

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**MISCELLANEOUS JURISDICTION**

**Crim. Miscellaneous Case No: HAM 195 of 2022**

**BETWEEN : DAYA RAM**

**APPLICANT**

**AND : STATE**

**RESPONDENT**

Counsel : Mr. A. K. Singh for Applicant  
Ms. P. Kumar for Respondent

Date of Hearing: 05 August 2022

Date of Ruling : 12 August 2022

**BAIL RULING**

1. This is an application for bail pending trial. The Applicant in the related substantive matter (HAC 234 of 2022) is charged with one count of child Rape.
2. The Respondent, on the basis of the affidavit filed by the Investigating Officer, WDC Pritika (IO Pretika), objects to bail on the grounds that the Applicant is charged with a serious offence and that the Applicant will interfere with the complainant and the witnesses.
3. Pursuant to Article 13(1)(h) of the Constitution and Section 3(1) of the Bail Act 2002, every person charged with an offence has a right to be released on bail, unless granting

of bail is not in the interest of justice. Section 3(3) of the Bail Act stipulates further that there is a presumption in favour of granting bail. Therefore, the party opposing bail must place material to displace that presumption. However, when a person is charged with a domestic violence offence, the said presumption is displaced in terms of Section 3(4) of the Bail Act.

4. IO Pretika, in her affidavit, states that the Applicant is the immediate maternal uncle of the complainant and, since they are in a domestic relationship under Section 2 of the Domestic Violence Act 2009, the presumption in favour of bail is displaced. The Applicant denies that he is the immediate maternal uncle and in a domestic relationship with the complainant. His position is that the complainant's grandfather is from his village and the people in the village address the elder people as uncle or aunty.
5. According to paragraph 17 of IO Pretika's affidavit, the Applicant had allegedly committed the offence whilst the child complainant was under the Applicant's care. Although the Applicant has denied that he had committed the offence as alleged when the complainant was under his care, he has not denied that the complainant was under his care at the time of the alleged offence. According to Paragraph 2 of the Applicant's written submission, the complainant in her witness statement has stated that the alleged offence took place in the sitting room where the Applicant, his wife and children were sleeping.
6. Unfortunately, the Court did not have the benefit of perusing the witness statements at the bail hearing as the State was yet to file the disclosures in Court. Before making decisions about bail in cases involving violence or a sexual offence, especially when the complainant is a child, it is the duty of the Office of the Director of Public Prosecutions to ensure that sufficient information about the relationship between the parties and the potential risks to the complainant is made available to the court. The Courts have acknowledged the importance of court perusing the witness statements for the purpose of bail determination. [Balaggan v State (2011) FJCA 43, Miscellaneous Case 31.2011 (15 September 2011)]. Such a course is necessary not only they provide reasonable opportunity to assess the strength or otherwise of the Prosecution case but also they contain vital information about the relationship between the parties and the potential risks to the complainant. Making the disclosures available to court in a timely fashion will not

prejudice the accused as the judicial officers are conversant with the limits within which those unsworn and untested statements could be used at the trial and the weight that should be attached to them. [In *Balaggan v State* (supra)) Justice William Marshal observed that *"An informed observer would also know that assessments for the purposes of bail application are untested as there is no oral evidence or cross-examination and prior rulings on bail applications do not mean that the judge or magistrate is unable to conduct a fair contested hearing at trial in respect of the substantive underlying criminal charges*].

7. In view of the referrals made to witness statements in the submissions filed on behalf of the Applicant, the Court directed the State Counsel to file the disclosures so that a well informed decision could be made with regard to bail. I am thankful to the State Counsel for the quick compliance.
8. The Court finds that the witness statements contain vast amount of information that is relevant for the bail determination. In light of the denial of a domestic relationship by the Applicant, I perused the witness statements to come to a finding on that. The witness statements reveal that the complainant was born out of wedlock and her mother had left her when she was 3 years old. She was being looked after by her grandfather Nand Lal who found it impossible to leave the complainant alone at home when he resumed work after the pandemic. He had entrusted the care of the complainant to the Applicant whom the complainant referred to as her maternal uncle. She had been schooling from Applicant's place when the schools reopened in October 2021. She had been there till early 2022 and the alleged incident had occurred somewhere in October 2021. Accordingly, the child complainant was under the care of the Applicant at his home at the time of the alleged offence.
9. Under Section 2 of the Domestic Violence Act "**family or 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;.....**"**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.**

