

STATE v ANTHONY FREDRICK STEPHENS

HIGH COURT — CRIMINAL JURISDICTION

5 GATES J

26 May 2003

[2003] FJHC 51

10 **Criminal law — bail — application to return items deposited as conditions of bail — conditions of bail — requirements for a person to be surety — duties of a surety — adversarial nature of criminal proceedings in Fiji — Bail Act 2002 s 2(1).**

15 Anthony Fredrick Stephens (Applicant) was convicted at trial. The Court of Appeal ordered the quashing of his conviction and sentence. The Applicant filed an application to the High Court for release of cash recognizance, cash surety and passport following the order with no order for retrial. He seeks the return of the items deposited with the High Court ordered by Surman J and for the cancellation of overseas travel restrictions as conditions of the bail pending trial. The Applicant also made an interview to Fiji TV 1 prior to the hearing.

20 **Held** — (1) The prosecution has not informed the High Court that the bail conditions of the surrender of passport and restriction on overseas travel without the court's permission apply in any other case before the court.

25 (2) If a person lives overseas, he will not be able to confirm a bail undertaking or to ensure the bail undertaking or conditions will be complied with. Above all, he will not be able to ensure that the Accused person bailed will attend for his trial or when notified to do so.

(3) It is not possible for an Accused himself to put up the cash surety or guarantee reimbursement to the surety in case of a bail default by him because the surety has independent duty to ensure compliance of the Accused's obligation, bail undertakings and conditions.

30 (4) All criminal proceedings in the High Court in Fiji are conducted in accordance with the adversarial system by which each side brings its complaint or application. Instead the Applicant has chosen to display his misunderstanding of criminal procedure on television which can amount to contempt. He should have sought advice from a lawyer about his application.

35 Application granted.
No case referred to.

The Applicant appeared in person.

N. Lajendra for the State.

40 [1] **Gates J.** The Applicant seeks the return of items deposited with the High Court, ordered by Surman J as conditions of bail pending trial.

[2] Those bail terms were as follows:

- 45 (1) Surety of \$1500 cash to be paid by midday Friday 1 October 1999.
(2) Own recognizance of \$1500 cash to be paid by midday Friday 1st October 1999.
(3) Passport to be surrendered to the registry by Friday 1 October at midday.
(4) Not to leave the Fiji Islands without permission of the court.

50 [3] I have not been informed of all the details but apparently the Applicant was convicted at trial. On 16 May 2003 the Court of Appeal ordered the quashing of his conviction and sentence, and made no order for retrial, stating that reasons for its orders would be given later.

[4] The Applicant accordingly, applied to the High Court for the return of his passport, cash recognizance, the cash surety of the surety, and for the cancellation of overseas travel restrictions.

5 [5] His application was made by motion, apparently by himself, and made ex-parte with an affidavit in support sworn by himself on 20 May 2003. The application should have been made inter-partes as is the rule in all criminal proceedings.

10 [6] At the first call of the case this morning the State was represented by Mr Lajendra, who did not seek to place any additional material before the court. Mr Lajendra said that DPP had no objection to the Applicant's application, save to raise a query on why the surety's cash surety should be returned to the applicant, not to the surety.

15 [7] I have not been informed by prosecuting counsel, that two of the bail conditions, that is those of the surrender of the passport and the restriction on overseas travel without the court's permission, apply in any other case before the court. Accordingly, I order the return of the Applicant's passport to the Applicant forthwith. Second, the restriction on overseas travel is to be lifted forthwith, and I will make an order that the Immigration Department be fully informed of this part of the order. I also order the return of the Applicant's cash recognizance to
20 the Applicant forthwith.

[8] The Applicant has informed me that at the time of signing the bail recognizance form, he himself put up the \$1500 cash surety which his brother Cyprian Desmond Stephens appears to have signed for. On the form the brother's
25 address was given as Martintar, Nadi, which in itself was inadequate. The applicant tells me his brother lives in Australia.

[9] In assessing whether a person is a suitable person to stand as a surety for an accused person, those granting bail must have regard to the definition of "surety" provided in s 2(1) of the Bail Act 2002.

30 "surety" means a person, other than an accused person or a person under 18 years, whom a Police Officer or Court determines to be acceptable to provide confirmation of the accused persons bail undertaking, or security that such undertaking will be complied with

35 [10] If a person lives overseas, he will not be able to confirm a bail undertaking or to ensure the bail undertaking or conditions will be complied with, and perhaps most important of all bail issues, to ensure that the accused person bailed will attend for his trial or the mention of his case when notified to do so.

