

Rajiv Kumar v Uganda [2023]

UGSC 34 (3 August 2023)

[2023] UGSC 34

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That the applicant filed an application No. 001 of 2023 in \$(1)\$ this court but it was dismissed on the 6th of April 2023 on

\$\mathbf{1}\$

the basis that, the applicant did not prove exceptional circumstances to warrant his release.

- That the circumstances under which bail was denied have \$(2)\$ since changed.
- That the changes in circumstances are that the medical \$(3)\$ facility in Luzira Prison cannot handle the Applicants medical condition while he is incarcerated.
- \$(4)\$ That given the backlog of cases determined on a first come first serve basis, it is unlikely that this appeal will be heard before he completes serving the sentence considering the period served already.
- That the applicant has served a substantial period and it \$(5)\$ will be in the interest of justice that he is admitted on bail pending the determination of the appeal.
- That the applicant is a first offender \$(6)\$
- That the applicant has substantial sureties who shall \$(7)\$ ensure that he abides with the terms of bail set by the court.
- That the appellant was granted bail in the lower court, and \$(8)\$ he complied with the terms.
- That the offence that the applicant committed did not \$(9)\$ involve personal violence.
- That the applicants appeal is not frivolous. \$(10)\$
- That the applicant is of good character and not a danger \$(11)\$ to society.

The respondent filed an affidavit in objection or opposition of the application for bail pending hearing and determination of the appeal. The affidavit was deposed by one Namatovu Josephine of the office of the Directorate of Public Prosecution, Kampala.

Namatovu deponed as follows inter alia:-

- That she is the head of the Anti-Corruption Department of \$(1)\$ the Director of Public Prosecutions.
- That she represented the DPP in the Court of Appeal No. \$(2)\$ 281 of 2021 Rajiv Kumar Sabharwal v. Uganda from which Supreme Court Criminal Appeal No. 004 of 2023 arises.
- That the applicant was charged with embezzlement, \$(3)\$ forgery and uttering false documents and he was convicted on his own plea of guilty and was sentenced to 4 years imprisonment and order to pay compensation of Ugs

\$\mathsf{2}\$

\$556,000,000/\$ = by the Anti-corruption Division of the High Court of Uganda at Kololo on 25th Nov 2021.

- That the applicants appeal has no possibility of success, \$(4)\$ and it is frivolous (See Annexure "X").
- That the first application by the applicant which was \$(5)\$ dismissed in a ruling delivered on 6th April 2023 was due to the Applicants failure to establish unusual or exceptional circumstances to warrant the grant of the order sought (Annexure "1").
- That it is not true in reply to paragraphs 8,9 that the \$(6)\$ circumstances since bail pending appeal was denied had changed.
- That the contents of paragraph 10 are false because it does \$(7)\$ not state that the facility at Luzira Prison cannot manage the condition of the Applicant in the said medical facility (Annexure "Z").
- That paragraph 11 of the affidavit which states that the \$(8)\$ busy schedule and backlog cases in which the court hears cases on first come first service it is unlikely that his appeal will be heard before he completes serving the sentence is speculative.
- That the absence of violence is not ground for grant of bail \$(9)\$ pending appeal.
- That the circumstances in which the applicant was \$(10)\$ granted bail have since changed since he was convicted sentenced and ordered to pay compensation and the Court of Appeal confirmed the sentence.
- (11) That the applicant has not proved reasons to grant him bail pending appeal.
- (12) That there is a high likelihood that the applicant will abscond once granted bail.
- \$(13)\$ That it is in the interest of justice that the application is denied.

Representation

At the hearing Mr. Caleb Alaka represented the Applicant Mr. Baine Stanley represented the Respondent.

Submissions for the Applicant

Counsel for the Applicant submitted that the grounds to support the notice of motion for the grant of bail pending appeal were in the Applicants affidavit. Counsel cited David Jarwa v. Uganda Misc Application No. 9 of 2018 and Ocepa Geofrey v. Uganda Misc Application NO. 07 of 2020.

