

IN THE HIGH COURT OF FIJI AT SUVA
(CRIMINAL JURISDICTION)

Criminal Miscellaneous Case No.: 143 of 2016

BETWEEN : WAQA NAITINI

Applicant

AND : STATE

Respondent

Counsel : Mr. S. Tinivata for Applicant
Ms. K. Semisi for Respondent

Date of Hearing : 01st and 16th September 2016

Date of Ruling : 20th September 2016

BAIL RULING

1. The Applicant is applying for bail pending trial. He is charged with one count of rape and one count of sexual assault contrary to section 207(1) and section 210(1) of the Crimes Decree 2009 (“Crimes Decree”) respectively. The applicant is related to the complainant being her father’s sister’s husband and at the time of the alleged incidents, the applicant and the complainant were living in the same house. The complainant was 16 years old at the time of the alleged incident.
2. The respondent objects for bail stating that the applicant is charged with serious offences, there is strong evidence against the applicant and there is a likelihood of interference with the complainant. Respondent further states that the presumption in favour of bail is

displaced as there is a domestic relationship under the Domestic Violence Decree 2009 (“Domestic Violence Decree”) between the applicant and the complainant.

3. The applicant has not disclosed the fact that there is a domestic relationship between him and the complainant in his bail application. During the hearing of this application when I inquired from the counsel for the applicant, his position was that the relationship between the accused and the victim does not come under the definition of a “domestic relationship” under the Domestic Violence Decree as the complainant and the applicant are no longer living in the same house.
4. In terms of section 2 of the Domestic Violence Decree 2009, domestic relationship means the relationship of;
 - (a) spouse;
 - (b) other family member;
 - (c) person who normally or regularly resides in the household or residential facility;
 - (d) boyfriend or girlfriend;
 - (e) person who is wholly or partly dependent on ongoing paid or unpaid care or a person who provides such care.
5. ‘Other family member’ means any of the following;
 - (a) parent, grandparent, step-parent, father-in-law, mother-in-law;
 - (b) child, grandchild, step-child, son-in-law, daughter-in-law;
 - (c) sibling, half-brother, half-sister, brother-in-law, sister-in-law;
 - (d) uncle, aunt, uncle-in-law, aunt-in-law;
 - (e) nephew, niece, cousin;
 - (f) clan, kin or other person who in the particular circumstances should be regarded as a family member.
6. Accordingly, there is a clear domestic relationship between the applicant and the complainant in terms of the Domestic Violence Decree. However, the question is whether the applicant is charged with a domestic violence offence. It is pertinent to note that, in order for the presumption in favour of bail to be displaced in terms of section 3(4) of the Bail Act 2002 (as

amended), an applicant should be charged with a domestic violence offence. The fact that there is a domestic relationship between the applicant and the complainant alone is not sufficient to displace the presumption.

7. The following definition was found in section 2 of the Domestic Violence Decree before it was amended by Act No. 31 of 2016 for the term ‘domestic violence offence’;

"domestic violence offence" means a domestic violence offence as defined in section 4 of the Penal Code"

8. The Domestic Violence Decree was amended by Act No, 31 of 2016 and section 57(b) of the said Act reads as follows;

“in section 2 in the definition of "domestic violence offence", deleting "a domestic violence offence as defined in section 4 of the Penal Code" and substituting the following—

"(a) a personal violence offence committed by the offender against a person with whom the offender is or has been in a family or domestic relationship;

(b) a property damage offence committed by the offender against a person with whom the offender is or has been in a family or domestic relationship; or

(c) the offence of breach of a domestic violence restraining order under section 77;”

9. The present case does not involve a breach of a domestic violence restraining order or a property damage offence. Then the question is, whether the offence of rape under section 207 of the Crimes Decree is a “personal violence offence”. It is pertinent to note that, section 57 of Act No. 31 of 2016; section 2 of the Domestic Violence Decree; or the Crimes Decree does not define the term “personal violence offence”. However, the said term is defined under section 4 of the repealed Penal Code as amended by Part 4 of the schedule provided under section 82 of the Domestic Violence Decree.

10. Though the Penal Code was repealed by virtue of section 391 of the Crimes Decree which came into effect on 01st February 2010, I consider it appropriate to refer to the aforementioned definition in order to examine the intention of the lawgivers. The said definition provided in the Penal Code as amended is as follows;

" "personal violence offence" means an offence specified in Part 1 of Schedule 1A;"

11. The relevant schedule 1A provided in the Domestic Violence Decree refers to certain offences in the Penal Code.

12. When it comes to repealing an existing law, either that law will be repealed with replacement (re-enactment of a new law) or without replacement. The Penal Code was repealed and replaced by the Crimes Decree 2009. The Crimes Decree does not completely abolish the criminal law established by the Penal Code but it makes comprehensive provisions in relation to the criminal law of the country. The preamble of the Crimes Decree reads thus;

"A DECREE TO REPEAL THE PENAL CODE AND MAKE COMPREHENSIVE PROVISION IN RELATION TO THE ELEMENTS OF CRIMINAL RESPONSIBILITY AND TO PRESCRIBE A RANGE OF CRIMINAL OFFENCES, AND FOR RELATED PURPOSES."

13. Whereas it was the intention of the lawgivers to identify the Penal Code offences listed in schedule 1A provided in the Domestic Violence Decree as personal violence offences, and whereas the Crimes Decree has replaced the Penal Code, in my view, the corresponding Crimes Decree Offences of the Penal Code offences listed under schedule 1A of the Domestic Violence Decree should be regarded as personal violence offences. Accordingly, the offence of rape under section 207 of the Crimes Decree should be regarded as a personal violence offence within the meaning provided under the Domestic Violence Decree.

14. In the circumstances, I agree with the position taken by the respondent that the presumption in favour of granting of bail is displaced in this case by virtue of section 3(4) of the Bail Act.

15. An applicant for bail pending trial who is charged with a domestic violence offence should deal with the factors highlighted under section 19(2)(d) of the Bail Act as the presumption in favour of bail is displaced by law.

16. The applicant in this case has failed to satisfy this court in terms of section 19(2)(d) of the Bail Act.

17. The bail application and the written submissions filed on behalf of the applicant are drafted on the basis that the respondent has the burden of displacing the presumption in favour of granting bail, where in fact, the presumption in favour of bail is displaced by virtue of the provisions of section 3(4) of the Bail Act. This application is misconceived.

18. Accordingly, this application for bail pending trial is refused.



Vinsent S. Perera

JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva.
Solicitors for the Accused : Toganivalu & Valentabua, Barristers & Solicitors, Suva.