the applicants interfering with police witnesses;
  - (b) the fact that the charges laid in this instance arises as part of a much publicised nation-wide police investigation called the "Yavato Operation";
  - (c) the fact that all the stolen roofing irons have not been recovered;
  - (d) the likelihood of the applicants absconding; and
  - (e) the likelihood of further charges being laid against the 1st-named applicant Adesh Singh.

**D** Before dealing with each applicant in turn, I think it is appropriate to summarise the factors that guide me in the exercise of my discretion on this application namely:

- (1) that an accused is presumed innocent until proven guilty;
- (2) that the primary test entitling an accused to bail is whether or not it is probable that he will appear to stand trial on the charges laid against him;
- E** (3) the existence of any earlier refusal of an application for bail;
- (4) the seriousness of the accusations and charges and the nature of the prosecutions evidence in support of those charges;
- (5) the likelihood of the offence being repeated before trial and whether or not the safety of the accused would be imperiled by his release on bail;
- F** (6) any likelihood of the accused interfering with prosecution witnesses;
- (7) the nature of the accused's character and antecedents;
- (8) the fact that the accused might be seriously prejudiced in the preparation of his defence;
- (9) the likelihood of further charges being laid against the accused; and
- G** (10) whether or not the application for bail is opposed.

I am also mindful that although the applicants in this case are charged jointly, nevertheless, the court must consider the merits of each application separately.

**H** Dealing then with the first applicant *Adesh Singh*. He is charged with an offence of *Receiving Stolen Property* which is punishable with a maximum sentence of 14 years imprisonment.

The nature of the prosecution's evidence against him as outlined by counsel for the State can only be described as very serious and extends beyond the narrow ambit

of the present charge laid against him. Indeed further charges may be laid and it appears that police investigations are still continuing against him.

There is therefore in my view a very real danger of this applicant absconding or interfering with prosecution witnesses some of whom have only very recently come forward with additional information of other stolen property that was allegedly in the possession of the applicant.

In the circumstances despite the nature of the applicant's defence and in the light of the factors enumerated above, after having fully considered the affidavit of the applicant and the submissions of his counsel, I would exercise my discretion by refusing the applicant's present application for bail.

The second applicant *Uma Shankar* is also charged with an offence of *Receiving Stolen Property*.

The prosecution's evidence against him appears to be based on the assistance he rendered in the distribution and sale of the roofing irons he is alleged to have received, as such, his role might be considered a secondary one.

He voluntarily surrendered his passport to the police who have retained it and although he has a permanent residency visa for New Zealand and I do not consider that there is any real likelihood that he will abscond from the country. However counsel for the state alleges that as a number of this applicant's purchasers live in the Koronivia and Raralevu areas, it might be in his own interest that he keep away from those areas.

Exercising my discretion in this instance I can see no good reason for departing from the primary test and I therefore grant the applicant bail in the sum of \$2,000 with one surety in like sum and impose the following conditions:

- (a) that he report to the nearest police station to his residence twice daily at 9 a.m. and 5 p.m.;
- (b) that he advise the police of any change of his residential address;
- (c) that he does not reside or go to the Raralevu or Koronivia areas;
- (d) that his passport continue to be retained by the police.

Similarly, in respect of the third applicant, *Rattan Singh* his role in the offence was undoubtedly a secondary one being merely the provision of a truck for the transportation of the roofing irons. It was not suggested that he actively sold any. He is for present purposes to be treated as a man of previous good character and investigations appear to be complete insofar as he is concerned.

I am satisfied that in his case too, which is almost indistinguishable from that of the 2nd applicant, I ought not to depart from the primary test and I grant him bail in the sum of \$2,000 with 1 surety in like amount and impose the following conditions:

- (a) that he report to the Nausori Police Station twice daily at 9 a.m. and 5 p.m.;
- (b) that he surrender to the police any passport he may have; and
- (c) that he advise the police of any change in his residential address.

Needless to say any interference by the 2nd and 3rd applicant with any prosecution witness will result in a withdrawal of his bail, as would, any breach of the conditions imposed.

One application refused; two applications granted on terms.