Counsel submitted that the conditions to grant bail pending appeal were summarized in the decision of Arvind Patel v Uganda SC Criminal Application No. 1 of 2003 where Justice Oder (RIP) set out the said conditions to be considered by court before granting bail pending appeal. These conditions such as:

- \$(1)\$ Character of the applicant
- Whether she or he is a first offender \$(2)\$
- Whether the offence the applicant is charged with involved \$(3)\$ personal violence
- Whether the appeal is not frivolous and has a reasonable \$(4)\$ possibility of success
- Whether there is reasonable possibility of delay in \$(5)\$ determination of the appeal
- Whether the applicant complied with bail conditions \$(6)\$

Counsel highlighted three of the considerations. Counsel submitted that the appeal is not frivolous because the applicant's utterances were taken to amount to unequivocal pleas when the trial court failed in its duty to explain the charge to the Applicant as required in law.

Counsel also highlighted exceptional circumstances which have to be proved or demonstrated. Counsel referred to the Medical Report from the Prison titled "Health status of Rajiv Kumar Sabherwal aged 60 years in UG Prison Upper" which was signed by medical Supritendant Dr. Kakoraki Alex (Annexure "E").

Counsel submitted that the applicant suffers from severe hypersensitive heart disease, old age, and is elderly. That given the applicant's past history of hypersensitive crisis and upper GIT (Gastral intestinal tract bleeding) prison conditions are not conducive for him.

Counsel submitted that ordinarily such medical report made under S. 15 of the TA must indicate that the health facility in the prison is not capable of treating the applicant when considering exceptional circumstances. Counsel pleaded with court to consider the medical report as a whole and in the context of a sick person so that the word conducive means in the context not capable of treating him.

Counsel relied on the decision in Chande Jamwa case supra where the medical report was written in the same manner. Counsel submitted that the court studies the medical report and at page 8 line 20-25 of the Ruling in the Jamwa case. Her Lordship Stella Arach Amoko (RIP) concluded that on perusal of the medical report dated 27th March 2018 it confirmed that the applicant suffers moderate to severe hypertension with an enlarged heart and poor function of the left ventricle as well as gross obesity with high risk of cardiac complications e.t.c.

Counsel cited the case of Sumbu Jean Luis v. the Medical Uganda Criminal Application No. 1 of 2019 where the medical report did not specifically state that the Prison could not treat the Applicant. But the court reviewed the medical report and the bail pending appeal was granted.

Counsel presented three sureties to when he said he had explained their responsibilities.

The first surety was Mr. Kabagambe Nicholas, that he had a national identity card. Kabagambe was a resident of Nakulabye church zone Rubaga. He had been the applicant's surety since High Court trial, and had a letter of introduction from the LC1 Chairperson (Annexure G). He was a friend of the Applicant aged 35 years. The photocopies are on court record. He had a certificate of

title deposited in the lower court the High Court Anti-Corruption Division FRV Folio 8, Block 40 Plot 612 registered in his names. The original copy is still in the High Court Anti-Corruption Division.

The 2nd surety was one. Nahabwe Enock Rubanzana a resident of Musoke LC1 Zone Natete Rubaga Disvision. He also had the national ID and an introduction letter from the LC1 Chairperson. He was 58 years old and worked in a company called Chains EEE Ltd. He has land and has a sale agreement to show that he has

property. Chains EEE Ltd is a company which deals in transportation.

The 3rd surety was Iga Godfey Sunday a close friend of the family and a business associate. He was 57 years of age and he had an introduction letter from the Chairperson LC1 where he resided in Tula Cell local Council II Maganjo ward. He had a national ID and a certificate of title in his names. It is Kyadondo Block 200 Plot 918 Mile land title of 0.053 decimals. It was identified in Court, and he had attached a photocopy on the filed documents.

Counsel submitted that the applicant lives with his family, a wife and a daughter at Bugolobi flats block 22 room C2 and the letter from the LC Chairperson is attached to the application. He is the managing director of Several Companies and a shareholder of Balteck Construction and Trading Company Ltd registered in Uganda in 2006.

Counsel submitted that if the applicant is released on bail he will not jump it as he was released by High Court and he complied with all bail conditions. Besides he was a first offender and wanted to settle the dispute with his partner.

Counsel prayed that this court grants him the prayer sought.

Respondent's submissions

Counsel for the respondent opposed the bail Application pending hearing and final determination of the Appeal. Counsel relied on the affidavit in reply deposed by one Namatovu Josephine Ass DPP and head of the department of the Anti-Corruption in the DPP.

Counsel submitted that the circumstances surrounding the applicant's case are that when he was admitted to bail the first time, he has since been convicted and the conviction have been confirmed by the Court of Appeal so the chances of absconding were high much as he is on bail. He was sentenced to 4 years imprisonment. That there is also a compensation order of Uganda Shs \$556,000,000/\$ = to pay.