10. In terms of the wide interpretation given to ‘‘domestic relationship’’ and ‘‘other family member’’ in the Domestic Violence Act, the Applicant should be regarded as being in a domestic relationship with the complainant even if the assertion of the Applicant that he is not the maternal uncle is accepted. Therefore the presumption in favour of bail is displaced.
11. Where the presumption in favour of granting bail is displaced, this Court in deciding bail should be guided by Section 18(1) and Section 19 (1)(d) of the Bail Act.
12. As per Section 18(1) of the Bail Act, three considerations come into play in deciding bail: (a) the likelihood of the accused surrendering to custody and appearing in court (b) The interests of the accused person; and (c) the public interest and the protection of the community. Section 19 (1)(d) provides that an accused person must be granted bail unless in the opinion of the court, the accused person is charged with a domestic violence offence and the safety of a specifically 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.
13. The Applicant in the substantive matter is charged with a serious offence. It is the general perception that, given the seriousness of the charge and the maximum sentence prescribed for the offence of Rape, there is a likelihood of accused not appearing in court to face the charge. The courts however have repeatedly held that the seriousness of the offence of itself is not a ground to refuse bail. In *Tak Sang Hao v the State* (2001) FJHC 15L; HAM 003d.2001, Justice Shamcem stated that even though the seriousness of the offence is relevant but not the predominant factor.
14. On the basis of the statement of the complainant, the so called ‘recent complaint’ to the teacher and the medical report, the State claims that it has a strong case against the Applicant. However, in view of conflicting versions, the strength of the rape charge has

to be finally decided at the trial: *Kumar v State* [2021] FJSC 1; CAV 20 of 2020 (5 February 2021).

15. The main concern of the State appears to be that, given the alleged domestic relationship existing between the complainant and the Applicant, and in view of the alleged attempts by the Applicant's wife to contact the complainant's grandfather over the phone, there is a likelihood of Applicant interfering with the State witnesses and that the safety of a complainant is likely to be put at risk if bail is granted.
16. Most of the rape charges filed in this Court allege domestic violence offences and, by virtue of which, the presumption in favour of granting of bail is displaced. That does not mean that the accused, as a matter of course, should be kept in remand until the case is heard. The vital questions to be asked in deciding bail is whether there is a real likelihood of accused interfering with the witnesses and whether the safety of a specifically affected person (complainant) is likely to be put at risk if bail is granted, even if strict bail conditions are put in place.
17. Mr. Singh for the Applicant strenuously argues that imposition of strict bail conditions that include relocation can address the issue of witness interference. The learned Counsel has cited number of decisions pronounced by the High Court (including those of mine), the Court of Appeal and the Supreme Court where the accused has been released on bail in domestic violence cases. The learned Counsel heavily relies on the Supreme Court decision In *Kumar v State* [2021] FJSC 1; CAV 20 of 2020 (5 February 2021). In those cases, the courts seem to have come to the conclusion that if strict bail conditions including orders for relocation are made, the risk of witness interference can be avoided if not minimized. However, none of those decisions expressed general guidelines as to the manner in which bail applications involving children in domestic violence cases should be dealt with. Bail determination is an individualized exercise where each case must be decided on its own facts and circumstances.
18. To assess the potential risk of witness interference and the safety of the child complainant, the Court wished to peruse the witness statements filed by the State again. As, indicated

earlier, the alleged rape incident has occurred in October 2021 and the complainant has reported the matter in June 2022. That complaint was made not to an immediate family member but to her class teacher Vandhana Lal who had continuously observed complainant's distressed condition at the school. The investigation has started when the Head Teacher reported the matter to Social Welfare. The explanation given by the child complainant for the delayed complaint was that she was afraid of the Applicant and his wife who had threatened the complainant even with death if she relayed the incident to her grandfather. She has even been beaten.

