

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 170 OF 2023

BETWEEN:

GUSTON FREDRICK KEAN

APPLICANT

AND :

STATE

RESPONDENT

Counsel :

Applicant in Person

Mr. T. Tuenuku for Respondent

Date of Hearing :

30 August 2023

Date of Ruling :

31 August 2023

BAIL RULING

1. The Applicant has filed this application seeking bail pending trial. The bail application is supported by an affidavit of the Applicant.
2. In the substantive matter, the Applicant is charged with one count of Aggravated Burglary and one count of Theft with his co-accused, Roneel Kumar. The Applicant has been in remand since 28 May 2023.

3. The Respondent (State) strongly objects to bail. The objection is supported by an affidavit of Investigating Officer D/Sgt. Filipe. The objection is based substantially on the fact that if the application is granted, given his criminal record, there is a strong likelihood that the Applicant will re-offend while on bail putting the protection of the community in jeopardy. It is also submitted that in view of strong case against the Applicant, he will not appear in Court to face his trial and that he will interfere with real evidence.
4. According to s 13(1) (h) of the Constitution, a person who is arrested or detained has the right to be released on reasonable terms and conditions, pending a charge or trial, unless the interest of justice otherwise require. Section 3(1) of the Bail Act states that 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. The court must therefore be satisfied that the refusal to release the Applicant on bail is warranted in this case in the interest of justice.
5. Section 19(2) of the Bail Act outlines the considerations for bail under three headings:
 - (a) the likelihood of surrender to custody (b) interests of the accused person (c) Public interest and the protection of the community. However, all three grounds need not exist to justify refusal of bail. The existence of any one of the grounds is sufficient to refuse bail. (Wakaniyasi v State [2010] FJHC 20; HAM 120 of 2009).

(a) The Likelihood of Surrender to Custody

6. 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 / her. The factors relevant in assessing the likelihood of surrender to custody are that- (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.(only the relevant parts are highlighted).

Seriousness of the Charge and the Likely Penalty

7. The first charge against the Applicant (Aggravated Burglary) is serious. It carries a maximum penalty of seventeen years' imprisonment.

The Strength of the Prosecution Case

8. The State submits that there is a strong case against the Applicant. Generally, the strength of the prosecution case for the purpose of bail are assessed on a balance of probabilities on the basis of the facts disclosed by the State. In *Seru v State* 2015] FICA 30; AAU 152.2014, the Court of Appeal stated the following regarding evidentiary rules when it comes to considering bail:

[12] When considering an issue relating to bail, there is no requirement for formal evidence to be given. It is well established that the bail jurisdiction was not equivalent to a criminal charge, the rules of evidence need not apply, and a court may rely on written hearsay evidence provided it was properly evaluated. In *In re Moles* 1981/ Crim L 170 the Divisional Court stated that strict rules of evidence were inherently inappropriate when deciding a bail issue. In *R v Mansfield Justices, Ex p Sharkey* [1985] QB 613, 626, Lord Lane CJ stated that in a bail hearing the relevant material can be presented by a police officer. Also, under the Bail Act 2002 Forms have been prescribed to provide the relevant information to the courts from the Bar table.

9. In *State v Tuimouta* [2008] FJHC 177; HAC 078.2008 Goundar J observed:

[18] A bail hearing is not a trial. In a trial the prosecution carries the burden of proof to satisfy the guilt of an accused beyond a reasonable doubt. In a bail hearing the prosecution carries the burden of proof on balance of probability that the accused should not be granted bail.

10. It is therefore clear that in a bail hearing, the strict rules of evidence need not apply, and the courts can consider the relevant material presented by the State to see how

strong the prosecution case would be so that the Court could form an opinion as to the Applicant's motivation to attend court and face trial.

11. The State submits that the identification made via CCTV footage obtained from the burgled house provides a strong basis for the case against the Applicant. D/Sgt. Filipe in his affidavit says that the CCTV footage does show the Applicant entering the house with his co-accused and exiting the house with bags of stolen items. The Compact Disc containing the alleged CCTV footages has been disclosed to the Applicant.
12. The Applicant challenges the CCTV footage and claims that his identity is mistaken and that he was not shown the footage at the caution interview. When it was drawn to his attention that the CCTV footage was in fact shown, the Applicant concedes that it was shown to him at the interview.
13. The critical evaluation of identification evidence is a trial function and not for the bail hearing. D/ Sgt. Filipe is the investigating officer and his affidavit in this regard is based on his personal knowledge and the marital placed before him. Thus it is acceptable to this Court at this stage. I am satisfied that the State has a reasonable and strong basis to initiate prosecution against the Applicant which the Applicant would want to evade.

