

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

MISCELLANEOUS CASE NO. HAM 41 OF 2022

BETWEEN: **AYUSH SHIVEKH CHAND** **APPLICANT**

A N D: **THE STATE** **RESPONDENT**

Counsel: Mr. A. Sumer for Applicant
 Ms. E. Thaggard for Respondent

Date of Hearing: 31st August 2022

Date of Ruling: 31st August 2022

BAIL RULING

1. The Applicant has preferred this application for bail pending trial in the High Court.
2. This Application was preferred by the Notice of motion dated 29th August 2022 and the grounds were set forth in an Affidavit.
3. When this matter was mentioned this morning the State agreed that the matter can be taken up for hearing at 2.30pm this afternoon. Accordingly, it was taken up for hearing and the State Counsel informed court that they have no objection to bail him granted in view of the circumstances of this case.
4. According to the Applicant's pleadings and submissions the accused ad the complainant have been in a relationship and there has been several communications by What's App and SMS between the accused and the complainant all of which are annexed as "AC6". These

messages clearly show that two of them have been in a relationship and due to some misunderstanding or a dispute that as a reason the complainant has threatened to complain to the police of rape and appears to have done so. The accused has obtained a DVRO against the complainant on 5th of August 2022.

5. The submissions of the State does not indicate that the Applicant has any previous convictions or pending matters.
6. According to the Affidavit of the Applicant and the submissions he is employed as a firefighter and has proposed five sureties and agreed to reside at Raranibulu with his parents.
7. The possible charge that may be preferred against the applicant is Rape. When this application was taken up for hearing State counsel Ms. Thaggard appearing for the Respondent inter alia submitted that, the Respondent has no objection to bail being considered for the applicant subject to conditions.
8. The counsel appearing for the Applicant submitted *inter alia* that, this Court be pleased to consider enlarging the Applicant on bail subject to strict conditions as the Respondent is not objecting to bail been granted.
9. His lordship Justice Kamal Kumar, President of the Supreme in Criminal Appeal held in the case of **Abhinesh Kumar V The State** [CAV 20 of 2020] 5 February 2021, cited with approval the following exposition made in the case of **Waqalevu v State [2019] Criminal Appeal No. 52 of 2019 (3 October 2019)** by the Court of Appeal as to the legislative scheme of the Bail Act, :-

*“[14] Thus, the legislative scheme in respect of bail in the Bail Act could be summarized as follows. Section 3(1) of the Bail Act states that every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted while section 3(3) states that there is a rebuttable presumption, which is displaced in the circumstances set out under section 3(4), in favour of the granting of bail to such a person. **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 [vide section 17(2) of the Bail Act]** and when deciding whether to grant bail to such a person, 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 presumption of bail may, however, be rebutted and bail may be refused if the court, upon being satisfied and having regard to all the relevant circumstances, is of the opinion that the accused is unlikely to surrender to custody and appear in court to answer the charges or the interests of the accused person will not be served through the granting of bail or granting bail to the accused would endanger the public interest or make the protection of the community more difficult [vide section 18 & 19 of the Bail Act].” (emphasis added)

10. Section 3(3) incorporates a rebuttable presumption in favour of the granting bail but by virtue of the provisions of sub section (4) (c) thereof the said presumption is displaced if the applicant is charged with a domestic violence offence as in the present case. However I observe that 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 [vide section 17(2) of the Bail Act].
11. In considering this application I am required to be mindful that, refusal of bail does directly interfere with right to liberty, freedom of movement and right to work of such person and Courts, when entertaining bail applications should exercise their discretion judicially, in the interest of justice and ensure that a person’s fundamental rights are not curtailed without just or lawful exercise. [vide- *Abhinesh Kumar v. The State (supra)*].
12. In **Tak Sang Hao v the State** (2001) FJHC 15L; HAM 003d.2001, Justice Shameem has held that, “...even though the seriousness of the offence is relevant but not the predominant factor.” Thus, no doubt that the charges against the Applicant in the present case are serious and will certainly entail severe punishment if found guilty. However, the seriousness of the charge alone cannot, by itself be a reason or the justification to refuse an application for bail.
13. Considering all the circumstances and the fact that the Respondent is not objecting I am inclined to grant bail to the Applicant as it appears to me that if bail is granted subject to strict bail conditions the likelihood of the Applicant committing further offences or interfering with witnesses will be remote and there is no reason to apprehend that the applicant will not appear in court to answer the charges laid against him. Thus, to my mind applicant is entitled to bail in this matter.

14. Accordingly, the application for bail pending trial is allowed and bail is granted to the Applicant subject to the following conditions;

The applicant should;

- a) sign a personal surety bond of \$1000,
- b) appear in case No. HAC 99 of 2022 on every court date,
- c) not commit any offence whilst on bail,
- d) not visit the house of the complainant Arishma Artika Prasad of Case No. HAC 99 of 2022,
- e) reside in Raranibulu until the conclusion of case, No. HAC 99 of 2022,
- f) not change the aforementioned address without the leave and permission of this court;
- g) not, either directly or indirectly interfere with prosecution witnesses,
- h) surrender all travel documents to court or if he does not have any travel document, then should not apply for any travel document and not leave Fiji until the conclusion of case No. HAC 99 of 2022,
- i) not leave Fiji until the conclusion of case No. HAC 99 of 2022,
- j) report to the Labasa Police Station on every last Sunday of the month between 6.00 a.m. and 6.00 p.m., commencing from the immediate Sunday upon being enlarged on bail,
- k) provide the three sureties who are named in paragraph 21.2 of this application and each surety is required to sign a bond of \$1000 to ensure that the applicant complies with his bail undertaking.

15. The applicant is warned that his failure to appear in court may lead to his trial taking place in his absence.




Gihan Kulatunga
Judge

At Labasa
31st August 2022

Solicitors

M/S Gibson & Company, Barrister & Solicitor, Labasa for the Applicant
Office of the Director of Public Prosecutions for the Respondent.