40 [11] Other persons will not be suitable for a variety of reasons. A spouse may be thought to be too beholden to, or emotionally engaged with, an accused person to possess sufficient independence to take on the duties of the surety. Persons with a criminal history will not be suitable either. The police need to check persons put up as sureties, and for that purpose to be allowed an opportunity to check out and approve the suitability of such persons. If there is a serious
45 disagreement, the matter of suitability of a surety will have to come back before the court for its decision.

[12] Prosecution witnesses, even if relatives of an accused, would not be suitable persons to stand as sureties because of a conflict of their interests.

50 [13] Because the surety has a duty to ensure the Accused's attendance at court, which is a duty independent of the Accused's obligation, and to ensure compliance with bail undertakings and conditions on the part of the Accused, it

is not possible for an Accused himself to put up the cash surety, or to guarantee reimbursement to the surety in the event of a bail default by the Accused. Indeed in England such conduct amounts to an offence (see s 9 of the Bail Act 1976).

5 [14] Unless the court were to receive a written request from the surety for his cash surety to be handed over to the applicant, the court must be bound by the bond document itself and order the cash surety to be returned only to the named surety.

10 [15] Having dealt with this application I turn now to mention an extracurial incident that occurred when the Applicant in this matter decided to give an interview to Fiji TV 1 prior to the hearing.

15 [16] All criminal proceedings in the High Court in Fiji are conducted in accordance with the adversarial system by which each side brings its complaint or application, presents its evidence, and through counsel or the litigant himself or herself, each side then proceeds to argue its respective case. Ex parte applications, that is applications brought by one side alone, where the other side is not heard, are in criminal proceedings of great rarity. They are only entertained if there is a genuine emergency or there is a dire need to bring on such an application, and then orders would be made only on an interim basis till the other side could be heard. In my 38 years of study and practice of the law I have only come across one such case.

20 [17] The Applicant, who is unrepresented in this application, may not have realised that parties to criminal litigation are always given an opportunity to be heard prior to the making of any orders that may be adverse to a party's interest. The right to be heard is a fundamental right. Essentially, it is the right to a fair trial: (s 29(1) of the Constitution). The determination of any issue in court is to be carried out with due process. Any issue is to be tried fairly between the parties.

25 [18] Any person, and that includes the State and its enforcement agencies representing the public interest, has the right to equality before the law: (s 38 (1) of the Constitution). If the Director of Public Prosecutions were able to obtain orders that the Applicant was to surrender his passport, not to travel overseas, to put up his own cash recognizance and a cash surety each in the sum of \$1500 which were to be deposited in court, without the court allowing the Applicant an opportunity to be heard, the Applicant would no doubt easily understand the unfairness of such a procedure. As I have already stated, criminal proceedings are not conducted in such a way. Any litigant is to be given first an opportunity to be heard prior to the making of any orders.

30 [19] The Applicant here, presumably without legal advice, has brought his application ex parte. He should have brought it inter-partes, and served the court documents on the Director of Public Prosecutions, for the State, the Respondent to the application where as here, bail conditions are sought to be discontinued, following a successful appeal.

35 [20] If there were to be no objections forthcoming from the director, the Applicant would then attain a speedy remedy. If there were objections, they should be heard. Instead the Applicant has chosen to display his misunderstanding of criminal procedure on television by suggesting there was something unusual or irregular in his application, a bail matter, having been marked to come before the court inter-partes, that is with both parties to the litigation being present when the application was to be made.

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[21] The Applicant should understand that ill-judged criticisms of a court *prior to hearing*, as opposed to rational criticisms of a judgment following a hearing, can amount to contempt. Such grand-standing is to be avoided. He would have been wiser to have sought advice from a lawyer on how to go about his application. The Applicant at least should have known that, since he is no stranger to court procedures.

[22] In the result the orders of the court are as follows:

- (1) The Applicant's own recognizance of \$1500 cash deposited with the High Court is to be returned to him forthwith.
- (2) Similarly, the Applicant's passport is to be returned to him forthwith.
- (3) The surety's cash sum of \$1500 is to be returned forthwith to the surety, Cyprian Desmond Stephens upon his attendance at the registry. However, if the surety forwards a letter to the court directing payment out to his brother, the Applicant, within the next 28 days the cash surety will be paid out to the applicant instead.
- (4) The Immigration Department are to be given a copy of this decision and informed that there is no longer any bail term restricting the Applicant's travel overseas.

Application granted.