

**SISARO TALEMAITOGA, OSEA VOLAVOLA v STATE
(MISC0023 of 0010)**

5 COURT OF APPEAL — MISCELLANEOUS JURISDICTION

MARSHALL JA

21 March 2011, 3 May 2012

10 **Criminal Law — bail — application for bail pending retrial — murder — robbery with violence — accused absconded on bail — chances of success in proposed appeal — right of appeal to Full Court — integrity of forthcoming trial — Court of Appeal Act.**

15 The applicants were convicted of robbery with violence and murder, however their convictions were subsequently quashed and a re-trial was ordered. They were granted bail and absconded, before being re-arrested. The applicants were refused bail pending retrial and applied for leave and for bail.

Held –

20 (1) Listing this for hearing by the Full Court would have ensured certainty and finality. If this Court refuses bail or leave for this application, the applicants have the right to renew their applications for leave and for bail before a Full Court.

25 (2) This Court agrees with the reasons of the lower Court for refusing bail. The charge is extremely serious, the applicants absconded on bail, and the public interest in a quick and fair trial for those accused of murder has been thwarted. The victim and his family have been denied the justice of resolution for ten years, and the witnesses have been inconvenienced and subjected to unnecessary stress.

(3) The integrity of the forthcoming trial is a consideration of overriding importance when bail issues fall to be decided. It is also in the interests of the three accused for the retrial to be heard expeditiously.

30 *The State v Abdul Sattar* Miscellaneous Action No 0031 of 2010
Leave refused and applications for bail pending retrial refused.

Cases referred to

Sitiveni Uluinacuvu and 3 Ors v The State Miscellaneous Action No 0008 of 2010, applied.

35 *S. Vaniqi* (as duty solicitor)

Appellants in Person

N. Wickramasekera for the Respondent

40 [1] **Marshall JA.** I heard an application for bail pending trial on behalf of Sisaro Talemaitoaga and Osea Volavola on 21st March 2011. Since they by rulings in *Sitiveni Uluinacuvu and 3 Others v The State* Miscellaneous Action No 0008 of 2010 the complexities of bail pending appeal and bail pending trial in the High Court which was introduced by Cap 38 of 1998 into the Court of Appeal Act. I
45 gave that ruling on 31st May 2011. I now apply that ruling to the case of the two applicants for bail now before me.

50 [2] On 26th January 2002 at about 9.00 pm a taxi driver, a Fijian woman and her daughter hailed a taxi. As they were about to get in three Fijian boys (Joji Ravuwai and the two applicants) asked if they could share the ride. Since the women knew Joji Ravuwai they agreed and five passengers were driven to the women's home in Nausori. The two women left the taxi leaving behind the three

boys and the taxi driver. Shortly afterwards in nearby Naselai Feeder Road the taxi driver's body was found murdered. He had been robbed of \$50. The taximeter had been ripped out and hidden in nearby bushes. The three boys had hailed another cab to take them to Nausori. There they went to a nightclub and had drinks. The prosecution case was that the three accused were the "passengers" who then perpetrated murder and robbery. All three made admissions of a joint enterprise murder and robbery.

[3] The events leading to their convictions for murder and robbery, their acquittal with an order for retrial by the Court of Appeal; their admissions to bail pending retrial and their eventual re arrest in order to face retrial are described as follows by Justice Daniel Goundar in his bail ruling of 13th August 2010.

[2] *The applicants were convicted of robbery with violence and murder of a taxi driver, following a trial before Winter J and three assessors in 2004. The offences were allegedly committed in 2002. By the time the trial was held, the case was over two years old. The applicants were sentenced to life imprisonment for murder and 10 years imprisonment concurrent for robbery. At the outset of the trial, the accused persons were separately represented by counsel.*

[3] *During the trial, counsel for the first and second applicants withdrew, with the leave of the trial judge, on the ground of conflicting instructions from their clients. Upon questioning by the trial judge, counsel disclosed to the trial judge the nature of the conflicting instructions by their clients. In explaining to the assessors the reasons why the first and second applicants' counsel withdrew, the trial judge disclosed the nature of the conflicting instructions to them. The Court of Appeal found the trial miscarried when the trial judge disclosed to the assessors the nature of the conflicting instructions by the first and second applicants to their counsel because the disclosure cast doubt on their credibility. The Court of Appeal in a judgment delivered on 28 July 2006, quashed the convictions of the applicants and ordered a re-trial.*

[4] *The third applicant was not affected by the error as he was represented by a different counsel through the trial. The Court of Appeal, nevertheless, ordered a re-trial in his case as well because the prosecution case was based on joint enterprise and it would be unfair if the trial recommenced against the first and second applicants only.*

