

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAM 292 of 2022

BETWEEN:

ESEKAIA NAWELE

vs

STATE

Counsel : *Ms. Nishaa S* - *for State*
Mr. Romanu I - *for Accused*

Date of Sentence : *09th August 2022*

BAIL RULING

1. The Applicant in this matter is charged with one count of Rape, contrary to **Section 207 (1) together with Sections 2 (b) and (3) of the Crimes Act of 2009** and has filed this bail application seeking bail. This is the applicant's second bail application, since he was arrested and remanded on the 02nd of March 2022. In support of this bail application, the Applicant's counsel has tendered written submissions, dated 21st October 2022.
2. The State has filed its response to this bail application, objecting to bail, supported by an affidavit tendered by the Investigating Officer **WDC 2571 Sereima**, dated 19th October 2022.
3. Submissions in support of bail on behalf of the Applicant;
 - i) It is asserted by the Applicant that under the **Bail Act of 2002** there is a presumption in favor of bail and bail should be granted, unless the Court is

satisfied of the existence of any one or more of considerations set out in **Section 19 (1)** of the **Bail Act of 2002**, as below:

- (a) That the accused is unlikely to surrender to custody and appear in Court;
 - (b) The interest of the accused will not be served through granting bail;
 - (c) Granting bail will endanger the public interest or make the protection of the community more difficult.
- ii) The Applicant also tenders, as change of circumstances to the first bail application, if bail is granted by this Court he will relocate himself to Waitolu Village, Naitasiri which is far away from the residence of the victim and potential Prosecution witnesses. Further, it is submitted that the Applicant was maintaining his family with 3 children before arrest.
- iii) The applicant also contends that the substantive matter in relation to the incident in issue has been fixed for trial in October 2023, which is almost a year from now, warranting the grant of bail at this juncture.

4. Submissions of the State in opposition to bail;

- i) It is the position of the Prosecution that there had been no change in the circumstances since the refusal of the first bail application of the Applicant on 09th of August 2022 by this Court.
- ii) In this regard, it is submitted that the Applicant is the Complainant's stepfather and the Applicant is married to the Complainant's mother, and therefore, there is domestic violence in this matter and the presumption in favor of bail is displaced under the **Bail Act of 2002**.
- iii) It is further highlighted by the state that under **Section 13 (4)** of the **Bail Act of 2002** any person charged for an offense can be held in custody for a period up to 2 years before his or her trial has begun. Still further, it is contended that the Applicant has been charged for a very serious offence, where if convicted it carries a sentence of life imprisonment.

Applicable Law and Analysis of the Current Matter

5. Pursuant to **Section 13 (1) (h)** of the **Constitution** and **Section 3(1)** of the **Bail Act of 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 of 2002** stipulates that there is a presumption in favor of granting of bail.
6. However, this presumption in favour of granting bail will be displaced under the conditions highlighted in **Section 3 (4)**, as below:

“The presumption in favour of the granting of bail is displaced where –

- (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.***

7. In this matter, as agreed by both parties, there is no contention regarding the Applicant previously breaching any bail undertaking or bail conditions, which is a primary consideration that this Court should consider in determining bail.
8. In the same tone of sentiment, in this matter, there is no need for this Court to consider the second ground that could displace the presumption in favour of bail, i.e. whether the person has been convicted and has appealed against the conviction.
9. Therefore, proceeding in this process of elimination, the only ground that could displace the presumption in favour of granting bail in this matter is whether the Applicant has been charged with a Domestic Violence Offence. For this end, this Court considered the **Domestic Violence Act of 2009** in determining whether the offence for which the Applicant is charged with could be considered as a “Domestic Violence Offence”.
10. In this regard, the Applicant is the Complainant’s stepfather, therefore the offence the Applicant is charged with fall directly within the category of domestic violence offences that could displace the presumption in favour of bail under the **Bail Act of 2002**.
11. Nevertheless, considering the submissions of the Applicant’s counsel that the Applicant has been in custody for almost 08 months now and that the substantive matter has been fixed for trial in October 2023, this Court considered the other material submitted to Court by parties to strike a balance between the rights of the Applicant and the public interests in line with the provisions of the **Bail Act of 2002**.
12. To address the circumstances in this matter, this Court intends to take guidance from the Supreme Court decision of **Abhinesh Kumar v The State [2021] FJSC 1; CAV 20 of 2020 (5 February 2021)**, where His Lordship the Chief Justice stated, as below:

“Before coming to a decision to deprive personal liberty of a person, interests of public and interests of the accused must be rightly balanced. In balancing competing interests, courts must be mindful of the primary consideration in determining bail; that is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.”

13. In this matter, there appears to be no risk of the Applicant not attending Court and facing charges against him. Further, though there is a relationship coming within Domestic Violence in this matter, this Court recognises the fact that the Applicant is willing to reside in Nettasiri if granted bail during the pendency of the trial. Further, Prosecution has not highlighted any interferences with the witnesses by the Applicant. In this light, this


Court is of the view that the Applicant could be granted bail on very strict conditions, as below:

14. **Orders**

- i) I order that Applicant be released on bail pending trial of Criminal Case No. HAC 221 of 2022 on following conditions:-
- ii) After being released on bail, Applicant is to reside in Naitasiri, Suva and not to change the address without leave of the High Court;
- iii) Applicant to enter into a personal bond of \$2000.00 (non-cash);
- iv) Applicant to tender two Sureties to the prosecution to check the suitability, who should enter into a bail bond in the sum of \$2000.00 (non-cash) each;
- v) The Applicant to be subject to a curfew between the hours of 9.00pm and 5.00am each day;
- vi) The Applicant is to report to Vunidawa Police Station between 6.00am and 6.00pm each Wednesday;
- vii) Applicant or his family are not to interfere directly or indirectly with the Complainant or any witness in any form or manner;

15. If not satisfied with this ruling, parties have thirty (30) days to appeal to the Fiji Court of Appeal.




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Hon. Justice Dr. Thushara Kumarage

At Suva
28th October 2022

- cc: 1. *Office of the Director of Public Prosecutions*
2. *Legal Aid Commission*