

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Miscellaneous. HAM 41 of 2018

BETWEEN : **SAIYAD FAIZAL ASLAM KHAN**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. M. N. Sahu Khan for the Applicant.
: Mr. A. Singh for the Respondent.

Date of Hearing : 19 March, 2018

Date of Ruling : 26 March, 2018

RULING

[Application for bail pending trial]

1. The applicant by Notice of Motion seeks bail pending trial. In support of the application the applicant relies upon his own affidavit sworn on the 26 February, 2018.

BACKGROUND INFORMATION

2. The applicant faces a charge of rape which is pending in this court being criminal action no. HAC 63 of 2016. The applicant was released on conditional bail on 18 March, 2016.

3. One of the conditions of bail was for the applicant to be of good behaviour and not to commit any offence whilst on bail.
4. On 2 February, 2018 the applicant was charged for two counts of conspiracy to defeat justice and interference with witness contrary to section 190(a) of the Crimes Act. This matter is pending at the Magistrate's Court, Lautoka.
5. The applicant made his first bail application at the Magistrate's Court which was refused by the learned Magistrate. Thereafter, the applicant applied to the High Court for bail which was also refused.
6. On 2 March, 2018 when the applicant appeared in the Magistrate's Court to answer the allegations in respect of the abovementioned two counts the applicant was further charged with an additional count of Breach of Bail contrary to sections 25(1)(b) and 26(1) of the Bail Act 2002. On this day bail was again refused by the Magistrate's Court.
7. The applicant's bail application has been refused twice by the Magistrate's Court and once by the High Court.

STATE'S RESPONSE

8. The application filed by the applicant is opposed by the State. The State has filed the affidavit of DC 3788 Omendra Gupta sworn on 16th day of February, 2018.

DETERMINATION

9. Since this is the second application for bail in the High Court the issue before this court is whether there has been a material change in circumstances since the earlier application was refused.

CHANGE IN CIRCUMSTANCES

10. The learned counsel for the applicant states that there is a change in circumstances from the earlier application made in this court. Counsel refers to paragraphs 16, 18 and 20 of the applicant's affidavit sworn on 26 February, 2018. For completeness the relevant paragraphs are reproduced below:

"Paragraph 16

I have been informed by a Mr. Basheer of Luvu Lautoka that my children are very disturbed emotionally and depressed and that is now affecting their daily lives and I believe that it will lead to them be affected in school work as well.

Paragraph 18

With respect although I have five employees in Lautoka and two in Suva and I am the only person who is able to attend to technical matters pertaining to my business which was unfortunately not brought to the Honorable Court's attention and which I would humbly plead with this Honourable Court to consider as being a "different consideration" for the purposes of this bail application as being a different consideration for the purposes of this application.

Paragraph 20

I say with utmost respect to this Honourable Court however which is reality that my business is suffering without my hand particularly in technical matters and I have to pay creditors as well and if business loss continues and it cannot operate any longer and closes down all my employees and their family may suffer as well."

11. In his earlier affidavit sworn on 9 February, 2018 (Misc. case no. 23 of 2018) the Applicant had deposed the following:

“Paragraph 16

I live at lot 2, Vagola Lane, Lautoka. With my wife and children.

Paragraph 17

I am married and I have three young children and my wife is engaged in domestic duties.

Paragraph 18

I am a businessman and I own Generator Parts Shop (GPS) located in Lautoka City.”

12. Counsel relies heavily on the case of *State vs. Zain Kasim, criminal miscellaneous jurisdiction no. 87 of 2007* where it was held that even if there had been a breach of bail conditions the court could simply tighten bail conditions without revoking bail. The learned counsel impresses upon this court to take the same approach in respect of this application. In my view this submission is misconceived since at this time the only issue for this court is to see if there is any material change in circumstances from the earlier application justifying the grant of bail.

LAW

13. It is not in dispute that the applicant was granted conditional bail pending trial. A condition of the bail has been breached by the applicant. The new allegations and the subsequent charges laid have been denied by the applicant which is a trial issue before the court of first instance.

14. The current application before the court is the second application after the first application for bail was refused on 19 February, 2018. Under section 14 of the Bail Act an accused person may make any number of applications to a court for bail. This provision of the law does not mean that a person seeking bail can make a frivolous or vexatious application for bail.
15. Section 30(7) of the Bail Act gives powers to this court to satisfy itself as to whether there are special facts or circumstances that justify the making of this second application.
16. When the initial application was made for bail pending trial, this court was made aware of the fact that the applicant was married with three young children and that his wife was engaged in domestic duties. Furthermore, this court was also informed that the applicant was a businessman who owned a Generator Parts Shop. In view of the above this court was aware of the family situation and the business of the applicant when the decision was made to refuse the applicant's bail application on 19 February, 2018.
17. The applicant now states that he has been informed by one Mr. Basheer of Lovu, Lautoka that his children are very emotionally disturbed and depressed which is affecting their daily lives. The applicant has not informed this court about the role Mr. Basheer plays in the lives of his children and the indicators or factors that had led Mr. Basheer to come to the conclusion that he has.
18. Moreover, there is no independent evidence to verify the information received by the applicant. This court was of the view that the children were living with their mother yet there is nothing from the mother of the children put before this court. The accuracy and the truth of the

information relayed by Mr. Basheer appear doubtful and therefore cannot be relied upon by this court.

19. This court is not satisfied on the limited information that the children are depressed and suffering emotionally due to the incarceration of the applicant. Applicants should stop using children or family factors in support of such applications without any cogent evidence to substantiate their contentions.
20. In respect of the financial hardship caused to the applicant's business, again there is nothing to substantiate the extent of the loss suffered (if indeed there have been losses). There is no evidence before the court that the applicant's business is suffering. The applicant in his first affidavit did not give any background information about his business but now has asserted that he is the only person who is able to attend to technical matters. What are those technical matters that the applicant is concerned about is not known?

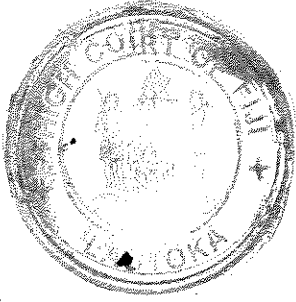
CONCLUSION


21. Taking into consideration all the evidence put before the court and the submissions made by both counsel there are no change in circumstances shown by the applicant since his application for bail was refused by this court on 19 February, 2018. This court does not attach any weight to what the applicant states to be change in circumstances in respect of this bail application.

ORDERS

1. The applicant's second bail application pending trial is refused.

2. The Magistrate's Court is to do all it can within its resources to hear the substantive matter of the applicant expeditiously.
3. A copy of this ruling is to be given to the Magistrate's Court at Lautoka.
4. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

26 March, 2018

Solicitors

Messrs Nazeem Lawyers for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.