

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

MISCELLANEOUS CASE NO: HAM 241 of 2020

ABHINESH KUMAR

V

STATE

Counsel : Mr. A. K. Singh for the Applicant
: Ms. Sadaf Shameem for the Respondent

Date of Hearing : 23 October 2020
Ruling : 9 November 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SS",

BAIL RULING

1. This is an application for bail pending trial. The Applicant is the accused in HAC 282 of 2020.
2. As per the Information filed by the Director of Public Prosecutions ("DPP") in the substantive matter, the Applicant is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 ("Crimes Act").
3. The full details of the Information reads as follows:

COUNT ONE

(REPRESENTATIVE COUNT)

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ABHINESH KUMAR, between the 1st day of October 2019 and the 31st day of May 2020, at Nasinu, in the Central Division, had carnal knowledge of **SS**, without her consent.

4. The State filed the Information and Disclosures in the substantive matter on 23 October 2020. The plea was taken today and the Applicant pleaded not guilty to the charge.
5. This application was filed by way of a Notice of Motion for Bail, together with an Affidavit in support deposed to by the Applicant.
6. Therein, the Applicant deposes that he has been remanded in custody for this case since 25 September 2020, the day on which he was arrested.
7. The Applicant submits that he is married and has a 21 year old daughter, who is a student of USP. He lives in the extended family home where his home is separated from the house where his two brothers, their wives (his sisters-in-law) and his mother are residing.
8. He deposes that he is employed as a Salesperson at Markan's Drugs since last year.
9. The Applicant deposes that the allegations made against him by the complainant are a total fabrication.
10. The Applicant also alleges that the complainant has informed her sister-in-law Josephine Kumar and her friend Upashna Prakash that she used to skip her school and go and spend time with her brother-in-law since she was in Year 8. In support of this claim the Applicant has produced statements signed by the said Josephine Kumar and Upashna Prakash. However, this Court notes that these are not statements made to the Police but mere letters signed by the two persons in support of the said bail application.

11. The Applicant has also attached similar letters signed by another relative Ravinesh Prasad, his mother Vidya Wati and his sister-in-law Reema Prasad in support of the application.
12. The Applicant deposes that if granted bail he undertakes to reside at 259 Tiqa Place, Tuirara, Makoi, Nasinu. If granted bail the Applicant undertakes to report to the Nasinu Police Station. He has undertaken to provide two sureties if granted bail.
13. The Respondent filed the Affidavit of WDC 2571 Sereima, Police Officer, based at the Nasinu Police Station, in opposition to this application for bail. WDC Sereima who is the Investigating Officer in this case, strongly objects to the granting of bail to the Applicant.
14. WDC Sereima deposes that the Applicant is the child complainant's paternal uncle. The Applicant and the victim's father are biological brothers. Therefore, there is a domestic relationship between the Applicant and the complainant.
15. As such, WDC Sereima deposes that if granted bail, there is a strong likelihood that the Applicant would interfere with the child complainant, who is his niece. WDC Sereima further deposes that there is currently on-going tension between the Applicant and the victim's family, and if granted bail the victim's safety will be put at risk.
16. A further Affidavit has been filed in opposition to this application for bail by the child complainant SS herself. The complainant deposes that she is 17 years of age and currently a Year 12 student at Rishikul Secondary School.
17. She deposes that ever since this matter had been reported to the Police, she has been subject to verbal abuse by her family, both immediate and extended for reporting the matter. Due to this fact she is now said to be residing with her grandfather in Nakasi.
18. The complainant totally denies that she has fabricated the allegations against the Applicant and states that the statement given to the Police by her on 11 August 2020 is a true statement of the incident.

19. The complainant further deposes that although it has been alleged that she has been in a relationship with her brother-in-law this is false. She states that she had never skipped school to meet her brother-in-law and nor did she ever do so since Year 8. She adds that she is not close to her sister-in-law Josephine Kumar and she never made a statement to her as she has alleged. Furthermore, Upashna Kumar (Prakash) is not a friend of hers and nor close to her. She is merely a school colleague who is also a cousin and related to the complainant. She never made a statement to even Upashna as alleged by her. Upashna is said to be living across the street from them and is closely acquainted with the Applicant's family.
20. The complainant further recalls that Josephine Kumar, Upashna Kumar and a few others having a meeting with the Applicant's family shortly after he was arrested. After this meeting, they had made similar false allegations about the complainant at the Nasinu Magistrate's Court and an Interim DVRO was issued to protect the Applicant's family from her and vice-versa.
21. The complainant has further deposed that she never made any false allegations against Ravinesh Prasad. She reiterates that she has reported the sexual abuse committed on her by the said Ravinesh Prasad to her parents and her family members. However, she had been pressurized by her family to say that he was only playing with her and therefore that matter did not proceed any further.
22. The complainant further deposes that even in the instant matter she had informed her own mother about the Applicant indecently touching her breasts and thighs in 2019. However, her mother had told her that he was just playing with her and not to take this matter any further.
23. The Applicant filed further Affidavits from the following persons in Reply to the Affidavits filed by WDC Sereima and the complainant:
 - i) Affidavit of the Applicant, Abhinesh Kumar;
 - ii) Affidavit of Kunal Rajnesh Kumar Hith – an older brother of the Applicant and another uncle of the complainant; and

iii) Affidavit of Reema Prasad – wife of Kunal Rajnesh Kumar Hith.

