

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 296 OF 2022

NILESH LAL

vs

STATE

| | | | |
|-------------------------|--------------------------|----------|--------------------------|
| <i>Counsels:</i> | <i>In Person</i> | - | <i>Appellant</i> |
| | <i>Ms. Ali N.</i> | - | <i>Respondent</i> |

Date of Ruling: 16 January 2023

BAIL RULING

1. The Applicant in this matter is charged in the case HAC-04-2022 with the following counts:

Count 1 - Aggravated Burglary contrary to section 313(1) (a) of the Crimes Act 2009;
Count 2 - Theft contrary to section 291 (1) of the Crimes Act 2009;
Count 3 - Assault causing Actual Bodily Harm contrary to section 275 of the Crimes Act 2009; and
Count 4 - Unlawful Possession of Illicit Drugs contrary to section 5 (a) of the Illicit Drugs Control Act 2004.
2. The Applicant has filed this bail application seeking bail from this Court. The Applicant had been arrested and remanded on the 25th of December 2021 on the allegation of above counts. In this application, though the Applicant appears in person, he had filed his submissions in Court supporting this bail application
3. The State has filed its response to this bail application, objecting to bail, supported by the Affidavit tendered by **A/CPL 4995 Simon Chand**, dated 24th October 2022.
4. Submissions in support of bail on behalf of the Applicant;
 - i) The Applicant tenders that under **Section 14 (2) (a)** of the **Constitution** of our country he has to be considered innocent, until proven guilty, and the burden of proving the guilt lies with the Prosecution.

- ii) It is contended by the Applicant that under **Section 26 (3) (a)** of the **Constitution** of Fiji that he should not be unfairly discriminated directly or indirectly on the grounds of his personal circumstances in the proceedings filed against him.
- iii) The Applicant also submits that though the Prosecution has highlighted a list of his previous convictions against this bail application, such convictions will not override his presumption of innocence guaranteed by **Section 14 (2) (a)** of the **Constitution** of Fiji.

5. Submissions of the State in opposition to bail;

- i) Counsel for the State submits that, though there is a presumption in favor of granting bail under the **Bail Act of 2002**, this presumption can be rebutted under **Section 3 (4)**, where in this matter that presumption is rebutted due to circumstances.
- ii) In the Affidavit filed of record by **A/CPL 4995 Simon Chand** in support of the stance taken by the State, in para 08 he states that the Applicant has 46 previous convictions for committing offences of similar nature as the case subject to this bail application, where 10 of these convictions are still active.
- iii) In para 23 of this Affidavit, **A/CPL 4995 Simon Chand** informs Court that currently there are 2 pending cases of similar nature to the case subject to this bail application against the Applicant in the Suva Magistrate's Court.
- iv) On the strength of the facts highlighted by points ii) and iii), **A/CPL 4995 Simon Chand** contends that granting bail to the Applicant will endanger the protection of the community and **Section 19 (1) (c)** of the **Bail Act of 2002** makes clear provisions for the Court to consider and refuse bail if granting bail would endanger the public interests and make the protection of the community more difficult.
- v) Further, in para 24 of the Affidavit of **A/CPL 4995 Simon Chand**, he informs Court that in the Nasinu Magistrate Court case number 20189/18 the Applicant was charged for absconding bail in a pending matter and therefore the conduct of the Applicant has violated the presumption in favour of bail as per **Section 3 (4) (a)** of the **Bail Act of 2002**.

Applicable Law and Analysis of the Current Matter

- 6. Pursuant to **Section 13 (1) (h)** of the **Constitution** and **Section 3(1)** of the **Bail Act of 2002**, every person charged with an offence has a right to be released on bail, unless granting of bail is not in the interest of justice. **Section 3 (3)** of the **Bail Act of 2002** stipulates that there is a presumption in favor of granting of bail.
- 7. In this regard, this Court wish to emphasize to the Applicant that his presumption of innocence is a paramount concern in the Criminal Justice system in the Republic of Fiji without any exceptions of any nature.
- 8. However, this presumption in favour of granting bail will be displaced under the conditions highlighted in **Section 3 (4)** of the **Bail Act of 2002**, as below:

“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.***”

9. Though there is no contention between the parties of the existence of the grounds stipulated in b) and c) above that will displace the presumption in favour of bail in this matter, the Prosecution has brought to the attention of this Court that the Applicant was charged in the Nasinu Magistrate Court case number 20189/18 for absconding bail. Therefore, this position can displace the presumption for bail under **Section 3 (4) (a) of the Bail Act of 2022.**

10. To address the circumstances in this matter, this Court intends to take guidance from the Supreme Court decision of **Abhinesh Kumar v The State [2021] FJSC 1; CAV 20 of 2020 (5 February 2021)**, where His Lordship the Chief Justice stated, as below:

“Before coming to a decision to deprive personal liberty of a person, interests of public and interests of the accused must be rightly balanced. In balancing competing interests, courts must be mindful of the primary consideration in determining bail; that is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.”

11. As stipulated above, the Supreme Court of Fiji has highlighted the priority that should be given in granting bail to the consequent probability of the accused appearing in Court to face his charge. However, in this matter there is clear evidence that the Applicant has violated bail conditions in a previous case and avoided appearing in Court to face his trial.

12. Having carefully considered the above discussed reasons, this Court refuses this application for bail pending trial on the ground that the Applicant has previously violated bail conditions imposed by a Court of law and absconded appearing in Court to face the charges against him, resulting in filing a case against the Applicant in the Magistrate’s Court. Therefore, this Court perceives that there is a probability of the Applicant not appearing in Court to face his charges if bail is granted at this juncture.

13. You have thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to read 'Thushara Kumarage'.

Hon. Justice Dr. Thushara Kumarage

At Suva
16 January 2023

cc: *Office of the Director of Public Prosecutions*