

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

MISCELLANEOUS CASE NO: HAM 256 of 2020

VIVEK VIJAY LAL

V

STATE

**Counsel** : Mr. Rohit Dayal for the Applicant  
Mr. Zenith Zunaid for the Respondent

**Dates of Hearing** : 23 October 2020 and 18 November 2020

**Ruling** : 2 December 2020

### BAIL RULING

1. This is an application for bail pending trial. The Applicant is the accused in HAC No. 337/2019.
2. As per the Information filed by the Director of Public Prosecutions ("DPP") in the substantive matter, the Applicant, together with Shaneel Kumar, is charged with the following 2 offences:

#### COUNT ONE

##### *Statement of Offence*

**AGGRAVATED BURGLARY:** Contrary to Section 313 (1) (a) of the Crimes Act 2009.

*Particulars of Offence*

**VIVEK VIJAY LAL** and **SHANEEL KUMAR** in the company of each other, on the 27<sup>th</sup> day of September 2019, at Nadera, in the Central Division, entered in to the property of **SANJAY SEN**, as trespassers with intent to commit theft.

COUNT TWO

*Statement of Offence*

**THEFT**: Contrary to Section 291 (1) of the Crimes Act 2009.

*Particulars of Offence*

**VIVEK VIJAY LAL** and **SHANEEL KUMAR**, on the 27<sup>th</sup> day of September 2019, at Nadera, in the Central Division, dishonestly appropriated 1 x Safe, \$15,000.00 cash, Safe key and other keys, 1 x Gold bracelet, 1 x Mangalsutra (gold necklace), 1 x Double Black alcohol, 1 x Red Label alcohol, 1 x Jim Beam alcohol, 1 x Black Label alcohol, 1 x Gordon's Gin (alcohol), 1 x Rum (alcohol), 1 x Grants Whiskey, 3 x Cartons of cigarettes, 1 x Good chain, 5 x Gold rings and 2 x Pairs of gold earrings, the properties of **SANJAY SEN** with the intention of permanently depriving **SANJAY SEN** of the said properties.

3. The State filed the Information and Disclosures in the substantive matter on 15 November 2019.
4. On 3 December 2019, the Applicant and Shaneel Kumar were ready to take their pleas. Accordingly, they pleaded not guilty to the two charges.
5. This Court granted bail to the Applicant on 15 November 2019 (HAM 345 of 2019). However, the application for bail filed by Shaneel Kumar was refused on 20 February 2020 (HAM 366 of 2019).
6. The Applicant failed to appear in Court on 27 July 2020 and on 11 August 2020 and as such, a bench warrant was issued for his arrest. However, the Police had failed to execute the said bench warrant in time.
7. Accordingly, on 25 August 2020, the Applicant appeared in Court on his own accord. He submitted to Court that on 27 July he was unwell and was vomiting blood. However, no

medical reports or other documents were submitted to Court in proof of same. In the circumstances, this Court cancelled his bail and he was remanded into custody. Thus the Applicant has been in remand custody for this case since 25 August 2020.

8. This application for bail has been filed by way of Notice of Motion for Bail, together with an Affidavit in support deposed to by the Applicant.
9. Therein the Applicant has inter-alia deposed as follows:
  4. *That my case was called at the Suva High Court No. 4 on the 23<sup>rd</sup> day of March, 2020 and a date was given but that time I was represented by the Legal Aid Commission Lawyer Ms Monisha Chand who did not advise me of the next court date.*
  5. *That sometimes in April 2020 my father Vijay Lal took me to the Legal Aid Commission Suva to enquire about my case and they told us that the case will be called on the 23<sup>rd</sup> day of April 2020.*
  6. *That my father then took me to the Suva High Court No. 4 and I was remanded in custody. I was told by the court to file a formal bail application.*
  7. *That on for the previous Court dates I was appearing and I was not represented properly by the Legal Aid Commission and was not very well aware of the court procedures and process.*
  8. *That the reason I did not attend the Court because I was genuinely sick and vomiting blood and went to Banabhai Health Centre in Makoi where I was seen by the doctor and they referred me to the CWM hospital but I was feeling very sick and drowsy and I went home to rest. I have also taken my photo whilst I was vomiting blood. A copy of the photo is exhibited hereto and marked with letter "VVL2".*
  9. *That I am going through mental and physiological stress that this case is hanging on my head ever since and I tend to forget the dates given to me by the Court.*
  10. *That my previous sureties namely Vishwa Nadan of Lot 27 Duvula Road Nadera and Ashis Avikash Datt of Lot 2 Caubati Road were not advising me properly about as when I have to go to court and failed in their part on the responsibilities of surety.*
10. An Affidavit has been filed by Inspector Melania Saukuru, Police Liaison Officer, based at the Office of the DPP, in opposition to this application for bail. Inspector Saukuru strongly opposes the granting of bail to the Applicant.