24. The Counsel for the Applicant has also filed detailed Written Submissions making reference to several case authorities, which I have had the benefit of perusing.
25. In terms of Section 3(1) of the Bail Act No. 26 of 2002 ("Bail Act"), *"Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted."*
26. Section 3(3) of the Bail Act provides that: *"There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption."*
27. However, in terms of Section 3(4) of the Bail Act, as amended by the Domestic Violence Act No. 33 of 2009 ("Domestic Violence Act"), the presumption in favour of granting of bail is displaced in the following circumstances:
- (a) the person is seeking bail has previously breached a bail undertaking or bail condition; or*
 - (b) the person has been convicted and has appealed against the conviction; or*
 - (c) the person has been charged with a domestic violent offence.*
28. As such, in this case since there is a domestic relationship between the Applicant and the complainant, the presumption in favour of granting of bail is displaced.
29. In terms of Section 17 (2) of the Bail Act the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in Court to answer the charges laid against him or her.
30. Section 19(1) of the Bail Act, as amended by the Domestic Violence Act, provides for grounds for the Court to refuse to grant bail. The sub section is reproduced below:
- "An accused person must be granted bail unless in the opinion of the police officer or the court, as the case may be-*

- (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 the 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."*

31. In forming the opinion required by subsection (1), section 19(2) of the Bail Act stipulates that Court must have regard to all the relevant circumstances, and in particular to the circumstances enumerated in the said sub section. In relation to section 19(1) (d), the relevant circumstances can be found in section 19(2) (d), which reads as follows:

"(d) 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 wellbeing of a specially affected person while on bail;

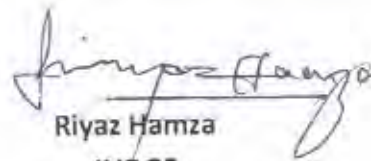
(iii) *whether a domestic violence restraining order is in effect for the protection of a relevant specially affected person;*

(iv) *the likelihood of the accused person committing a further domestic violence offence while on bail."*

32. The primary objection taken up by the State to the granting of bail is that there is a high likelihood that the Applicant may interfere with prosecution witnesses, including the complainant, who is his niece and a minor child. This Court cannot ignore this fact, even though the Counsel for the Applicant submitted to Court today that in the event of him being granted bail he undertakes to reside in Navua. The chances of the Applicant interfering with the prosecution witnesses, who are all family members, still exists. Furthermore, the complainant has deposed that ever since this matter had been reported to the Police, she has been subject to verbal abuse by her family, both immediate and extended for reporting the matter.
33. I agree that the presumption of innocence is a right guaranteed by the Constitution available to all accused persons. The presumption of innocence means that an accused person is presumed innocent. He does not have to prove anything. The burden lies with the prosecution to prove the case against the accused beyond reasonable doubt. However, this does not mean that the presumption of innocence alone should be considered by a Court of Law as a factor in granting bail to an accused person. In that event Court will have to grant bail to every person accused of an offence and who is seeking bail.
34. In this case the prosecution submits that they have a strong case against the Applicant. The charge filed against the Applicant relate to serious offences, which have been allegedly committed over a period of 8 months. The offence of Rape carries a maximum penalty of imprisonment for life. The tariff for Rape of a juvenile is between 11 years to 20 years imprisonment.

35. It has been submitted by the State that there is ongoing tension between the families due to this incident. This Court is of the opinion that granting bail to the Applicant would endanger the public interest and make the protection of the community more difficult. The Applicant is charged with a domestic violence offence and the safety of the specially affected person (the complainant) is likely to be put at risk if bail is granted. Since the Applicant is charged with a serious offence, there is a high likelihood that he would fail to appear in Court if granted bail.
36. Taking all the above factors into consideration, I refuse this application for bail pending trial and the application for bail is accordingly dismissed.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 9th Day of November 2020

Solicitors for the Applicant : A. K. Singh Lawyers, Barristers and Solicitors, Nausori.
Solicitors for the Respondent : Office of the Director of Public Prosecutions, Suva.