R v Moala

Supreme Court, Pangai, Ha'apai
Hampton CJ
Cr 197/97

13 March, 1997

Bail - conditions - sureties - forfeiture - obligations
Criminal law - bail - conditions - sureties - forfeiture - obligations

The accused was charged with unlawful carnal knowledge of a girl under 12, and indecent assault. He was committed to the Supreme Court for trial, allowed bail, but absconded. Proceedings were taken against his two bail sureties to forfeit the amounts of their bail bonds.

Held:

1. For serious alleged offending (as this) significant and appropriate monetary terms, and conditions, of bail must be imposed. The greater the potential penalty, the greater the risk of an absconding.
2. It is entirely inappropriate and indeed, improper for a police officer (let alone as here the investigating officer of the particular alleged crime) to stand bail as a surety. The potential conflicts of interest which arise are aggravated when the police officer is a relative of the accused.
3. The whole of the security of the accused be forfeited to the Crown.
4. The sureties were persuaded to enter into bail bonds in quite a casual and light manner. But sureties have important obligations the primary one being to try and ensure that the accused person answers his bail and appears in Court when required. Sureties must use their best efforts and endeavours to achieve that. It is a positive obligation.
5. In each case the bonds of the sureties were forfeited to the Crown.

Statutes considered : Bail Act 1990

Counsel for prosecution : Mr Cauchi
Sureties in person

Judgment

From what is on this file, it seems that the accused person Losepeli Moala had summonses issued against him on 20th September 1996, to appear in the Magistrates' Court Ha'apai on 26th September last year on two charges, both under the Criminal Offences Act, one being for unlawful carnal knowledge of a girl under 12 and the other being for indecent assault.

It would seem that the preliminary inquiry took place in two stages before the Magistrate. The first on 12th December 1996 in this Court building and the second again in this Court on 6th January 1997. After the hearing, or the part hearing, on the 12th December, the accused man was allowed bail to appear again on 6th January for the resumed hearing. His bail was on his own bond of $200 and two sureties, each of $150.

I assume he had bail before then, and I want to make some comment as to bail generally before I look first at the bond entered into in December and then, more importantly for this hearing, at the bond entered into in January.

Here was a man facing, from anybody's viewpoint, serious charges; the indecent assault carrying a maximum penalty of up to 5 years but, more importantly, the unlawful carnal knowledge of a girl under 12, carrying a potential penalty of up to life imprisonment.

That latter charge is, by it's penalty, one of the most serious in the Criminal Offences Act. Accepting all that the Bail Act says, and accepting all that the presumption of innocence means, nonetheless for offending alleged of this grave nature, if bail is to be allowed then significant and appropriate terms of bail, both as to (i) amount of own bond and amount of sureties; and (ii) conditions as to where a person lives, what they do with their passport and how often they report to the police; must be imposed and I stress (for the benefit of the Magistracy) - must be imposed.

I am not trying to lay down (and it would be foolish of me and wrong to try and lay down) a general prescription as to bail and terms of bail but I implore Magistrates to take the greatest care and to impose appropriate terms of bail, if bail is to be granted.

One of the matters that any Court must always consider on questions of release on bail and on questions then of terms of bail if release is to be made, is the nature and seriousness of the offending alleged.

It hardly needs saying, in my view, but obviously the greater the potential penalty that an alleged offender faces (and here this man faces up to life imprisonment) then the greater is the possibility that an alleged offender might well abscond rather than face the charges.

Those are general comments which I will ensure are distributed amongst the Magistracy of the Kingdom.

If I turn now to the bond that was entered into on the 12th December last year in relation to this particular matter. Given the potential seriousness of the matters the bond for the accused in the sum of $200 and the two sureties of $150, it seems to me, were quite inadequate when, as well, there were no special conditions as to place to be lived in, for example; surrender of passport, for example; or reporting to the police or, at the very least, to someone in responsibility on the island on which this man lived. When it comes to it, the same comments can be made in relation to the subsequent bail that was entered into on 6th January because that was on the same monetary terms and lack of special conditions.

The other thing I want to comment about the bail of 12th December is this (and in

fact this has already been drawn to the attention of the Crown and I understand that the Senior Crown Counsel has taken it up with the appropriate police authorities): from what I had seen on the file, and it has been confirmed today in evidence, one of the sureties who stood bail as a surety on 12th December was a police officer. Not only that, he was the very officer, or one of the police officers, who was involved in this investigation, including the interview of the accused. And indeed in the preliminary inquiry he gave evidence as the 6th witness.

It seems to me that it is entirely inappropriate that a police officer, let alone an investigating police officer (and I mean investigating the particular alleged crime) should stand bail as a surety for the accused. In fact I would put it stronger; it is quite improper.

