

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Misc. No. HAM 232 of 2019**

**BETWEEN** : **PENI TUILASELASE**  
**APPLICANT**

**AND** : **THE STATE**  
**RESPONDENT**

**Counsel** : Mr. M. Naivalu on instructions of Tuifagalele Legal for  
the Applicant.  
: Mr. T. Tuenuku for the Respondent.

**Date of Hearing** : 26 February, 2020

**Date of Ruling:** 28 February, 2020

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**RULING**

[Application for bail pending trial]

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1. The applicant seeks bail pending trial by filing his Bail Application Form dated 7<sup>th</sup> October, 2019 supported by his own affidavit sworn on 23<sup>rd</sup> October, 2019 and proposed surety affidavit sworn on 23<sup>rd</sup> December, 2019 under the heading "Supplementary Affidavit".

2. The application filed by the applicant is opposed by the prosecution. The prosecution has filed the affidavit of WDC 3961 Meredani sworn on 5<sup>th</sup> December, 2019. The applicant did not file any affidavit in reply.

### **BACKGROUND INFORMATION**

3. The applicant is charged for two counts of aggravated robbery contrary to section 331 (1) (a) of the Crimes Act.

### **APPLICANT'S SUBMISSION**

4. The applicant deposes that he has been in remand since 17<sup>th</sup> September, 2019. On 27<sup>th</sup> September, 2019 the applicant had informed this court that he was assaulted by the Remand Centre Officers at Lautoka Remand Centre. As a result this court had ordered the applicant to lodge a police complaint and undergo a medical checkup and for the safety of the applicant he was to be remanded at the Suva Remand Centre.
5. According to the applicant when he was transferred to the Suva Remand Centre he was threatened by the Remand Centre Officers at Suva for complaining about the Lautoka Remand Centre Officers.
6. The applicant submits that he is not safe at any of the remand centres so he seeks bail pending trial. Furthermore, the applicant also submits that the prosecution does not have a strong case against him and he has a family to support as a taxi and mini bus driver.
7. The applicant is willing to pay a cash bond of \$500 and he seeks bail under strict conditions. The applicant will reside at Naulu Housing,

Nasinu and he can report to the Nasinu Police Station once or twice a week. The two proposed sureties are ready and willing to act as sureties and they will ensure that the applicant obeys all his bail conditions.

### **RESPONDENT'S SUBMISSIONS**

8. The prosecution relies on the affidavit of WDC 3961 Meredani who deposed that the applicant is charged with serious offences and the circumstances of the alleged offending is that both the complainants suffered traumatic experiences during the robbery. If convicted the applicant faces an immediate long term custodial sentence which is a good incentive for the applicant to abscond.
9. The applicant has 40 previous convictions out of which one is active previous conviction dated 22<sup>nd</sup> July, 2015 for the offence of theft. The state counsel submits that the prosecution has a strong case against the applicant in that one of the co-accused namely Togalesi Matarara has been granted immunity by the prosecution to give evidence against the applicant.
10. The prosecution will rely on the accomplice evidence and circumstantial evidence to corroborate the evidence of the accomplice. If the applicant is released on bail there is a likelihood that the applicant will interfere with this witness.
11. Counsel further stated that grant of bail by the court was based on trust and although the applicant has two previous convictions for escaping from lawful custody in 1997 and 1998 which are expired or irrelevant previous convictions strict bail condition is not the answer to stop any breach of the bail conditions in this situation.

## **LAW**

12. Section 3 of the Bail Act states that every person has a right to be released on bail unless it is not in the interest of justice that bail should be granted. The prosecution must rebut this presumption when bail is objected to. The presumption in favour of the granting of bail inter alia gets displaced where the person seeking bail has previously breached a bail undertaking or bail condition.
  
13. The relevant considerations which this court must take into account when determining whether bail is to be granted or not is mentioned in section 19 of the Bail Act. The three broad categories are:
  - a). the likelihood of surrender to custody and appearing in court;
  - b). the interest of the accused person,
  - c). the public interest and protection of the community
  
14. Section 19 (2) of the Bail Act states 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 beat liberty for other lawful purposes (such as employment, education, care of dependents);*
  - (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.*

### **DETERMINATION**

15. It is not in dispute that the applicant has 40 previous convictions out of which 39 previous convictions are expired or irrelevant convictions.

