

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAM 85 OF 2018

BETWEEN : **DAVENDRAN**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. S. N. Luvena for the Applicant.

Mr. A. Singh for the Respondent.

Dates of Hearing : 20, 25 July, 2018

Date of Ruling : 30 July, 2018

RULING

[Application for bail pending trial]

1. The applicant filed a Notice of Motion supported by his own affidavit sworn on 25 May, 2018 and the affidavit of his two proposed sureties namely Kokilamma Goundar and Raj Ratnam Goundar sworn on 20 June, 2018 and 6 July, 2018 respectively.

2. The applicant seeks an order that bail be granted pending trial. The application filed by the applicant is opposed by the State. The prosecution filed the affidavit of DC 3556 Kesi Ratavo sworn on 5 July, 2018. The applicant also filed his affidavit in reply sworn on 10 July, 2018.

BACKGROUND INFORMATION

3. The applicant is charged with two (2) counts of attempted murder. In one count the complainant is his mother in law and in the other count the complainant is his step daughter.
4. The incident arose as part of a domestic setting whereby the complainants and the applicant lived in close proximity at Garampani, Tavua.
5. The applicant states the following personal details and circumstances:
 - (a) He is 56 years of age;
 - (b) Has no prior convictions but this court notes that the applicant has a conviction for act with intent to cause grievous harm dated 16 July, 1990, however, this conviction is over 10 years so it is irrelevant and will be ignored by the court;
 - (c) Is the sole breadwinner of the family supporting his step daughter Riya Rishika Kumar, 13 years, his two daughters aged 5 and 3 years respectively and his wife;

(d) The applicant deposes that his daughter Diwansha (5yrs) is attending kindergarten and his daughter Dristi is disabled and occasionally requires medical attention at Tavua and Lautoka hospitals.

SURETIES

6. The applicant has provided affidavits from two proposed sureties namely;
(a) Raj Ratnam Goundar; and
(b) Kokilamma Goundar
7. The first proposed surety Raj Ratnam Goundar is the son of the applicant he is a Machine Operator who lives at Vatusui, Ba.
8. This proposed surety is happy to accommodate the applicant with him until the matter is concluded. He undertakes to monitor the applicant and also ensure that the applicant appears in court as and when required.
9. The other proposed surety is Kokilamma Goundar the mother of the applicant she is 76 years of age resides at Garampani, Tavua. This proposed surety is a social welfare recipient who also gets financial support from her children as well. She has attached to her affidavit a copy of her bank statement marked as exhibit "KG 2". The current balance shows an amount of \$910.52 as savings, however, this court notes that on the day the affidavit of Kokilamma Goundar was sworn that is 20 June, 2018 there was a cash deposit of \$400.00. Although the proposed surety has stated that she receives monetary assistance from her children there is no evidence or explanation about the sum of \$400.00. This court therefore doubts the financial capability of this proposed surety to enter into any bond or financial pledge.

10. Moreover, there is no explanation given by this proposed surety as to how she will be able to have a control over the applicant.
11. In accordance with section 22 (3) of the Bail Act this court is not satisfied that Kokilamma Goundar is in a position to act as a surety for the applicant.

AFFIDAVIT IN OPPOSITION BY THE STATE

12. The prosecution in its opposition states that the State has a strong case against the applicant and if convicted a lengthy sentence will imposed by the court. The State's case is based on direct evidence of the two complainants, furthermore, the applicant's wife is a prosecution witness and that there is a strong likelihood of interference by the applicant since all the witnesses are known to the applicant. Since the State has a strong case against the applicant there is a high chance that the applicant will not attend court if released on bail.
13. The State also contends that the conduct of the applicant was so extreme in the circumstances of this case that if he is released on bail the lives of the two complainants will be at risk.

SUBMISSIONS

14. The applicant's counsel filed written submission and made oral submission whereas the state counsel made oral submissions only at the hearing of this application. This court appreciates the helpful submissions of both counsel.
15. The applicant's counsel submitted that the relocation of the applicant to Ba would avoid any interference with the prosecution witnesses.

Furthermore, the applicant's wife is unemployed therefore there is a need for the applicant to support his two children. At paragraph 8 of his affidavit sworn on 25 May, 2018 the applicant deposes:

"I am supporting my step-daughter Riya Rishika Kumar, 13 years, Diwansha Rishika Goundar, 5 years and Dristi Goundar 3 years and my wife Vikashni Devi"

16. The applicant's counsel also submits that the Applicant's daughter Dristi is disabled and requires medical attention. During further hearing on 25 July, 2018 the applicant's counsel by consent submitted the medical report of Dristi Goundar dated 11 May, 2017 which states that the child is suffering from congenital heart disease. According to the doctor *"she is currently well and attends her clinics both here in Tavua hospital and Lautoka hospital."* Counsel relies on the case of *Sanjana Devi -v- State [2003] FJHC 200* where the applicant Ms. Devi was granted bail after the court took into consideration the best interest of the children.
17. The case of *Sanjana Devi (supra)* is distinguished from the current case reason being Ms. Devi was charged with her husband and there was no one to look after their 4 year old son. Here the situation is different the mother of the children is in a position to look after the children. In *Sanjana Devi (supra)* the High Court held that in all acts involving children, a decision must be made after assessing what is in the best interest of the children. If both parents are in custody and there are no arrangements made for the care of children of tender years, bail should be granted because it is in the best interest of the children that they are not separated from their parents. Here this court has no reasons to doubt that the wife of the applicant is in a position to look after both the children. The applicant's wife also receives social welfare assistance on behalf of the applicant.