(b) Public interest/ Protection of the Community

Previous Criminal History

14. The character of the applicant and especially his previous convictions are relevant considerations in a bail application. The State's main objection to the bail application of the Applicant is the high likelihood that the Applicant may re-offend if released on bail. In the Bail Act 2002, the 'Likelihood of re-offending' is under the overall heading of the need to protect the public interest and the protection of the community.

15. D/Sgt Filipe in his affidavit says that the Applicant has 16 previous convictions, most of which are of similar nature. The Previous Convictions Report (PCR) from the CRO is attached to the affidavit.
16. The Applicant argues that his previous convictions are more than 10 years old, not active and therefore should not be considered in deciding bail in this matter.
17. Section 26(2) of the Rehabilitation of Offenders (Irrelevant Convictions) Act 1997 (ROA) states as follows:

Where a person is convicted of an offence and after the rehabilitation period applicable to that conviction has expired, that person is convicted in Fiji or overseas, of an offence that was committed before that rehabilitation period expired, a new rehabilitation period shall begin to run in respect of the first-mentioned conviction from the date on which the rehabilitation period applicable to the later conviction begins and, until the new rehabilitation period expires, that person may, subject to subsection (3) of this section, be treated as if the first rehabilitation period applicable to the first conviction had not expired.

18. Where a custodial sentence has been imposed, the rehabilitation period begins to run when the prisoner is unconditionally released to the society upon conclusion of the prison term [S 6 (1) (b) of the ROA], and it is clear from the previous conviction report that a conviction has been recorded before the rehabilitation period for his first conviction expired. The whole purpose of the ROA is to promote rehabilitation of persons with convictions and remove certain disabilities (see: the preamble) and not to allow repeat offenders to abuse the rehabilitation period. Therefore, in a bail matter, the repeat offenders cannot claim the benefit of the ROA when they have committed another offence even after the rehabilitation period of their first conviction has expired.
19. The Applicant further argues that the State's reliance on previous convictions to rebut the presumption in favour of bail is contrary to his right guaranteed under Section 14 (2)(a) of the Constitution. This Section provides that every person charged with an offence has the right to be presumed innocent until proven guilty according to law. The right to be presumed innocence is not absolute in Fiji [State v Abourizk HAC 126 of 2015 (16 June 2023)]. This right can be restricted to achieve the ends of justice. The

Bail Act provides for a reasonable basis upon which the right to liberty can be curtailed until the presumption of innocence is rebutted.

20. The protection of the community is not only limited to the protection from physical harm but also extends to the protection of their properties regardless of whether the owner of the property is physically harmed or not in the commission of the offence. The total value of property stolen amounts to \$25,965. It is shocking if the properties amassed over a period are stolen and lost in a single night. Night-time home invasion is considered a gross violation of the right to privacy also.
21. The record of previous convictions is very much relevant in determining Applicant's propensity to commit similar offences if he is released on bail. I am of the view that there is a high risk of re-offending if the Applicant is released on bail, rendering the protection of the community much more difficult.

Likelihood of interference with Evidence/ Witnesses

22. D/Sgt. Filipe claims that none of the stolen items are yet to be recovered and in view of the strong CCTV evidence, there is a real danger that the Applicant will tamper with real evidence and the stolen items will be disposed of if he is released on bail.

(c) Interests of the Accused

23. As regards the interests of the accused person, the length of time the Applicant is likely to remain in custody before the case is heard will depend on various factors which include case management expediencies. The Applicant has been in remand since end of May 2023 and once the investigation, perhaps the recovery of stolen items, is complete and the pre-trial issues are sorted out, the substantive matter could be tried without delay. If there exists an inordinate delay, the Applicant is free to make a fresh application for bail. However, fresh applications will be entertained only if it can be shown that there is change in circumstances after this determination.

24. I cannot see any difficulty for the Applicant to have access to legal practitioner of his choice and to prepare a defence while being in remand. He has already retained a legal practitioner from the Legal Aid Commission for his substantive matter.
25. The substantive matter involves, a serious offence. There is alarming increase of burglaries in Fiji and it is in the interest of justice that bail be refused.
26. The application for bail is refused.



Aruna Aluthge

Judge

31 August 2023

At Lautoka

Counsel:

- Applicant in Person
- Office of the Director of Public Prosecution for Respondent