

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

Criminal Miscellaneous Case No. HAM 244 of 2018
[High Court Criminal Case No. HAC 186 of 2018]

BETWEEN : MOSESE TAVUTU

AND : STATE

Counsel : Ms L Ratidara for the Accused
Ms L Bogitini for the State

Date of Hearing : 17 September 2018
Date of Ruling : 21 September 2018

RULING

- [1] The Accused seeks bail pending trial. He is charged with rape of a child under the age of 13 years. The alleged incident occurred in November 2017 on the island of Kadavu. The complainant is a relative of the Accused.
- [2] Information and disclosures have been filed. The Accused has entered a plea of not guilty to the charge. He has been in custody on remand since 16 April 2018 when he first appeared in the Magistrates' Court.
- [3] The Accused is 28 years old. He does not have a stable employment. He earns a living by farming. He has no criminal history or history of breaching bail conditions. He has proposed two sureties – his aunt and his father. The aunt is a senior government employee. She resides in Nasinu, Suva. The Accused proposes to reside with her while on bail.

[4] The State has no objection to bail being granted to the Accused. The concession is based on the fact that the complainant resides on the island of Kadavu and therefore it is unlikely that the Accused will interfere with her if he is released on bail. The State's concession is a relevant consideration but the discretion to grant or refuse bail lies solely with the judicial officer. As Gates CJ said in *FICAC v Benjamin Padarath* Crim. Revisional Case No. HAR019/2012 at [10]:

“... Where counsel concedes a legal point in court or does not object to bail as here, that is not the end of the matter so far as the judicial officer is concerned. The judge or magistrate should take the concession into account carefully when deliberating upon his own decision. He or she will consider why the concession has been made, and whether it is correct on the facts and the law. Ultimately however, the responsibility for deciding the pertinent issue lies solely with the judicial officer. There can be no abandonment of that public duty. It is placed upon the Magistrate here and not the prosecutor: *Tevita Sarokoqica v The State* Crim. Misc. Case No. HAM020/11 (1st December 2011); *Timoci Aluseni v The State* Misc. Crim. Case No. HAM08/2013 (22nd January 2013) at para 15, both per Goundar J.”

[5] The Bail Act 2002 (the Act) codifies much of the law relating to bail. Part II of the Act contains provisions of general application. The Act provides for two presumptions. An accused has an entitlement to bail (s 3(1)). This does no more than reflect the principle of the presumption of innocence, which is also stated in the Constitution. The entitlement will fail if it is not in the interests of justice that bail should be granted. Secondly, there is a presumption in favour of the granting of bail (s 3(3)). However, that presumption is rebuttable if it can be shown that the accused has previously breached a bail undertaking or bail condition, or been convicted and has appealed against the conviction, or has been charged with a domestic violence offence (s 3(4)).

[6] Section 17(2) of the Act states that the primary consideration in determining whether to grant bail is the likelihood of the accused appearing in court to answer the charge laid against him or her. The Court must also take into account the time the accused may have to spend in custody before trial if bail is not granted. The current practice of this Court is to hear the trial of an accused person who has been refused bail within 12

months from the date of arraignment. So if bail is not granted to the Accused the time in custody while in remand will be about 12 months.

- [7] Although the primary consideration in determining whether to grant bail is the likelihood of the accused person appearing in court to answer the charge (s 17(2)), the court may refuse bail if the interests of the accused person will not be served through the granting of bail or the granting of bail would endanger the public interest or make the protection of the community more difficult (19(1)). Section 19(2) of the Act outlines a list of factors that the court must have regard to when determining whether the Accused will appear for his trial or would endanger the public interest.
- [8] In coming to my conclusions, I have considered the disclosures filed in support of the charge by the prosecution. The complainant is a child. She was 9 years old when she was allegedly raped by the Accused in her home. At the time of the alleged offending she was residing with her adopted parents. The Accused is a cousin of the adopted mother. When the alleged incident occurred, the Accused was living with the complainant's adopted parents.
- [9] According to the complainant's police statement, the Accused had sexual intercourse with her on a night she was left alone at home. The adopted parents were away drinking kava at a relative's home.
- [10] The following day, the complainant reported the matter to her adopted mother. According to the complainant's statement, her adopted parents were instrumental in getting the Accused off the island to avoid arrest. There is a social welfare report on the complainant that states her adopted parents had been instrumental in interfering with the police investigation by convincing the complainant to implicate someone else to the alleged crime and not the Accused. On 4 December 2017, the complainant was medically examined. There is some medical evidence to potentially support the police statement of the complainant.
- [11] The prosecution case is potentially strong.

[12] Rape is a serious offence. Rape is more serious when the alleged victim is vulnerable due to young age. The presumption in favour of the granting of bail is displaced due to the fact that the complainant is related to the Accused through her adopted mother. If the Accused is convicted, he is potentially looking at a long prison sentence. The likelihood of the Accused interfering with the witnesses is high. The likelihood of him not appearing for his trial is also high. Taking all these matters into account, I am satisfied that it is not in the interests of justice to grant bail.

[13] Bail is refused. The Accused will remain in custody on remand pending trial. A priority trial date will be assigned to this case.



A handwritten signature in blue ink, consisting of a stylized 'D' and 'G' followed by a horizontal line.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of Legal Aid Commission for the Accused
Office of the Director of Public Prosecutions for the State