Counsel submitted that there was no reasonable possibility of success of the appeal, and it was frivolous. Counsel submitted that

a copy of the judgment was attached, though he would not delve in the merits of the appeal since it has not been heard yet. Counsel further submitted that the circumstances of the applicant from the time the bail application was rejected had not changed to warrant the grant of his prayer. That the applicant's medical condition is the same as the previous time. Counsel submitted that the medical report does not state that the facility at Luzira prison cannot handle the condition of the applicant.

Counsel argued that the case of Sumbu Jean Luis (Supra) relied on by Counsel for the applicant was distinguishable from the facts of the instant case. Counsel relied on the case of Degeya Hasan v Uganda which held that proving unusual exceptional circumstances is high in regard to an application such as this in a first appellate court. And that release on bail pending appeal should be an exception not the norm. That bail was denied for the lack of proof of the exceptional circumstances.

Counsel submitted in effect that the sureties were not substantial since the applicant was an investor, he ought to have produced fellow Indian investors who are substantial and close to him as sureties if he was of good character.

That for instance Nahabwe Enoch had only presented property worth 16 million Uganda shillings and was yet to clear the payment. Mr. Kabagambe's title had not been presented in court. It was still in the Anti-Corruption Division of the High Court. Counsel prayed that this court exercises its discretion not to grant the bail application pending appeal for the Applicant.

Bold reply by counsel for the applicant: Counsel submitted that the delay in disposing of the case was not speculative. This was matter of which the court could take judicial notice, that cases are handled on a first come first serve basis. This was an appeal filed in this very year, \$2023\$.

As far as compensation is concerned, counsel submitted that this could be recovered by civil proceedings. As compensation order was a civil debt. And that this was distinguishable from Hassan Degeya v Uganda Misc Application No. 16 of 2021 where the applicant was a manager and in the instant case, he was a managing director.

On the sureties, counsel for the respondent submitting that they had to be investors of Indian origin, there was no law that compelled any person /applicant to bring specific nationality to stand surety. Counsel affirmed that the sureties brought were those that he presented since High Court and they are substantial.

Consideration of the Application

This application under Article 132 (2) of the Constitution, S. 40 (2) of the Criminal Procedure Act, S. 132 (1) OF THE TIA, rules 6 (2) (a), 43 (1) and (2) and 42 (3) of the Judicature (Supreme Court Rules) Directions SI 13-11. It was by way of notice of motion seeking for the order that the Applicant be released on bail pending the hearing and determination of Criminal Appeal No. 004 of 2023 before this court.

I considered the affidavits for and against the application, submissions of both Counsel and the authorities they relied upon.

In such applications there are conditions well-articulated in the celebrated case of Arvind Patel v. Uganda SCCA No. 1 of 2003 which have to be considered to facilitate determining whether or not to grant the prayer sought.

These are:

- 1) The character of the Applicant
- 2) Whether the Applicant is a first offender
- 3) Whether the offence the applicant was charged with involved personal violence
- 4) Whether the intended appeal is or is not frivolous and has a possibility of success
- 5) Whether there's is possibility of substantial delay in the hearing and determination of the appeal
- 6) Whether the accused has complied with bail conditions granted before or after conviction

It has to be noted at this point that in the judgment of Oder JSC (RIP) in the above cited case Arvind (Supra) it was stated that not all the above considerations/conditions ought to be proved or

established. Two or three of them may suffice, bearing in mind that each case is decided upon its own facts and circumstances.

It is trite law that exceptional circumstances have to be proved or demonstrated before such an application can be granted therefore. Counsel for the applicant drew the attention of this court to the contents of the medical report from Luzira prison with the heading "Health status of Rajiv Kumar Sabherwal aged 60 years in UG Prison Upper" dated 23rd June 2023 signed by the Medical Superintendent Dr. Kakoraki Alex (Annex E).

According to the report, the applicant upon examination had chest pains, palpitations, severe epigastric pain, headache, vomiting associated with Diarrhea and general body weakness.

The report stated that the conditions that precipitate severe epigastric pain include spicy food and taking long without eating. The epigastric pain wakes him up towards dawn and Diarrhea is associated with vomiting. He has been severally treated for chronic Gastritis with various Proton Pump Inhibitors (eg Ome prazole, antispamodus, antibiotics, analgesics, antiacids, diet with or and of imprisonments. For hypersensitive heart disease he has been using Lorsatan -H, Captopil, Furosemide and Diazepan. He has a past medical history of having been treated for severe hypertension (Hypertension Crisis) and upper Gastrointestinal Tract (GIT) bleeding (passed melema stool) from Nsambya Hospital about 4 years ago etc.