18. The applicant's counsel also stated that the applicant is denying the allegations and the trial will not be possible any time soon since the court diary was full for this year and that pre-trial issues were yet to be finalized. He also stressed that the presumption of innocence was in favour of the applicant and strict bail conditions can be imposed. The applicant has been in remand for about two (2) months already and it is unlikely his trial will be heard this year.

LAW

19. 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.
20. 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.
21. 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

LIKELIHOOD OF SURRENDER TO CUSTODY

22. The State does not dispute the applicant's background. This court takes into account that the last conviction of the applicant was in 1990 almost three decades ago and that up till now the applicant has not been on the wrong side of the law. The charge against the Applicant is serious which carries a life imprisonment sentence if convicted, however, no matter how serious the charge is, it is not a sufficient ground to refuse bail pending trial (see *Nazeem Sheraz Ali vs. State, Criminal Misc. Case No. HAM 101 of 2016 (6/07/2016)*).
23. The State relies on the evidence of direct witnesses, confession of the accused (which is the subject of a voir dire challenge) of the alleged act to prove the charge against the applicant. The applicant has the right to test the veracity of the State's case which can only be done during the trial. At this stage there is some evidence against the applicant which suggests that the State has a strong case which is relevant to assess the likelihood of the applicant's appearance in court to answer the charge.
24. On the other hand, there is no previous bail violation by the applicant although there is a conviction against him which is irrelevant and

expired. The Constitutional safeguard of presumption of innocence in respect of this charge is still very much in favour of the Applicant (*see Bechu and Another vs. R, 8 FLR 240*).

25. The State has not made any suggestions that the applicant had not cooperated with the Police at the time of arrest or had shown resistance to arrest.

INTEREST OF THE ACCUSED

26. This is a 2018 matter and the court diary for this year is full hence a trial this year will not be possible even to the extent that it is quite unlikely that this matter will be heard in 2019 hence it is not in the interest of the applicant to be kept in custody for an indefinite period.

PUBLIC INTEREST AND THE PROTECTION OF THE COMMUNITY

27. The State contends that the actions of the applicant were horrific and extreme and if released on bail the lives of the two complainants are at risk and therefore remanding the applicant will ensure the safety of the complainants. Further, it is contended that the wife of the applicant is a prosecution witness and there is always a likelihood of interference by the applicant if released on bail.
28. There is no evidence before the court from the complainants that there is any reason for them to feel threatened by the applicant. Furthermore, the applicant has provided evidence of his relocation to Vatusui, Ba where he will be residing with a surety.
29. The State's concern that the applicant may interfere with the prosecution witnesses can be taken care of by imposing strict bail conditions.

CONCLUSION

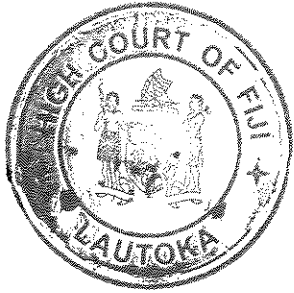
30. Despite the presumption in favour of granting of bail being displaced due to the fact that the circumstances of the offending emanates from a domestic setting this court is satisfied that it is in the interests of justice that the applicant be granted bail pending trial under strict conditions.


ORDERS

1. The applicant is bailed in the sum of \$1,000.00 with two sureties to be bonded in the like sum upon compliance of the following requirements:
 - (i) The applicant is to provide another surety as a replacement for Kokilamma Goundar to the satisfaction of the court;
 - (ii) The applicant is to deposit the sum of \$500.00 being cash bond prior to release from remand. This cash bond is to be returned to the applicant upon the conclusion of the substantive matter. The applicant will forfeit the sum of \$500.00 if there is any breach of the bail conditions.
 - (iii) Upon compliance with (i) and (ii) above the following additional bail conditions apply;
 1. An interim Domestic Violence Restraining Order in respect of non-molestation and non-contact is to issue immediately where the protected persons are all the prosecution witnesses who are in a family or domestic relationship with the applicant;

2. The applicant is not to speak to or communicate or interfere with any prosecution witnesses either directly or indirectly or harass them or intimidate them or threaten them in anyway whatsoever;
3. The applicant is to stay with his son at Vatusui, Ba and is not to change his address without the approval of the court;
4. The applicant is to be of good behaviour and is not to commit any offence whilst on bail;
5. A stop departure order is to issue immediately against the applicant;
6. The applicant is to report to Nukuloa Police Post every Wednesdays and Saturdays between 6.00am to 6.00pm;
7. A curfew is imposed on the applicant between 8.00pm and 6.00am every day;
8. The applicant is not to go near Garampani, Tavua where the civilian prosecution witnesses live until the conclusion of the trial;
9. For administration purposes the applicant is to provide a photo identification which will be photocopied and kept in court file for future reference;

10. The applicant and the sureties are to sign the usual terms and conditions of bail as additional conditions.




Sunil Sharma
Judge

At Lautoka

30 July, 2018

Solicitors:

Messrs. Howell & Associates, Tavua for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.