

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[CRIMINAL JURISDICTION]**

Criminal Miscellaneous Case No. HAM 37 of 2019

[High Court Criminal Case No. HAC 35 of 2019]

BETWEEN : ERNEST VUKINAMUALEVU PICKERING

AND : STATE

Counsel : Ms Vuli for the Applicant  
Ms Naibe for the State

Date of Hearing : 14 & 20 March 2019

Date of Ruling : 21 March 2019

**RULING**

1. The Applicant filed his bail application in person. Later he applied for Legal Aid assistance.
2. The Applicant is indicted for the offence of rape of his 5-year-old daughter.

3. The Respondent filed the response to the bail application. The State does not object for bail on the following grounds;
  - a) That the trial for this matter may not be set this year since the court's diary is full ;
  - b) That the sureties provided by the applicant are suitable; and
  - c) The State has checked with Criminal Records Office and both sureties have nil previous convictions.
  
4. Although the Respondent has consented to bail I have decided to consider the bail application of the Applicant due to the circumstances of the case.
  
5. I have considered the bail application tendered by the Applicant. He has stated the following in his bail application form:
  - a. He has a pending case in Sigatoka Magistrates court for assault and trespass.  
(at the bail hearing he said it's a case in Lautoka Magistrate's court)
  - b. He has four children aged 6 years, 5 years, 3 years and 3 months
  - c. He worked as a carpenter
  - d. He is a first offender
  - e. He has obligations to support his family
  - f. He will stay away from the victim
  - g. He denies the allegation
  
6. Section 3(1) of the Bail Act provides that every person has a right to be released on bail unless it is not in the interest of justice that bail should be granted. Further Section 3(3) of the Bail Act states that there is a presumption in favour of the granting of bail to a person.
  
7. However, the Section 3(4) of the Bail Act provides for instances where the presumption is displaced;
  - a) The person seeking bail has previously breached a bail undertaking or bail condition;

- b) The person has been convicted and has appealed against the conviction;  
or
- c) The person has been charged with a domestic violence offence.

8. Further Section 17(2) of the Act provides that the primary consideration in deciding whether to grant bail is likelihood of the accused person appearing in court to answer the charges laid against him or her.

9. Section 19 of the Bail Act states that an accused person must be granted bail unless the court is of the opinion that;

- a. The accused person is unlikely to surrender to custody and appear in court to answer the charges laid;
- b. The interests of the accused person will not be served through granting of bail;
- c. Granting bail to the accused person would endanger the public interest or make the protection of the community more difficult; or
- d. The accused person is charged with a domestic violence offence and the safety of a specially affected person is likely to be put at risk if bail is granted taking into account the conditions that could be applied if bail were granted.

10. This is clearly a case involving a domestic violence offence. Therefore, the presumption in favour of granting bail is displaced by virtue of Section 3(4)(c) of the Bail Act.

11. In a similar case, *Rogovasa v State* [2018] FJHC 10; HAM40.2017 ( 19 January 2018) Justice Goundar refused bail stating the following;

“The applicant by virtue of his age (54 years) and relationship commands authority over the victim and her family..... The risk that the applicant will interfere with the witnesses for the prosecution is real.”

12. In *Sharma V State* [2017] FJHC 888; HAM198.2017 (22 November 2017) Justice Perera refused bail for an accused in a child rape case involving a domestic relationship, on the basis that there is a high likelihood of interference. In that ruling

His Lordship quoted Justice Goundar in State v AV (Criminal Case No 192/2008) as follows;

“Children below the age of 14 years are the most vulnerable victims, and therefore, the need for protection of law is greater..... By ratifying the convention, the State is obliged to take all appropriate legislative measures to protect children of this country from all forms of physical or mental violence, injury or abuse or exploitation or sexual abuse. The Convention also allows for judicial involvement to carry out the protective measures for children.”

13. The victim is 5 years old and she is a daughter of the Applicant. The Respondent informed court that the victim resides with her mother in Tomuka, Lautoka. The mother of the victim was present in court on 14 March 2019 and she informed the court that she came to as the “kids wanted to see their dad”. However, upon inquiry, she said that the victim in this case had gone to school.