The potential conflicts of interest which might arise I do not need to spell out. But the potential is aggravated as well when, as I learn today, this officer was not only an investigating officer but he is also a relative of the accused.

I trust I will not see this sort of event happening again and that the persons who are enabled, as a matter of law to take the bonds of recognizances of persons who are going to stand bail as a surety, take note of what I have said.

Those people who are named in section 10(4) of the Bail Act 1990, are a police officer either of the rank of or over the rank of Inspector, or an Officer-in-Charge of a Police Station, a Magistrate or a Registrar of the Supreme Court. Those people have obligations under the Bail Act to be satisfied about a surety's suitability.

Again, I will have this judgment circulated so that it's provisions, that is the provisions of this judgment, will be brought to the attention of the persons who have that responsibility as to the suitability of sureties.

And I would express the hope that the Police Commander will make sure that it goes down through the ranks, so that it is clear to all his members, that I consider it not only inappropriate but improper for police officers, especially investigating officers, to enter into bail bonds in this way.

I turn then to the particular bail papers of 6th January 1997 executed after the completion of the preliminary inquiry when the accused person was committed to this Court for trial. The accused person was committed on the two charges I have already mentioned, but when this Court started it's circuit in Pangai, Ha'apai, at the start of this week and, again, when the matter was called specifically yesterday, there was no appearance on the part of the accused and a bench warrant for his arrest was issued.

The information placed before this Court would indicate that the accused is in all probability in New Zealand, having left the Kingdom on or about the 20th February 1997. Yesterday I made an order, pursuant to section 10 sub-section 7 para. (a) that the whole of the $200 security of the accused be forfeited to the Crown. Yesterday I also made an order that the two sureties who entered into bonds or recognizances should be summonsed to this Court today, to show cause as to why each of them should not have forfeited the $150 security which they had entered into. That is pursuant to section 10 sub-section 7 para. (b) of the Bail Act. (No.27 of 1990).

Summonses were issued; they have been served; each of the sureties have appeared before me today and, on oath, offered explanation as best they could and been examined both by Mr. Cauchi, of Counsel for the Crown, and by myself.

The two sureties are both related, in different ways, to the accused and each of them were called upon to sign bail perchance as it were, and each of them approached to do

that by the same investigating police officer I have already referred to in this judgment. Again I am not entirely happy with his role in the matter although I am not making any finding, because he has not been put on notice, has not been examined and has not been offered the chance to make explanation. But if what I am told by each surety is correct (and I have no reason to doubt what they say, from their perspectives, at this time), he approached them in quite a casual "by the way" manner and in fact persuaded them to enter into bail, I believe quite lightly.

Both sureties say they had explained to them their obligations which included, most importantly, the obligations to try and ensure that the accused person answered his bail, that is appear in Court when required.

I stress that because that when all is said and done that is the primary obligation of a surety. They are undertaking to the Court that they will use their best (and I stress best) efforts and endeavours to make sure that the person appears.

It is a solemn and serious undertaking that they entered into and I will not have it treated lightly by anyone. Nor will I have it said that obligation is fulfilled simply by signing a bond and then doing nothing else. It is a positive obligation that is cast, and which they take up. They cannot fulfil it by simply shutting their eyes and doing nothing.

Again, I intend that this judgment be circulated to the various people and organisations involved in the justice and police systems, but also intend, if it all possible, to have this judgment given general publicity so that people who are thinking of entering into bail bonds understand what is involved.

The experience of this Court in the last few months has indicated far too many people absconding whilst on bail, and far too many sureties not bothering to try and take steps to prevent such things occurring. No more. This Court will set it's face sternly against such behaviour.

I turn to the individual cases of the two sureties before me. I have considered each of their explanations separately and given quite separately. In neither case do I see any ground at all why the amount of security given, that is the $150 bond in each case, should not be forfeited in whole to the Crown. I order, accordingly, that in each case the whole of the $150 bond be forfeited to the Crown.

Having said that, I recognise a difference in position, in terms of ability to pay, between the surety Loisi Veikoso on the one hand and the surety Polutele Niupalau on the other.

In the case of the latter, I am of the view that he has the ability to pay this bond within a shorter time then he has said. It may impose some hardship on him but so be it; that is part of that undertaking that he had entered into in January of this year. In his case I direct payment to be made, of the $150 in full, by the end of 2 months from today. Payment to be made into this Court, to the Sub-Registrar in this Court, and then to be forfeited to the Crown.

In the case of the former surety, that is Mrs Veikoso I recognise as I have said, some difference in her ability to pay, given her obligations particularly to her family as the only income earner. I think she may well have over-estimated her ability to pay and I am prepared to allow her 4 months in which to make payment. So the full amount to be paid within 4 months from today. Payments to be made again to the Sub-Registrar of this Court.