

SANJANA DEVI (f/n HANUMAN DEVI) v STATE

HIGH COURT — MISCELLANEOUS JURISDICTION

5 SHAMEEM J

4, 5 March 2003

[2003] FJHC 200

10 **Criminal law — bail — application for bail — whether bail should be granted for the best interests of child — whether bail should be given presumption in accordance with law — whether Applicant should be granted bail on the ground of her non-absconding and offending.**

15 The Applicant is charged on three counts of imitation of currency and also her husband. She applied for bail in the Magistrates' Court but the application was refused. She now made an application for bail to the High Court by motion and affidavit. The application was based on two grounds, one was that the prosecution had no basis in law to request further remand and that the Applicant had a son which the court needed to consider for the best interests of the child in the grant or refusal of bail.

20 **Held** — (1) In all acts involving children, a decision must be made after assessing what is in the best interests of the child. If both parents are in custody and there are no arrangements for the care of children of tender years, bail should be granted because it is in the best interests of the children that they are not separated from their parents. One situation where it would not be in their best interests would be where the parents are
25 accused of abusing or neglecting their children. However, this is not to say that bail should always be granted where both parents are in custody. There may be circumstances where public interest considerations or the conduct of the parents themselves, would justify a refusal of bail. Each case must turn on its own facts.

30 (2) The law gives presumption in favour of bail and set down the criteria to be considered on a bail application. These are the principles which must be applied in all bail applications in Fiji. The best interests of the Applicant's 4-year-old son are a primary consideration in the grant or refusal of bail in this case.

35 (3) The United Nations International Convention on the Rights of the Child provides that states parties shall ensure that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine in accordance with applicable law and procedures that such separation is necessary for the best interests of the child.

Bail allowed.

Case referred to

40 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; 128 ALR 353; 39 ALD 206; 69 ALJR 423, considered.

G. O'Driscoll for the Applicant.*A. Singh* for the State.

45 **Shameem J.** The Applicant is charged on three counts of imitation of currency, contrary to s 366(1) of the Penal Code. She has been in custody pending trial since the 21st of February 2003. Her husband, who is a co-accused is also in custody.

50 She applied for bail in the Magistrates' Court but the application was refused. She now makes this application in the High Court by motion and affidavit. The application is based on two main grounds, one is that the prosecution has no basis

in law to request further remand, and the other is that the Applicant has a four-year-old son who now has no caregiver and whose clothes are locked up at the Applicant's house while she is in custody. Counsel submits that the learned magistrate who refused bail, did so on the basis that investigations were continuing. This, he said, was not a good reason for refusing bail. Finally he submitted that under the Convention on the Rights of the Child, the court needed to consider the best interests of the Applicant's child in the grant or refusal of bail.

Section 27(3) of the Constitution provides that every person who is arrested for a suspected offence has the right "to be released from detention on reasonable terms and conditions pending trial, unless the interests of justice otherwise require". Section 3(1) of the Bail Act (No 26 of 2002) provides that:

(i) Every person has a right to be released on bail, unless it is not in the interests of justice that bail should be granted.

Section 3(3) creates a presumption in favour of granting bail. Section 17(1) provides that the court must consider the time a person may have to spend in custody before trial if bail is not granted. Section 17(2) provides:

... 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 19(1) provides that an accused person must be granted bail unless the court thinks:

- (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; or
- (c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult.

In forming an opinion about these factors, the court must consider all relevant circumstances, in particular—

- (a) as regards the likelihood of surrender to custody—
 - (i) the accused person's background and community ties (including residence, employment, family situation, previous criminal history);
 - (ii) any previous failure by the person to surrender to custody or to observe bail conditions;
 - (iii) the circumstances, nature and seriousness of the offence;
 - (iv) the strength of the prosecution case;
 - (v) the severity of the likely penalty if the person is found guilty;
 - (vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);
- (b) as regards the interests of the accused person—
 - (i) the length of time the person is likely to have to remain in custody before the case is heard;
 - (ii) the conditions of that custody;
 - (iii) the need for the person to obtain legal advice and to prepare a defence;
 - (iv) the need for the person to be at liberty for other lawful purposes (such as employment, education, care of dependants);
 - (v) whether the person is under the age of 18 years (in which case section 3(5) applies);

- (vi) whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;
- (c) as regards the public interest and the protection of the community—
 - (i) any previous failure by the accused person to surrender to custody or to observe bail conditions;
 - (ii) the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person;
 - (iii) the likelihood of the accused person committing an arrestable offence while on bail.