14. Section 19(2)(d) further provides the matters the court must have regard to in forming an opinion regarding bail as regards the safety of a specially affected person when the accused is charged with a domestic violence offence-

- i) the nature and history of alleged domestic violence by the accused in respect of the person against whom the alleged offence has been committed and any other specially affected person;
- ii) the views of the person against whom the alleged offence has been committed and any other specially affected person about the risk, if any, that the accused may pose to the safety and well-being of a specially affected person while on bail;
- iii) whether a domestic violence restraining order is in effect for the protection of a relevant specially affected person;
- iv) the likelihood of the accused person committing a further domestic violence offence while on bail.

15. It is very clearly discernible that if bail is granted the safety of the victim is likely to be put at risk due to the authority he has over the victim and her mother. I am not satisfied that the release of the Applicant on bail would not be likely to adversely affect the safety, wellbeing and the interests of the victim. Further, I am not satisfied that direct or indirect interferences can be ruled out given the circumstances and the relationship between the Applicant and the victim.
16. I have considered the affidavit tendered by the proposed sureties. Jone Cama is a cousin of the Applicant. He has deposed in the affidavit that the Applicant will reside with him at Sikituru village, Nadi.
17. The second proposed surety, Simeli Rauvi is also a cousin of the Applicant. He has deposed in his affidavit that the Applicant will be residing with him in Nabulivou settlement, Lautoka.
18. When the mother of the victim was present in court, it was inquired from her where would the Applicant reside if bail is granted. She initially said, in Tomuka and then she again said he will stay in Nadi.
19. Therefore, it is not clear where will the Applicant be relocated if bail is granted. I am not satisfied that the Applicant has plans to relocate or the sureties have made genuine arrangements to relocate the Applicant. I do not think that the proposed sureties are suitable to take the responsibility of the Applicant.
20. The Applicant is facing a serious charge and if convicted he runs the risk of serving a long prison term. There is a possibility that it could entice the Applicant to abscond bail.
21. In *Seru v State* [2015] FJCA 30; AAU0152.2014 ( 27 February 2015) it was held that there is no requirement for formal evidence in considering an issue relating to bail. It was further observed in that decision that;

“ 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 LR 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 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.”

22. The Respondent did not object to bail based on the possible delay in taking up this matter for trial. Apart from that the Respondent did not provide any details to assist the court in determining bail. Therefore, this court had to rely on the information provided by the mother of the victim to assess the situation in absence of any material placed before the court by the Respondent.

23. The courts must act cautiously when determining bail involving domestic violence offences. If there is a likelihood of victims falling prey to repeated domestic violence or if there is likelihood of interferences with witnesses, it is a matter of public interest and the court has a duty of careful scrutiny of factors, for and against the granting of bail. Bail is a matter of judicial discretion. If the court is satisfied that it is not in the interest of justice that bail should be granted, bail can be refused for reasons set out in Section 19 of the Bail Act.

24. In **Kreimanis v State** [2012] FJHC 1316;HAM86.2012 (6 September 2012) Justice Nawana observed the following while refusing bail;

“Accordingly, I conclude that the granting of bail to the applicant in this case is certainly not in public interest, which attracts paramount consideration in granting bail under the Bail Act in Fiji. In the result, bail is refused. Refusal of bail, even after ten-month long detention on remand, is within the statutory framework of the Bail Act – especially under Section 13(4) of the Act- which empowers court to detain an accused on remand for a maximum period of two years before the trial in appropriate circumstances.”

25. However, I am mindful of the fact that the court has to consider the time that he may have to spend in custody pending trial as per Section 17(1) of the Bail Act. Given the age of the victim and the nature of the offence there is no doubt that this case can be given priority according to the new case management system in place. Therefore, I do not have any reason to believe that the Applicant will have to spend a prolonged period in custody pending trial.

26. All in all, I decide that it is not in the interest of justice to grant bail in this matter. The application for bail is refused.



Rangajeewa Wimalasena  
**Acting Judge**

**Solicitors:**

Legal Aid Commission for the Applicant

Office of the Director of Public Prosecutions for the Respondent