11. The Officer deposes that the Applicant is charged with very serious offences and, if found guilty, the Applicant is likely to be imposed a long custodial sentence.
12. The State submits that they have a strong case against the Applicant. In order to prove this case against the Applicant, the State intends to rely on the full admissions made by the Applicant in his caution interview statement and other circumstantial evidence of civilian witnesses.
13. In terms of section 3(1) of the Bail Act No. 26 of 2002 (“Bail Act”), *“Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted.”*
14. Section 3(3) of the Bail Act provides that: *“There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption.”*
15. In terms of Section 3(4) of the Bail Act, as amended by the Domestic Violence Act No 33 of 2009 (“Domestic Violence Act”), **the presumption in favour of granting of bail is displaced in the following circumstances:**
  - (a) *the person seeking bail has previously breached a bail undertaking or bail condition; or*
  - (b) *the person has been convicted and has appealed against the conviction; or*
  - (c) *the person has been charged with a domestic violence offence.*

*[Emphasis is mine]*

16. In this case it is clear that the presumption in favour of bail has been displaced since the Applicant had previously breached a bail undertaking or bail condition, by his failure to appear in Court on 27 July 2020 and on 11 August 2020.

16. In terms of Section 17(2) of the Bail Act the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in Court to answer the charges laid against him or her.
17. Section 18 (1) of the Bail Act stipulates that a person making submissions to a Court against the presumption in favour of bail must deal with-
- (a) *the likelihood of the accused person surrendering to custody and appearing in court;*
  - (b) *the interests of the accused person;*
  - (c) *the public interest and the protection of the community.*
18. Section 19(1) of the Bail Act (as amended by the Domestic Violence Act No 33 of 2009), provides for grounds for the Court to refuse to grant bail. The sub section is reproduced below:
- “An accused person must be granted bail unless in the opinion of the police officer or the court, as the case may be-*
- (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 person will not be served through the granting of bail;*
  - (c) *granting bail to the accused person would endanger the public interest or make the protection of the community more difficult;*  
*or*
  - (d) *the accused person is charged with a domestic violence offence and the safety of a specially affected person is likely to be put at risk if bail is granted taking into account the conditions that could be applied if bail were granted.”*
19. In forming the opinion required by subsection (1), section 19(2) of the Bail Act stipulates that Court must have regard to all the relevant circumstances, and in particular to the circumstances enumerated in the said sub section.