However, the applicant has one active previous conviction relating to theft dated 22<sup>nd</sup> July, 2015.

16. The applicant comes to this court with an unimpressive record although 39 of his previous convictions (two for escaping from lawful custody) are irrelevant. The active previous conviction is in respect of theft which is most recent about five years ago.
17. Although the two previous convictions for escaping from lawful custody are irrelevant, however, it does have a bearing on whether the applicant is likely to surrender to custody and appear in court. In respect of family commitment there can be no doubt that when a person has complicity or involvement in conflict with the law his or her immediate family members will be affected. Whilst family ties and bonding is important, it is not an overriding or compelling factor in cases such as this.
18. This court does not accept that there is any threat to the life of the applicant at the Suva Remand Centre the assertion by the applicant that he was threatened by the Suva Remand Centre Officers is vague and unbelievable, it appears that the applicant is trying his best to come up with a reason to be released on bail.
19. In any event, the applicant has not divulged pertinent information about the threats made to him such as exactly when the threats were made, and whether the applicant had brought this incident to the attention of the relevant authority at the Remand Centre. It is noted that the applicant has appeared in court many times but this is the first time this issue has been raised by the applicant.

20. Considering the fact that the applicant faces serious charges, the strength of the prosecution case and the likelihood of a lengthy imprisonment term upon conviction, there is a likelihood that the applicant will not appear in court if granted bail.
21. In *Osea Namua vs The State, Criminal Appeal No. AAU 46A of 2015 (26 February, 2016)* the Court of Appeal confirmed the above at paragraph 20 as follows:

*“The presence of a combination of factors such as the seriousness of an offence, the strength of the prosecution case and likelihood of a lengthy imprisonment sentence could operate as a strong incentive for an accused person to abscond the jurisdiction of court to avoid trial”. This was held in Bai v State [2010] FJHC 595; HAM 086.2010 (26 May 2010) and fits in to the case under consideration. Escaping from lawful custody and the forfeiture of bail bonds makes the case worse for the appellant as the presumption in favour of the granting of bail is displaced in terms of section 3 (4) of the Bail Act. Section 3 (4) states that, “The presumption in favour of the granting of bail is displaced where –(a) the person seeking bail has previously breached a bail undertaking or bail condition.” Therefore I find that this application is without any merit.*

22. This court is mindful that the presumption of innocence is very much in favour of the applicant and that the applicant has been in remand for about 5 months now. In *The State vs. Albertino Shankar and Francis Narayan, Misc. No. HAM 14 of 2003* Gates J. (as he was) at paragraph 9 had observed:

*“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 of bail [Section 3 (1)]. This does no more than reflect the principle of the presumption of innocence, which is also stated by the Constitution [Section 28 (1) (a)]. Section 3 (6) however also states that entitlement will fail if it is not in the interests of justice that bail should be granted.”*

23. Under section 13 (4) of the Bail Act a person can be kept in remand for 2 years or more if the interest of justice so requires.
24. This court cannot be oblivious to the applicant’s apparent complicity or involvement in the commission of the offences he is alleged to have committed, although, the applicant strongly argues that he has a meritorious defence to create a reasonable doubt in the prosecution case that is not a matter for the court at this point in time but a trial issue. The Director of Public Prosecutions has decided to proceed with the information filed that is his prerogative.
25. After considering the evidence adduced and the submissions made it is not in public interest to grant bail to the applicant.
26. The prosecution has been able to rebut the presumption in favour of granting bail to the applicant.

## **ORDERS**

1. The application for bail pending trial is refused;
2. Both parties to make speedy progress in the substantive matter so that an early trial date can be assigned;



3. 30 days to appeal or review by the Court of Appeal.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

28 February, 2020

**Solicitors**

**Messrs. Tuifagalele Legal for the Applicant.**

**Office of the Director of Public Prosecutions for the State.**