STATE v ALBERTINO SHANKAR and Anor

HIGH COURT — CRIMINAL JURISDICTION

GATES J

9, 17 April, 8 May 2003

[2003] FJHC 50

Criminal law — bail — application for bail — interpretation of delay caused by the fault of the person under the new Bail Act — general merits for the application of bail — whether Accused is unlikely to surrender and appear in court if granted bail — whether the interests of the Accused person will not be served if granted bail — whether public interest would be endangered through the granting of bail — Bail Act 2002 ss 3(1), 3(3), 3(6), 13, 13(4), 13(6), 19.

Albertino Shankar (1st Accused) and Francis Narayan (2nd Accused) were jointly charged with a single count of Murder. First Accused applied for legal aid but was refused. Second Accused was not also given legal aid as his counsel was still engaged in a Treason trial. Both Accused filed for an application for bail because they were held in custody for a long period of time and their trial has not yet begun. The application is concerned with the interpretation to be given to the word "fault" in the phrase "delay caused by the fault of the person" under the new Bail Act 2002. The State filed an opposition.

Held — (1) The court must take into account the time the Accused is to spend in custody before trial if bail is not granted when deciding whether to grant bail. In this case the trial is likely to commence on 20 May 2003 and conclude by 20 June 2003, by which date the Accused would have been awaiting the finalisation of their trial almost 2 years and 3 months. The primary consideration in this decision process is the likelihood of the Accused person appearing in court to answer the charge.

(2) If the caution interview statements are admitted into evidence together with the evidence of linkage of the deceased's property will make a strong case against both of the Accused. A mandatory life sentence follows any conviction for Murder. All these factors point to a likelihood that the Accused would not surrender to custody and appear in court if they were allowed bail.

(3) There is nothing unusual about the conditions of their custody. For the Accused to be out on bail would result in an easier preparation of the defence case. The Accused being in custody is not a serious handicap to the defence. There are no special personal circumstances such as employment, education or care of dependents, tender age or incapacity required for the necessity for bail.

(4) The non-availability of defence counsel on two occasions and the refusal to accept his counsel by 1st Accused are considered as faults in process of litigation attributable to both Accused. The word "fault" in s 13(6) means litigation fault for which the Accused is to be held responsible and not personal fault of the Accused. To read the section as only applying to "personal" fault would mean the 2-year limit might be used unscrupulously and thereby to obtain mandatory bail. This is not the Parliament's intent.

(5) Bail is only granted in Murder cases in exceptional circumstances and these are not present in the instant case.

Bail refused.

Cases referred to

Dunkley v R [1995] 1 AC 419; *Jese Tuilaucala v State* HAM 16 of 2002S (unreported); *Kaylesh Chandra v State* HAM 5 of 1994 (unreported); *Mitchell v R* [1999] 1 WLR 1679; *Roshni Devi and Another v State* (Labasa High Court, Bail Application No 1/02, November 2002, unreported); *Sailasa Naba v State* HAC 12

of 2000L (unreported); *State v Silatolu* HAC 11 of 2001S; *State v Felix Keith Vusonitokalau* HAC 5 of 1996S (unreported), cited.

Lownes v Babcock Power Ltd [1998] Times LR 84, February 18, 1998; *State v Silatolu and Another* HAM 8 and 10 of 2002S, considered.

M. Waqavonovono for both the Applicants.

J. Rabuku for the State.

K. Keteca for the Attorney-General.

[1] **Gates J.** This application is concerned with the interpretation to be given to "fault" in the phrase "delay caused by the fault of the person" (the Accused) under s 13 of the new Bail Act 2002. The Act came into force on 1 February 2003.

[2] Section 13 (4) of the Act provides:

> If a person charged for an offence has been in custody for over 2 years or more and the trial of the person has not begun, the court must release the person on bail subject to bail conditions the court thinks fit to impose.

And Section 13(6):

> For the purpose of subsection (4), the period of 2 years does not include any period of delay caused by the fault of the person.

[3] It would appear from the committal papers that both Applicants were taken in for questioning by the police on 31 March 2001. It is likely therefore that this date marks the commencement of the long period of their being held in custody. The formal order of remand was made by the Suva Magistrates Court on 3 April 2001. They have been in custody so far therefore for 2 years 4 weeks.

[4] The Applicants face an information with a single count jointly charging them with the murder of one Tang Wen Jun between 20th to 27th March 2001.

The application

[5] A notice of motion was first filed by the Legal Aid Commission on behalf of the 1st Accused on 3 April 2003. The 1st Accused swore an affidavit in support. The motion was subsequently amended and refiled on behalf of both Applicants. The 2nd Accused also swore an affidavit for the proceedings. There was a third affidavit sworn by Ronald Prasad in support which set out the chronology and explained the delays in the litigation.