[5] *After the re-trial was ordered, on 10 August 2006, the case was called before Shameem J for mention. The first and second applicants were present in court while the third applicant was absent. It is unclear from the record why the third applicant did not appear in court but it appears he was released from prison after the Court of Appeal ordered a re-trial. After his release, the authorities were unsuccessful in serving him with a notice of hearing because he had disappeared.*

[6] *On 20 October 2006, the second applicant failed to appear in court and a bench warrant was issued for his arrest.*

[7] *While the bench warrant against the second applicant was pending for execution, on 2 February 2007, the first applicant failed to appear in court and a warrant of arrest was issued against him. The bench warrants were not executed until 28 June 2010, when the three applicants appeared in court under arrest.*

[8] *The applicants filed separate bail applications. Their main contentions are that they need bail to engage counsel due to the seriousness of the charges and that they have families who are dependent on them for their livelihood.*

[9] *The State opposes the applications for bail upon grounds advanced in the affidavit of the investigating officer, Inspector Viliame Caqausau. The first applicant has six previous convictions, five of which were committed while the*

bench warrant in this case was pending against him. In 2007, he was convicted of resisting arrest and escaping from lawful custody. Apart from these convictions, he has two robbery cases and a burglary case pending in the Magistrates Court, which he allegedly committed after absconding while on bail in this case.

5 [10] *The second applicant also re-offended after absconding while on bail in this case. In 2007, he was convicted of criminal trespass. He ran away from his village when the police went to arrest him on 26th June 2010. However, he was arrested with the assistance of the villagers.*

10 [11] *The third applicant does not have any criminal history. None of the applicants have stable employment.”*

[4] Applying the law explained by me in **Sitiveni Uluinacuvu and 3 Others** (supra) I probably should have listed this for hearing by the Full Court. This would have ensured certainty and finality. But having heard the application for bail pending trial as a Single Judge I am bound to follow that process. This means that if I refuse bail or refuse leave for this application, Sisaro Talemaitoa and Osea Volavola have the right to renew their applications for leave and for bail before a Full Court. I am at liberty to sit as one of three judges in the Full Court if the applications are renewed.

20 [5] I now turn to Justice Daniel Goundar’s reasons for refusing bail. He said:

[13] *The applicants are charged with murder and with robbery with violence. These offences are serious. Both offences are punishable by life imprisonment.*

25 [14] *The evidence against the applicants has been tested in court. They were convicted after a trial. Their convictions were not overturned on the basis of evidence led at the trial but on procedural fairness when counsel for the first and second applicants withdrew due to the conflicting instructions.*

[15] *After a re-trial was ordered, the first and second applicants were released on bail. Once they were released, they breached their bail by absconding. The third applicant disappeared after he was released from prison. They knew about the re-trial but they tried to avoid it by absconding. They were at large for nearly four years before they were arrested on bench warrants.*

30 [16] *For these reasons, there is a likelihood that the applicants will not answer their bail when called upon to attend their trial.*

[17] *Although no trial date has been set yet, this case can be heard early next year, provided the applicants are able to arrange legal representation. The remand period pending re-trial is not going to be unreasonable. The offences are old and it is in the applicants’ interests that the re-trial be heard expeditiously.*

35 [18] *The applications for bail are refused. The applicants will remain in custody pending re-trial. They are advised that they have a right of appeal against this decision to the Court of Appeal within 30 days.*

40 [6] I agree with the reasons expressed by Justice Daniel Goundar for refusing bail. The charge of murder is extremely serious. I am surprised that the three accused were given bail pending retrial. Predictably they absconded and were at large for nearly four years before they were arrested on bench warrants. Meanwhile the public interest in a quick and fair trial for those accused of murder has been thwarted. The victim and his family have been denied the justice of resolution in this case for ten years. Also the witnesses have been inconvenienced and subjected to unnecessary stress. As I said in my ruling on 2nd March 2011 in *The State v Abdul Sattar* Miscellaneous Action No 0031 of 2010 the integrity of the forthcoming trial is a consideration of overriding importance when bail issues fall to be decided. It is also in the interests of the three accused for the

50 retrial to be heard expeditiously.

[7] In this legal framework there is the requirement of leave which is not present in applications for bail pending appeal.

[8] I have suggested in **Sitiveni Uluinacuvu** (supra) that “*a threshold for leave would seem to be undesirable*”. But there has been no action in the form of an executive decree enacting this proposed reform. There are no chances of success in this proposed appeal. It is unarguable. I therefore propose to refuse leave. However that will not prevent Sisaro Talelaitoga and Osea Volavola from renewing their applications to a Full Court asking for leave and asking for bail pending their retrial for murder and robbery.

10 **ORDER**

[9] I order

- (1) that leave to Sisaro Talelaitoga and Osea Volavola to apply for bail be refused.
- (2) that the applications of Sisaro Talelaitoga and Osea Volavola be refused.

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Leave and applications for bail refused.

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