

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL CASE NO. HAM 56 OF 2022

BETWEEN : **ISEI TAMANIKALOU**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. S. Seruvatu for the Applicant.
: Ms. K. Vulimainadave for the Respondent.

Date of Hearing : 08 August, 2022
Date of Ruling : 16 August, 2022

RULING

[Application for bail pending trial]

1. This is an application for bail pending trial. The applicant makes this application by filing a Bail Application Form dated 22 March, 2022 supported his own affidavit sworn on 25th May, 2022. The applicant has also filed two proposed sureties affidavits of Tevita Cokailati and Akata Tamanikalou sworn on 25th July, 2022 respectively. The applicant also filed his affidavit in reply sworn on 20th June, 2022.

2. The application filed by the applicant is opposed by the state. The state in its opposition to bail has filed the affidavit of Cpl. 3600 Arunesh Kumar sworn on 3rd November, 2021. This affidavit was filed by the state counsel when the applicant filed his initial bail which was later withdrawn. The state relies on this affidavit in opposing the applicant's application for bail.

BACKGROUND INFORMATION

3. The applicant has been charged for one count of Murder contrary to section 237 of the Crimes Act. It is alleged that the applicant on 30th of June, 2021 murdered Ratu Mara Batina.
4. The applicant deposes that he has been in remand from early July, 2021 which is now about 1 year and 1 month. He was residing at the Rakiraki Settlement, Sonaisali, Nadi with his defacto wife and his in laws. If bail is granted he will reside with his elder brother who is one of the sureties at Tavakubu, Lautoka away from the place of the alleged incident.
5. The applicant further states that he understands the seriousness of the offence he has been charged with and he is also happy to abide by all the bail conditions and is willing to surrender to custody when required. He has 3 active previous convictions out of the 18 previous convictions (15 April, 2013 for robbery, 22 January, 2021 for theft and in March this year he had pleaded guilty to breach of curfew hours in Nadi Magistrate's Court).
6. The applicant has provided two sureties as part of his bail bond security. The proposed sureties have sworn separate affidavits stating their willingness to be bound by the terms of any bail bond they may be called upon to sign. The proposed sureties have also stated that they understand their responsibilities as sureties.

7. The applicant is willing to abide by any bail conditions that may be imposed by this court should bail be granted. The applicant also suggests the following additional bail conditions:
- a) Curfew between 9 pm and 5 am daily;
 - b) Reporting to Lautoka Police Station every Saturdays;
 - c) Complete restriction in entering Nadi.
8. In his affidavit in opposition the Investigating Officer Cpl. Arunesh Kumar stated that the alleged offending is serious, the prosecution has a strong case whereby a conviction is inevitable. The fear of a mandatory life imprisonment cannot be avoided and this would compel the applicant to abscond bail.

LAW

9. Section 3 of the Bail Act states that 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. There is a presumption in favour of the granting of bail but the person who opposes may seek to rebut this presumption. 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;
 - b) the person has been convicted and has appealed against the conviction; or
 - c) the person has been charged with a domestic violence offence.
10. Under section 17 of the Bail Act when deciding whether to grant bail to an accused person the court must take into account the time the person

may have to spend in custody before trial if bail was not granted. The primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charge laid against him or her.

11. Under section 19 of the Bail Act an accused person must be granted bail unless in the opinion of the court:
 - a) the accused person is unlikely to surrender to custody and appear in court to answer the charges laid;
 - b) the interests of the accused will not be served through the granting of bail;
 - c) granting bail to the accused would endanger the public interest or make the protection of the community more difficult.