[6] The State filed one affidavit in opposition, that of Sergeant Mohammed Safiq, the investigating officer.

[7] Counsel for the state had originally indicated that the Director of Public Prosecutions was taking the point that the commencement date of the Bail Act 2002 had been brought into effect and gazetted by the wrong minister. This objection was eventually withdrawn. Before such withdrawal, the Attorney-General had been invited to appear through counsel and to be heard on the matter. I was greatly assisted by counsels submissions both written and oral.

[8] The order of committal for trial in the High Court was made by the magistrate on 28 September 2001. The trial of the Applicants was recently set down to commence on 5 May 2003, and may take 4–5 weeks. This date has had to be postponed to 20 May 2003 because of the continuance of a prior trial. Ms Nair will be appearing for the 1st Applicant at trial but Ms Waqavonovono

appears for him and for the 2nd Applicant on this application only. Ms Prem Narayan will be appearing at trial for the 2nd Applicant.

Bail Act 2002

[9] The Bail Act 2002 has encapsulated long standing principles of the common law and provides guidance to persons charged with the duty of deciding bail, and on the priority of competing considerations. First, the Act makes clear that there is for every Accused person an entitlement to bail: s 3(1). This does no more than reflect the principle of the presumption of innocence, which is also stated by the Constitution: s 28(1)(a). Section 3(6) however also states that that entitlement will fail if it is not in the interests of justice that bail should be granted.

[10] The second presumption is stated to be that in favour of the granting of bail. The presumption is rebuttable (s 3(3)), if it can be shown that the Accused has previously breached a bail undertaking or bail condition, or has been convicted and has appealed against the conviction (s 3(4)).

[11] Special rules apply to persons under the age of 18 years. These do not apply to the present Applicants who are aged 20 and 23 respectively.

[12] The court must take into account when deciding whether to grant bail to an Accused person the time the person may have to spend in custody before trial if bail is not granted: s 17(1). In this case the trial is likely to commence on 20 May 2003 and conclude by 20 June 2003, by which date the Accused would have been awaiting the finalisation of their trial almost 2 years 3 months.

[13] The primary consideration in this decision process is the likelihood of the Accused person appearing in court to answer the charge: (s 17(2).

[14] Opposition to the grant of bail must cover the following three areas of objection:

(a) the likelihood of the Accused person surrendering to custody and appearing in court;
(b) the interests of the Accused person;
(c) the public interest and the protection of the community.
[Section 18(1)]

[15] It is the statutory duty of the deciding court if it decides to refuse bail to rule on each of the criteria in subs (1) of s 18 and to deal with the submissions made on each one. The Bail Act imposes upon the decision-maker therefore a duty of careful scrutiny of the arguments for and against the grant of bail. Section 19 sets out what would need to be considered, that is, the relevant circumstances, for arriving at an opinion that bail must be refused.

[16] The High Court in this case is asked to exercise original jurisdiction in order to grant bail: s 31(2)(a). This section replaced ss 108-118 of the Criminal Procedure Code (Cap 21) which the Bail Act repealed: s 33. Section 32 allows for the making of regulations. None have been brought to my attention, and I am not aware that any have been made by the minister with the approval of the Chief Justice: s 32 (1).

General merits of application

[17] First I set out in full the governing section, s 19:

> (1) 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; or

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

(2) In forming the opinion required by subsection (1) a police officer or court must have regard to all the relevant circumstances and 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.

(a) Likelihood of surrender to custody

[18] It is clear from a reading of s 19 that the affidavits filed with such applications will have to provide the court with much more focused information than has hitherto been the case. This places a considerable burden upon defence solicitors, but without adequate information and evidence, application material may fail to support the presumption of bail, and fail to answer submissions in opposition.

[19] From the depositions, which I accept only for the purposes of this application, it appears 1st Accused Albertino Shankar is a 20-year-old man educated to form 2 level. He said he could not read and write Hindustani, only speak it. He can read English. He lived with his mother, who is described as unemployed. His grandfather supported them both. He said he was unemployed but said he earned small sums from odd jobs done for his grandfather who owned a small block of four flats, in one of which the crime is alleged to have been committed.

[20] First Accused proposes to live with his mother and grandfather at the flats in Toorak Road if granted bail. He offers them both as his sureties. I note that his mother was apparently living in Brown Street not with his grandfather. There is no evidence relating to character, therefore I assume he has no prior convictions.

[21] Second Accused also used to live in Toorak Road. He does not state where he proposes to live, who with, or whether he could offer any surety. In interview he said he was working for his cousin at 8 miles Nasinu, and that he lived with his family in Toorak. I assume that he is of previous good character.