The conclusion was that the Applicant Rajiv Kumar Sabharwal of 60 years in Upper prison Luzira suffers from (a) chronic Gastritis with high suspicion index of Peptic ulcer disease.

(b) severe hypersensitive heart disease (c) old age (elderly) $\frac{1}{2}$

It was noted in that very report that with past history of hypersensitive crisis and upper GIT bleeding, prison conditions are not conducive for him.

Considering the above medical report and the conclusion, it was clear to me that a person in such condition with his age of 60 years

unless one wants him dead cannot remain in incarceration/detention. It is a time bomb.

The word conducive according to Oxford languages dictionary online means suitable or helpful etc. The way it was used in the report, it is negative with the addition "not conducive", which means not suitable or not helpful for the applicant in the health status he is

I was not persuaded by learned Counsel for the respondent when he submitted that the report ought to have specifically stated that the medical facility in Luzira could not handle. The words "not conducive" read and understood in the context it was used, suffices.

I am buttressed by the respondent's submission to the effect that, "though the prison facility is not the best for the Applicant because of his history of hypersensitive crisis and upper gastric intestinal tract bleeding, it did not mean that the facility in Luzira failed and cannot handle.

This submission raised doubt in my mind that truly Counsel for the respondent was merely submitting but was convinced inwardly that the medical facility could not handle it was not helpful since it is not the best. That submission makes me believe that the applicant's life is in danger, and he needs to get the best medical care which he cannot access unless he is granted bail. In any case in the medical report it was stated by the medical superintendent that the medical facility was not conducive.

On the ground of abscondment which learned counsel for the respondent was fearful that the likelihood was high because he was convicted and both the sentence and the conviction were confirmed by the Court of Appeal. I am of the view that the conviction and sentence having been confirmed, does not mean that the presumption of innocence is in limbo. That is why the appellate courts exist in the fundamental law of the land in Articles 129 and 132 which are very clear, so until the final court determines the matter to its finality unless the accused decides not to appeal, it's still open. The courts of law are managed by man/human beings who are prone to making mistakes. It is my

view that, bail pending appeal should not be withheld on that basis.

The Applicant, when he was on trial was on bail and he never breached any condition as the record of court has it. It reveals much about the character of the applicant i.e., that it is good. Besides, he is a family man, and his wife and child came to court and were introduced to court by his counsel. That exhibited the sense of responsibility on his head.

Thirdly, much as the sentence of 4 years was accompanied by the order of compensation of more than 500m Uganda Shillings, this cannot be a hinderance to the granting of bail. I accept counsel for the applicant submission that this can be recovered by action in a civil court, and I would add that being in detention cannot make him pay it.

Also, regarding the issue of substantial delay, I cannot accept the submissions of counsel for the respondent that it was speculation. This is real. This is an appeal of June 2023 and yet the court has to handle appeals of 2019, 2020, 2021 and 2022. So it is a matter this court is obliged to take judicial notice of.

Finally regarding the sureties, it is discriminatory if not sectarian to argue that they ought to have been investors of Indian origin. The constitution of the Republic of Uganda out laws discrimination on any grounds among other including race. There is no law that requires that sureties must be of any specific origin. This court cannot allow any arguments that would be discriminatory.

From the above foregoing, I am satisfied that exceptional circumstances have been proved in the medical report pertaining to the Applicants health status. He presented substantial sureties who have been consistent right from High Court to this time.

I therefore grant bail pending hearing and determination of the appeal on the following terms:-

- 1) The applicant to deposit cash bond of Uganda Shs \$10,000,000/\$ = and each of the three sureties be bound in the same amount of Uganda Shs \$10,000,000/\$ = but not cash.
- 2) The certificate of title Mr. Kabagabe deposited in the Anti-Corruption Division of the High Court Registry be brought to the Registry of this court within 14 days of the date this Ruling. shall be
- 3) The applicant report in this court fortnightly to the Registrar to answer his bail until the appeal is heard and determined on its merits, starting from 17th August 2023 at 9:00am

So I order.

Dated at Kampala this.....

Thursday

Mwondha Justice of the Supreme Court

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