DETERMINATION

12. The state counsel in his submissions also stated that the defacto wife of the applicant is a crucial witness in that she is an eye witness to the alleged offending. This aspect is not denied by the applicant. Counsel further submits that considering the closeness of the relationship between the applicant and his defacto wife there is a real possibility that the applicant once released on bail may interfere with this witness.
13. The Court of Appeal in *Eliki Seru v State [2015] FJCA 30; AAU 0152 of 2014 (27 February, 2015)* at paragraph 8 explained the meaning of likelihood of interference with witness in the following words:

As required by section 18(2) of the Bail Act 2002, the trial judge considered each of the criteria and concluded that it was in the public interest to revoke the appellant's bail in light of the fact that the complainant withdrew her

police complaint a week before the trial was scheduled to commence and that there was a strong likelihood that she had been interfered with. The word likelihood as used in the Bail Act 2002 does not connote probability. In Livingstone-Thomas v Associated Newspapers Ltd (1969) 90 W.N. (Pt.1) (NSW) 223 Wallace P said at 229: "[I] think the legislature has meant 'likely' in a sense of a tendency or real possibility". This meaning was adopted by Wilson J in Kysely, Re Bail Application [1980] PNGLR 36; 14 April 1980 when considering a similar phrase in the Bail Act 1977 (PNG):

"I hold that the word "likely" in the phrase "likely to interfere with witnesses" in s. 9(1) (f) means likely in the sense of a tendency or real possibility. It does not mean "more likely than not", "probably", or "very likely".

14. 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 a little over one year now. In *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."

15. 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.

16. The applicant strongly argues that the merits of the prosecution case is not a matter for consideration at this point in time but a trial issue. The applicant's counsel submits that the applicant has two sureties to offer who are his elder brother who has control of the applicant with who the applicant will be living. The other surety is the youngest sister of the applicant. Any breach of bail condition will have direct implication on his siblings and the applicant has no intention of breaching his bail conditions.

LIKELIHOOD OF SURRENDER TO CUSTODY

17. The state does not dispute the applicant's background, however, the previous convictions although 15 of them are over 10 years does not give a good picture of the applicant. Moreover, the most recent one has been the conviction for breach of curfew hours this suggests that the applicant has no respect for orders of authority. The charge against the applicant is serious which carries a mandatory life imprisonment if convicted.
18. The state relies on direct evidence and most importantly on the applicant's defacto wife to prove the charge against the applicant. There is a real possibility and likelihood that the applicant may interfere with this witness and no strict conditions of bail will be able to police this.

INTEREST OF THE ACCUSED

19. The applicant argues this is a 2021 matter and the court diary for this year is full hence a trial date for this year will not be possible. However, at the time of the bail hearing a matter has been taken off the list and I am prepared to hear this matter on the 12th of September this year. It is noted that there was a delay by the state counsel in providing additional disclosures to the defence counsel but this has been attended to in July

this year. The only thing left for the counsel is to attend to the pretrial documents so that a pretrial conference can be held on 22nd August as scheduled. The interest of the accused will be served if the trial is held in September this year or if counsel are not ready then 24th April, 2023 is suitable to this court.

PUBLIC INTEREST AND THE PROTECTION OF THE COMMUNITY

20. The state counsel contends that looking at the action of the applicant and the serious nature of the offence alleged it is not in public interest that the applicant be granted bail. Granting of bail will encourage the applicant to interfere with the prosecution witnesses in particular the defacto wife of the applicant.

CONCLUSION

21. After considering the evidence and the submissions made, in my view the concerns raised by the state counsel are valid. This court is mindful of the fact that the applicant has not breached his bail conditions previously, however, looking at the previous convictions of the applicant and the most recent conviction of breach of curfew hours it is not in the public interest that the applicant be granted bail. There is also a real likelihood that the applicant whilst on bail may interfere with the prosecution witnesses in particular his defacto wife who is a crucial witness in this case.

ORDERS

- a) The application for bail pending trial is refused;
- b) Both counsel are to ensure that all pretrial issues are attended to as soon as possible;
- c) The earliest available trial date is 12th September, 2022;

d) 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
16 August, 2022

Solicitors

Office of the Legal Aid Commission for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.