[22] I assume that there has not been any other court matter, or any previous failure to surrender to custody or to observe bail conditions.

[23] The allegation is a very serious one. It is that both Accused entered the flat of the female victim at night when she was asleep. Both of them then raped her twice. They had bound and tied her legs and wrapped masking tape over her face, almost completely covering it. They strangled her with a rope until she expired. They left the flat taking with them some of the deceased's personal property, a radio, camera, bags, a fan etc. Bail is only granted in murder cases in exceptional circumstances. These are not present here: *Kaylesh Chandra v State* (unreported, Suva High Court, Misc Applic No 5.94, 24 June 1994); *State v Felix Keith Vusonitokalau* (unreported, Suva High Court, Crim Case No HAC0005.96S; 2 September 1996).

[24] If the caution interview statements are admitted into evidence, these together with evidence of linkage of the deceased's property with the two Accused could make for a strong case against both of them. A mandatory life sentence follows any conviction for murder. All of these factors might point to a likelihood that the Accused would not surrender to custody and appear in court, if they were allowed bail.

(b) Interests of the Accused

[25] On the other hand as regards the interests of the Accused (s 19(2)(b)), the length of time they have already been held in custody awaiting trial militates strongly in favour of a grant of bail. Pain J in *Vusonitokalau* described custody of 1 year 9 months as "an inordinate delay that is totally unacceptable". Arrested persons awaiting trial have the right to be released from detention on reasonable terms and conditions, unless the interests of justice otherwise requires: s 27(3)(c) of the Constitution.

[26] There is nothing unusual raised about the conditions of their present custody. There has been plenty of time for their solicitors to obtain full instructions, in spite of the inconvenience of doing so while they are on remand in prison. For the Accused to be out on bail would result in an easier preparation of the defence case. But this is not a case of fraud with many papers to be perused, invoices, vouchers, receipts and the like to be located, and so I do not consider the Accused being in custody to be a serious handicap to the defence.

[27] There are no special personal circumstances such as employment, education or care of dependents, tender age or incapacity, tipping the balance towards the necessity for bail.

(c) Public interest and protection of the community

[28] As regards the public interest factor and protection of the community, the state raises the question of interference with witnesses. The two close relatives of 1st Accused who are put up as sureties are also witnesses in the case, and there

is the possibility that other witnesses dealing with the linkage of the deceased's property to the Accused, could be approached. These suggestions defence counsel urges me to brush aside as mere conjecture. However I find the state's concerns realistic and they sensibly give rise to anxiety on that account. The other factors for consideration under this sub-head do not apply.

Delay

[29] A good deal of the delay was caused by the processing of 1st Accused's legal aid application. The Accused first applied for legal aid on 14 June 2001. This application was refused. A review of that refusal was sought. On 14 January 2002 this too was declined. On 25 April 2002 Shameem J requested the Legal Aid Commission to reconsider its decision, and expressed reluctance to proceed with the trial unless both Accused were represented. This request was similarly turned down.

[30] Mr G P Lala of counsel then offered his services pro bono esse. A hearing date was set for 19 August 2002. But later that date had to be vacated because Ms Narayan for 2nd Accused was involved in the treason trial (*State v Timoci Silatolu* Crim Action HBM 2.02. That hearing date was accordingly vacated. It was re-fixed for 23 September 2002. In his affidavit Ronald Prasad, an executive officer with the commission, deposed:

> The matter did proceed to a hearing for about half a day but due to some difference Mr. Lala withdrew as counsel and the 1st Applicant was again left unrepresented.

[31] In her ruling of 23 September 2002 Shameem J. said:

> When we re-commenced Mr GP Lala asked for leave to withdraw saying that he had had a dispute with his client and his client no longer wished to retain him as counsel. The 1st Accused confirmed this and asked for time to make a further application for legal aid.

[32] Her Ladyship considered that proceeding with the trial without representation for the 1st Accused would expose him to a significant risk of prejudice. The judge therefore discharged the assessors and decided upon a trial de novo.

[33] The commission's assessment of its function underwent a change following the decision in *Silatolu v State, Attorney-General (intervenor), Human Rights Commission (intervenor)* CA Action No HAC0011.2001S, 12 August 2002. Legal aid was accordingly granted to 1st Accused on 28 October 2002.

[34] Another trial date was set, this time for 10 February 2003. But this date had also to be vacated because counsel for 2nd Accused was still engaged in the treason trial.

Did the delay amount to a fault attributable to the Accused?