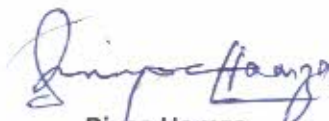
20. It must be stated that provisions of Section 19 (1) (d) are not relevant or applicable in the instant case. What is relevant and applicable in relation to the instant case are the provisions of Section 19 (1) (a), (b) and (c).
21. The primary consideration in this matter is for the Applicant to satisfy Court as to the reasons for his absence on 27 July 2020 and on 11 August 2020. At paragraph 9 of this Ruling I have reproduced the contents of paragraphs 4 to 10 of the Affidavit deposed to by the Applicant.
22. At paragraph 4 it is deposed that this case was called in the Suva High Court on 23 March 2020 and that on that date the Applicant's Legal Aid Counsel who appeared for him did not advise him of the next date. This averment is factually incorrect. The substantive Criminal Case HAC 337 of 2019 was not called on the 23 March 2020. The matter had been called on 6 March 2020 and postponed for the 14 April 2020. Due to the lockdown in Suva on 14 April 2020, the matter was re-fixed for 11 May 2020 on which date the Applicant was present in Court.
23. Therefore, what is deposed at paragraph 5 of the Applicant's Affidavit is also factually incorrect, since this matter was never fixed for Mention on 23 April 2020 before this Court.
24. At paragraph 6 of the Affidavit it is deposed that the Applicant's father had taken him to the Suva High Court No. 4 and that he was remanded into custody. However, peculiarly, no date has been stated in the said Affidavit as to when this had taken place.
25. From the contents of his Affidavit it is clear that the Applicant is in the habit of blaming his Counsel from the Legal Aid Commission and his sureties for failing to advise him of his Court dates. It is the opinion of this Court that such accusations are unfair and baseless since the Applicant, being an adult of 28 years of age (Date of birth 12 November 1992), should be responsible and be aware of his Court dates and not blame others.
26. At paragraph 8 of his Affidavit the Applicant has deposed that the reason that he did not attend Court was because he was genuinely sick and vomiting blood and went to Banabhai Health Centre in Makoi, where he was seen by a Doctor who referred him to the CWM Hospital. However, since he was feeling very sick and drowsy the Applicant

deposes that he had gone home and rested (instead of going to the CWM Hospital). A copy of a photo has been attached to the Affidavit, where the Applicant states it is a photograph taken by him whilst he was purportedly vomiting blood.

27. However, curiously, absolutely no mention has been made in the Affidavit as to when the incidents referred to at paragraph 8 of the Affidavit had taken place. During the Hearing of this application Counsel confirmed, having checked with the Applicant, that this incident took place on 27 July 2020. However, this Court is concerned as to why the Applicant has failed to mention such an important and crucial matter such as this in his Affidavit at the very outset.
28. Furthermore, there are no medical reports which have been tendered to Court to substantiate the above position taken up by the Applicant. On the first date of Hearing of this matter, this Court granted further time to the Applicant and his Counsel to produce any medical evidence in support of the assertion taken up by the Applicant that he was genuinely sick and vomiting blood on 27 July 2020. However, the Applicant failed to do so.
29. In any event, the contents of paragraph 8 would be in relation to the Applicant's absence from Court on 27 July 2020. However, as stated before, the Applicant failed to appear in Court even on 11 August 2020. No satisfactory explanation has been provided by the Applicant for his absence on that day.
30. Considering all the above, I am of the opinion that the Applicant has failed to satisfactorily explain to this Court as to the reasons for his absence on 27 July 2020 and 11 August 2020.
31. The Learned State Counsel had pointed out to Court that at paragraph 21 of his Affidavit the Applicant has stated thus: *"THAT plea has not been taken in this matter and I believe that the trial in this case is not likely to occur soon and if I am kept in custody until trial, it would cause extreme hardship and inconvenience to me and my family."*
32. This again is another factually incorrect and misleading statement made by the Applicant. The Applicant took his plea in the matter as far back as 3 December 2019, which was nearly one year ago. The substantive matter has now been fixed for trial from the 5 to 16 April 2021.

33. As stated before it is clear in this case that the presumption in favour of granting bail to the Applicant is displaced since the Applicant has previously breached a bail undertaking or bail condition.
34. Considering all matters stated above, this Court is of the opinion that granting bail to the Applicant would endanger the public interest and make the protection of the community more difficult. Since the Applicant is charged with serious offences, there is a high likelihood that he would fail to appear in Court if granted bail.
35. Therefore, taking into consideration all the circumstances of this case, especially the fact that the presumption in favour of granting of bail to the Applicant has been displaced, due to the fact that the Applicant failed to appear in Court on 27 July 2020 and 11 August 2020, for which no satisfactory explanation has been offered, I am not inclined to grant bail to the Applicant.
36. Accordingly, I refuse this application for bail and the application is dismissed.



  
Riyaz Hamza  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 2<sup>nd</sup> Day of December 2020

**Solicitors for the Applicant** : **Bale Law, Barristers & Solicitors, Suva.**  
**Solicitors for the Respondent** : **Office of the Director of Public Prosecutions, Suva.**