19. The complainant has made a second statement to police on 20<sup>th</sup> July 2022. The circumstances under which this statement was made are most relevant to the issue under consideration. According to this statement, which is annexed as part and parcel of the affidavit of IO Pretika, after the Applicant was arrested and remanded, the wife of the Applicant Shiyashna has made several attempts to contact the complainant's grandfather, Nand Lal, under whose care the complainant currently is. The complainant has overheard one of the calls received on 06.07.2022 when the phone was on loud speaker mode. The complainant in her statement says that she was so scared when she heard Shiyashna's voice and she recalls how she was threatened after the incident. She is afraid of the Applicant and fears that the Applicant will do something to her if he comes out, as she is alone at home with her grandfather. This second statement has been made after her class teacher Vandhana Lal observed complainant crying on the next day (07.07.2022) of the alleged phone call. The teacher in a statement to police (which is part of discourses) has confirmed how fearful the complainant was of the Applicant.

20. The Applicant and in a separate affidavit by his wife Shiyashna deny this allegation and challenge the credibility of this statement. They allege that the police have failed to obtain the call history of Applicant's wife and failed to record a statement of complainant's grandfather to verify the accuracy of this complaint.

21. It is highly unthinkable that, to make such an illicit call, the Applicant's wife would have used her own mobile phone, leaving the police with evidence of interference. Anyway, the truthfulness or otherwise of this complainant has to be decided upon evidence at the trial.

For the time being, I rely on this statement for two reasons. Firstly, I am inclined to believe that this 11 year old child would not have made such a statement to police without any basis. Secondly, the phone call she said she overheard appears to have come to light when her teacher noticed her crying at the school.

22. Pursuant to Section 19(1)(d) of the Bail Act, as regards the safety of a specially affected person when the accused is charged with a domestic violence offence, the court must have regard to:

(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." *(emphasis added)*

23. In light of this Section, the views, the concerns and the sentiments expressed by the complainant must necessarily be taken into account in deciding bail for the Applicant.

24. Pursuant to section 41(2) of the Constitution, the best interests and safety of a child are the primary consideration to take into account in any decision that affects a child, including when making decisions about bail where the complainant is a child. The courts have an added responsibility under the Constitution to ensure that children have equal access to justice, and that their best interests are respected and protected.

25. Starting from the accused's initial appearance and bail application, the Courts should be mindful of its obligation to protect children's safety and to prevent further harm to the child. The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime emphasise that where the safety of a child complainant or witness may be at risk, judicial officers must take appropriate measures, from the earliest stages of the

proceedings, to protect the child. This includes protecting the child from direct contact with the alleged perpetrator when appearing at court, using court-ordered restraining orders, **ordering pre-trial detention of the accused**, or setting special “no contact” bail conditions. Under the Bail Act 2002, community safety, the protection of the community, and prevention of interference with the complainant and other witnesses are key considerations to take into account when deciding whether to grant or refuse bail (s.19(1)(c) and (2)(c)). Section 23(2)(a) and (b) of the Bail Act also allow the court to impose conditions on bail to protect the welfare of the community or to protect the welfare of any specially affected person. (The Bench Book on Children developed by the Fiji Judicial Department <https://judiciary.gov.fj/wp-content/uploads/2021/03/Child-Bench-Book1.pdf>)

26. In this case, the affidavit of the investigating officer and the witness statements filed by the State place sufficient material for this Court to be satisfied that the risk of witness interference and safety of the complainant is real and evidence based. This is not a case, in my view, where imposition of strict bail conditions could eliminate those risks. Therefore the application for bail should be refused in the interests of justice.
27. When deciding whether to grant bail to the Applicant, the Court must take into account the time the person may have to spend in custody before trial if bail is not granted [vide section 17(1) of the Bail Act]. The Applicant has been in remand since 06 July 2022. Since the State has already compiled the disclosures, the trial can be fixed at any time this year on priority basis once the information is filed and the PTC issues are finalized.
28. Having taken into consideration everything that is said above, the application for bail is refused.



Aruna Aluthge  
Judge

12 August 2022

At Suva



Counsel:

- AK Singh Law for Applicant
- Office of the Director of Public Prosecution for Respondent