Section 20 requires that if bail is refused the court must record the reasons and give them to the accused person within 24 hours.

These very clear provisions give effect to the presumption in favour of bail, and set down the criteria to be considered on a bail application. These are the principles which must be applied in all bail applications in Fiji.

Applying these principles to this application, I accept that the Applicant has no history of absconding while on bail, that the offences with which she is charged (s 366(1) of the Penal Code) are misdemeanours with a maximum sentence of 6 months' imprisonment on each count, and that if convicted the penalty is unlikely to be the statutory maximum. I note also that no hearing date has been set, and that she has now been remanded for 2 weeks. It is not suggested that the conditions of custody are unduly oppressive, or that she has had difficulties preparing her defence. However, she says that there is no one to look after her 4-year old son and that she is prepared to accept stringent conditions of bail to allow her to take care of him.

Clearly the care of dependents is a relevant consideration in the grant or refusal of bail. The United Nations International Convention on the Rights of the Child was adopted by the United Nations General Assembly in 1989. Article 3 states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9 provides:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

The ethos of the Convention is clear. In all acts involving children, a decision must be made after assessing what is in the best interests of the child. The Convention is a valuable guide to the weight that a court must put on s 19(2)(b)(iv) of the Bail Act. Where, for instance, both parents are in custody and there are no arrangements for the care of children of tender years, bail should be granted because it is in the best interests of the children that they are not separated from their parents. One situation where it would not be in their best interests, would be where the parents are accused of abusing or neglecting their children. However, this is not to say that bail should always be granted where both parents are in custody. There may be circumstances where public interest considerations or the conduct of the parents themselves, would justify a refusal of bail. Each case must turn on its own facts.

The Convention applies in Fiji pursuant to s 43(2) of the Constitution which provides that the courts "must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter" (which includes

s 28). The High Court of Australia said in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; 128 ALR 353; 39 ALD 206; 69 ALJR 423 per Mason CJ and Deane J:

5 It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.

And, in relation to Art 3 of the Convention:

10 The concluding words of Art 3.1 are “the best interests of the child shall be a primary consideration”. The article is careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal but not paramount weight.

15 The best interests of the Applicant’s 4-year-old, who is now left without a caregiver, is a primary consideration in the grant or refusal of bail in this case.

20 Counsel for the State raises public interest issues in opposing bail. He submits that the investigations are continuing, that the Applicant herself may be a target for other persons currently under investigations and that further charges may be laid. He did not provide any evidence that the Applicant had tried to interfere with witnesses. Nor is there any suggestion that the Applicant might reoffend while on bail, or that she had failed to appear in the past. She has no previous convictions. He very fairly conceded that the Convention on the Rights of the Child and the welfare of the Applicant’s child was a relevant consideration in the granting of bail, but said that in this case the police, with the Applicant, had
25 dropped the child at an aunt’s house on the day of the arrest. The police had no further information about his whereabouts.

30 In these circumstances, there seems to be no good reason why bail should be denied. The Applicant has no history of offending, or of absconding. She is charged with misdemeanours. Her husband is also in custody and they have a child about whom no one has any real information in relation to his welfare and custody. There is no history of interference with witnesses, and Fiji’s laws do not allow the courts to place people in custody “for their own protection”. The protection of Fiji’s citizens is the responsibility of the police, not the Prisons Department.

35 In all the circumstances I consider that bail should be granted on strict conditions. The Applicant’s passport must be surrendered forthwith to the police. She must reside at Omkar Road, Narere and must not change her address without informing the Valelevu Police Station. She must report three times a week, on Mondays, Wednesdays and Fridays between 6 am and 6 pm at the Valelevu
40 Police Station. She must not speak to or contact any witness in this case. She must provide two sureties in the sum of \$500 each. She must attend the Magistrates’ Court at 9 am on the 27th of March 2003. Bail is granted on these conditions.

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Bail allowed.

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