LEPANI MAIWAQA v STATE

HIGH COURT — MISCELLANEOUS JURISDICTION

GATES J

13, 14 October 2003

[2003] FJHC 218

Criminal law — Murder — whether presumption in favor of grant of bail rebutted by State — Bail Act (No 26 of 2002) ss 3, 14(2), 17(2), 18(1), 18(1a), 18(2), 19 — Constitution s 27(3) — High Court Rules O 41 rr 8(2), 9(2)

The Labasa High Court convicted Applicant of Murder. The Court of Appeal quashed the conviction and ordered a retrial. Applicant sought bail pending trial with the Suva High Court with two supporting affidavits, not properly indorsed. The judge allowed the use of the affidavits. The State opposed the presumption in favour of the grant of bail.

Held — Applicant dealt with the likelihood of him surrendering to custody and appearing in court. The presumption in favour of the grant of bail had not been rebutted by the State though there are some risks both to the Applicant and to the community of Waiyevo. A balance had to be struck.

Bail allowed.

No case cited.

B. Malimali for the Applicant.

W. Kurisaqila for the State.

[1] Gates J. The Applicant was convicted of Murder by the High Court at Labasa on 9 November 1998. On 14 August 2003 the Court of Appeal quashed the conviction and ordered a re-trial.

[2] A notice of motion seeking bail pending trial was filed with the High Court, Suva on 1 October 2003 with two affidavits in support. Neither affidavit was properly indorsed as it should have been O 41 r 9; *Re Kim Industries Ltd* (unreported, Lautoka High Court, HBF0036.1999L, 7 July 2000). I overlook these imperfections and grant leave for the use of the affidavits in the application pursuant to O 41 r 9(2). Nor should affidavits be bound together in a book. They are separate pieces of evidence and each should be bound separately with its own documentary exhibits. Such affidavits should be filed in future in proper form.

[3] Though inadmissible in criminal proceedings, affidavits, following the English practice, have for long been used in Fiji as a shortform method of placing information before a court. This is usually in interlocutory applications such as bail, enlargement of time and the like. Though the High Court Rules specifically state that the rules do not apply to criminal proceedings O 1 r 8(2), practitioners should frame their affidavits therefore in broad compliance with O 41.

[4] Because the alleged offence happened on the island of Taveuni, it has not been easy for the State to place sufficient material before the court swiftly. The Bail Act encapsulates the common law approach and requires a court to deal with a bail application as soon as reasonably practicable [s 14(2)]. The State had to take the affidavit of the investigating officer in Taveuni before filing it in Suva, in opposition to this application.

[5] The Constitution provides that a 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 [s 27(3)].

This right is reflected in the entitlement to bail and the presumption in favour of bail provided in s 3 of the Bail Act No 26 of 2002. Section 3 relevantly states:

> 3.(1) Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted.
>
> (2) …
>
> (3) 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.

[6] The crime here was alleged to have been committed on 24 April 1998. The Applicant was arrested and charged the next day and taken into custody. His trial was heard between 2–9 November 1998 when he was convicted upon the unanimous opinions and judgment of the court. He was in custody pending trial a little over 6 months prior to conviction. In the circumstances existing at Labasa then, that length of time would appear to be a reasonable period.

[7] The processing of the appeal, for reasons that were not the fault of either of the parties, took over 4 years. Alas, in the judicial system, Homer nodded. Since the Applicant was a serving prisoner for most of that period, such period is to be excluded from consideration under the mandatory release after 2 years rule provided for in s 13(4). Had he been awaiting trial for all of that period, a court would have been bound by s 13(4) to release him on terms. Since there is to be a re-trial, the relevant trial for the purposes of the Bail Act, has not yet begun. That, strictly speaking, is the position in law. But if ultimately the Applicant succeeds in his defence of the charge, he will have been in custody for almost 6 years by the time the second trial is concluded. His re-trial is unlikely to be listed in Labasa before February 2004.

[8] The Applicant states he is a 30-year old farmer. He says he has one previous conviction for being drunk and disorderly in 1996. His solicitors should have made a prior check with Criminal Records Office before allowing their client to depose to such information. In fact he has 5 previous convictions according to the record attached to the Investigating Officer's affidavit, which includes convictions for throwing object, damaging property, larceny, and two convictions for assault occasioning actual bodily harm. He has served imprisonment for them, the longest term being for 21 months in 1996.