[35] Many factors contribute to litigation delays in Fiji and they are often resource based. For some time there has been a shortage of judges and court staff. The judicial system had difficulties in providing 1st Accused with publicly funded legal representation. His application may have been a borderline case so far as the commission's guidelines were concerned, and the commission might reasonably have expected some contribution from his family, for the grandfather owned the block of flats. The Legal Aid Commission is a comparatively new institution in Fiji and so far it has been provided with only meagre funds to carry out its tasks. It was sometime therefore before the commission was in a position to take on the case for 1st Accused.

[36] The Constitution adheres the authorities in the judicial process to proceed to trial swiftly so that every person charged with an offence is accorded the right to have his case determined within a reasonable time, and thus to have a fair trial: s 29(1) and (3). He has the right to counsel for his defence, and if as here, the interests of justice so require he or she is to be provided with the services of a legal practitioner under a scheme for legal aid.

[37] I have said previously that where resources are not in issue, fundamental rights are to be accorded to all citizens and inhabitants of Fiji without diminution. There is a danger in assuming the stance that human rights cannot or need not be accorded to Fiji's inhabitants because to do so would be an expensive and unnecessary hindrance to government, development and progress. But where resources are in issue, the courts may, but not invariably, have to strike a balance.

[38] The state says it has been ready to proceed at each of the dates so far set for trial. In *Mitchell v R* [1999] 1 WLR 1679 the Appellant had been legally aided in his defence and provided with two counsel. The Appellant told the judge at trial that he was dissatisfied with his counsel's cross-examination and he would prefer to cross-examine himself. Counsel were allowed to withdraw. The Privy Council considered the judge should have allowed an adjournment so that the Appellant could have obtained the services of another counsel.

[39] In *Dunkley v R* [1995] 1 AC 419 the Privy Council considered the withdrawal of counsel had occurred through no fault of the appellant. In *Mitchell* the Privy Council did not consider the lack of representation was due to the Appellant's "fault". But was the delay, which would result from the adjournment then necessitated, had the trial judge allowed it, to be classified as "fault" of the Appellant?

[40] In *Lownes v Babcock Power Ltd* [1998] Times LR 84, February 18 1998, Lord Woolf MR said of responsibility for default in litigation:

> The person who suffered because the action was dismissed was not the plaintiff's solicitor but the plaintiff personally therefore it could be said that the judge was visiting the sins of the solicitor on the client and should not let the desire to discipline the solicitor injure the plaintiff personally.
>
> His Lordship was very conscious of the force of that point but it was wrong to give way to it. The plaintiff, even in a personal injuries case, had to be responsible for the conduct of his solicitor. Consideration had to be given to the position of parties to other litigation.

[41] In a sense the non-availability of defence counsel on two occasions, and the refusal to accept his counsel by 1st Accused are to be considered as "faults" in the process of litigation attributable to the two Accused. A certain amount of discretion may have to be exercised by the courts on occasion to alleviate the harshness of this approach. But I read "fault" in s 13(6) to mean "litigation fault for which the Accused is to be held responsible", as opposed to "personal fault of the Accused".

[42] To read the section as only applying to "personal" fault would mean the 2-year limit might be used unscrupulously to fritter away time and thereby to obtain mandatory bail. I cannot read that interpretation as parliament's intent. In *Vusonitokalau* the judge described the Accused's role in the delay by saying: "He has not contributed to that delay in any way. He has been meekly waiting in prison for 21 months for his trial to be heard". The Accused were similarly faultless in *Roshni Devi v State* (unreported, Labasa High Court Bail Application

No 1.02, November 2002); *Sailasa Naba v State* (unreported, Lautoka High Court Crim App HAC0012.00L, 4 July 2001).

[43] Accordingly I find there are several months to be deducted from the qualifying period of time spent in custody for the purposes of s 13(4) and (6), perhaps as much as 6 months from the accruing time.

[44] But I am troubled by the length of time these two Accused have spent in custody awaiting trial. This is an important consideration for the exercise of the discretion to grant bail, a residual power not removed by the Bail Act. Were the trial not to commence on 20 May 2003 I should feel compelled to grant bail no matter how grave the allegation: *Vusonitokalau*. It is to be hoped with more judges appointed and the salutary statutory reminder of s 13(4) for all participants in the justice system, we shall not have cause to hear of the plight of persons in similar circumstances to these two Accused.

[45] I conclude that s 13 does not apply to this application. For the reasons set out in this ruling, I do not consider, at this stage, that it is right to grant bail. If the trial were not to proceed for good cause on 20 May, I would ask to have this application renewed as was done in *Jese Tuilaucala v State* (unreported, Suva High Court Misc Action No HAM0016.02S, 24 May 2002, Shameem J). The Accused are advised that they are entitled to apply to the Court of Appeal for review of this decision: s 20. Their respective counsel can advise them further.

Bail refused.