[9] Ms Malimali correctly submits that the State in making its submissions against the presumption in favour of bail is obliged by s 18(1) "to deal with" each of the paragraphs set out in the section. They are:

> (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.

[10] If the court decides to refuse bail, it must give a written ruling on each of the criteria and deal with the submissions made on each one s 18(2). Mr Kurisaqila accepts that his material does not so deal. There is no history of the Applicant's previous attendance record, for these proceedings or for any of his previous court matters. The State's obligations under ss 18(1) and 19 of the new Bail Act are yet to be considered and addressed in Fiji. It will require first, the maintenance of sufficiently detailed and factual records by the police or prosecution authorities of the accused's non-attendance and the reasons for such. These will have to be kept by Criminal Records Office no doubt fed by Investigating Officers and police prosecutors. For instance evidence will have to

be readily available of non-attendance or of absconding from trial if s 18(1)(a) is to be relied upon as a ground of objection to bail.

[11] It must be remembered that "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": s 17(2). Details of bench warrants being issued by the courts, of re-arrests, of excuses given, and of action taken by the courts may be relevant under this head. If the prosecution does not "deal with" this section the court will have to presume the accused has always attended for his court cases, at all mentions and ultimately for his trial. In this application therefore I have to presume there is nothing adverse against the Applicant on the issue as to whether he will surrender to custody and appear in court when ordered. Finally it must be understood, the State must provide such evidence for the court as a matter to be taken into account on a bail application irrespective of whether it intends to rely on non-attendance or unreliability as a ground of objection.

[12] It is said that there is tension on Taveuni in relation to this case. One witness who went with the Applicant to the police station has in turn been murdered. In the appeal judgment the Court of Appeal recorded that the person responsible for the second murder is now being held in a mental home.

[13] The Applicant is asking to be allowed to reside with his cousin sister in Balivaliva, Labasa. To some extent this could be regarded as away from the area of all the troubles and ill-feeling. But there are still some risks of encountering persons from Taveuni who may visit Labasa, as the main town of the Northern Division.

[14] The allegation is one of murder. The circumstances suggest the perpetrator acted with a gruesome malice. After a fight, the victim was strangled with his own trousers and a beer bottle was pushed into his anus. The Applicant says he confessed as a result of threats from the man who did commit the crime. If the confession is not upheld as voluntary there may be little evidence left linking the Applicant to the death. I am informed the Director of Public Prosecutions will be reviewing the evidence. But at this stage I cannot conclude that the result of the second trial would be any different from the first.

[15] Though there are some risks here both to the Applicant and to the community of Waiyevo, a balance has to be struck. I find the presumption in favour of the grant of bail has not been rebutted by the State.

[16] Accordingly I grant bail to the Applicant upon the following terms and conditions:

(i) In his own recognizance of $500.

(ii) He is to be of good behaviour during his period on bail and to attend court when told to do so.

(iii) He is to reside with his cousin sister Torika Dipa at Vatia Subdivision, Balivaliva, Labasa until the conclusion of his trial.

(iv) He is not to change his address without written leave of the Deputy Registrar of the Labasa High Court, which must be obtained before he changes his address. The DPP Labasa must also be informed by the Applicant. If he is aggrieved by any refusal to allow a change of address, application can be made to me or to a judge of the High Court on 1 day's notice.

(v) He is not to approach any prosecution witnesses, directly or indirectly, or to interfere with or harrass them in any way.

(vi) He is not to apply for a passport, not to travel overseas, and not to visit Taveuni for any purpose pending the conclusion of his trial.

(vii) He is to report to Labasa Police Station, the main station in Labasa, every Friday between 6 am–6 pm.

(viii) He is bailed to attend court at Labasa High Court for mention of his case on Tuesday 27 January 2004 at 9.30 am when he will be informed of his date of trial or given a further date of mention by a judge or by the Deputy Registrar.

(ix) Breach of any of these conditions of bail will result in the cancellation of his bail and the issuance of a warrant for his arrest and his return to custody till he is tried.

Bail allowed.